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49 Cal.2d 370

In re SECURITY FINANCE CO., a corporation in the process of voluntary winding-up.

Earl R. ROUDA, Petitioner and Respondent,
v.

George N. CROCKER and Herbert A. Crocker, Respondents and Appellants.
S. F. 19455.

Supreme Court of California,
In Bank.

Nov. 12, 1957.

Rehearing Denied Dec. 11, 1957.

Proceeding in the matter of a personal loan company in the process of voluntary winding up wherein a stockholder owning 50% of the stock filed a petition for judicial supervision. From orders of the Superior Court, City and County of San Francisco, Frank T. Deasy, J., granting the petition and assuming jurisdiction the dissenting stockholders appealed. The Supreme Court, Traynor, J., held that judicial supervision of the winding up of the corporation was warranted under the circumstances.

Orders affirmed.

Opinion, 308 P.2d 531, vacated.

1. Corporations ⇨592

At common law, a corporation had no power to end its existence and the shareholders could surrender the charter but actual dissolution depended on acceptance by the sovereign.

2. Corporations ⇨610(2)

The general statutory provisions authorize voluntary dissolution of corporations in California with the consent of cer-

tain percentage of the stockholders. West's Ann.Corp.Code, §§ 4600, 4607-4619.

3. Corporations ⇨610(2)

A court has jurisdiction to judicially supervise the voluntary winding up of a corporation by stockholders only if the corporation is in the process of voluntary winding up and such occurs only if a valid election to wind up has been made pursuant to the statutes. West's Ann.Corp.Code, §§ 4600, 4607.

4. Corporations ⇨610(2)

Under the statute, the election to dissolve a corporation is the election of the corporation, not merely of shareholders representing 50% of the voting power, although it is through their consent that the election is made. West's Ann.Corp.Code, § 4600.

5. Corporations ⇨610(5)

In proceeding for the voluntary winding up of a personal loan corporation where a stockholder owning 50% of the stock filed a petition for judicial supervision, order authorizing supervision was not required to be set aside on the ground that the trial court never passed on the issue whether the decision to dissolve the corporation was made in good faith. West's Ann.Corp.Code, § 4600.

6. Corporations ⇨610(2)

The shareholder representing the requisite voting power may protect his investment in the corporation by dissolution, where all alternative methods are foreclosed, no advantage is secured over other shareholders, and no rights of third parties adversely affected. West's Ann.Corp.Code, § 4600.

7. Corporations ⇨610(2)

Where stockholder owning 50% of stock of corporation in process of voluntary winding up filed a petition for judicial supervision and the stockholder for several years had been attempting to receive a fair return on his investment but the other stockholders would not agree and the purpose of the stockholder in dissolving the corporation was to protect his investment, evidence established that he did not act in bad faith in doing so. West's Ann.Corp.Code, § 4600.

8. Corporations ⇨610(2)

That stockholder seeking voluntary dissolution of personal loan corporation consented to the adoption of the unanimous consent provisions and restrictions of the transfer of his stock, did not preclude his complaint against the abuse of such provision by other stockholders to benefit themselves at the stockholder's expense. West's Ann.Corp.Code, § 4600.

9. Appeal and Error ⇨1057(1)

Where stockholders established that dissolution of a personal loan corporation was necessary to protect his investment and it would give him no undue advantage, excluding evidence that stockholder had knowledge that dissolution would injure the corporation, though error because the evidence was relevant as to the issue of his good faith, was not prejudicial in view of other evidence. West's Ann.Corp.Code, § 4600.

10. Compromise and Settlement ⇨12

Where stockholder established that dissolution of a personal loan corporation was necessary to protect his investment, paragraph of settlement agreement between the stockholders by which the stockholder agreed to future dissolution only with respect to operation of the corporation did not waive stockholder's right to seek voluntary dissolution in view of further provision of the agreement declaring that any party could take steps to dissolve the corporation pursuant to California law. West's Ann.Corp.Code, § 4600.

11. Corporations ⇨610(2)

Where a shareholder has properly instituted dissolution he is entitled to court

supervision as a matter of right. West's Ann.Corp.Code, § 4607.

12. Corporations ⇨610(2)

Where stockholder sought voluntary dissolution of personal loan corporation and a judicial supervision of the winding up and the evidence showed that other stockholders threatened to delay dissolution for 10 to 15 years and they would not consent to a sale of assets unless stockholder paid them a large sum of money, evidence justified the conclusion that it would be to the best interest of all the parties to have court supervise the winding up of the corporation. West's Ann.Corp.Code, § 4607.

13. Corporations ⇨610(2)

The statutes requiring special notice of meeting of shareholders and the approval of shareholders of the dissolution in lieu of a special meeting, apply only if the election to dissolve a corporation is by vote rather than by written consent. West's Ann.Corp.Code, §§ 2201(e), 2239, 4600, 4607.

Brobeck, Phleger & Harrison, Long & Levit, Malcolm T. Dungan and Bert W. Levit, San Francisco, for appellants.

Young, Rabinowitz & Chouteau, Morris M. Doyle, William W. Schwarzer, and McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, for respondent.

TRAYNOR, Justice.

This appeal is from orders of the Superior Court granting a petition for judicial supervision and assuming jurisdiction under Corporations Code section 4607 over a corporation allegedly in the process of voluntary winding up and dissolution pursuant to Corporations Code section 4600.

The Security Finance Company, the enterprise now alleged to be in the process of winding up, began in 1940 as a partnership engaged in the business of making personal loans and buying conditional sales contracts. The partners were Earl R. Rouda, and Herbert A. and George N. Crocker, who are brothers. Rouda had considerable experi-

ence in the personal loan business, and agreed to devote his talents and energies to the enterprise. The Crockers agreed to contribute \$20,000 in capital and to secure necessary bank credit.

In 1946 the partners decided to incorporate. They agreed that Rouda was to hold 3,000 shares and the Crockers 1,500 shares each of the common stock of the corporation. The Crockers and other shareholders, whose names do not appear in the record, hold 11,500 shares of preferred stock. The right to vote is vested exclusively with the common stock in the absence of default in the payment of dividends to the preferred shares.

The incorporation agreement reaffirmed the principles on which the partnership was founded: Rouda agreed to "devote his entire and undivided time, attention, effort, business experience, and knowledge to the interests and conduct of the business * * *," and to contribute his "work and labors specifically to the active management and operation of the business. * * *" The Crockers agreed to procure loans from banks, and in their sole discretion to make available to the corporation their credit and financial standing. The agreement required unanimity for all acts of the board of directors and for the exercise of powers vested in the voting shareholders, and provided generally that, "it is the intention of the parties hereto that the control of the corporation and of all its acts shall be exercised by and with the unanimous concurrence of all of the parties hereto." The agreement also provided that no shareholder could sell all his common stock unless the purchaser first agreed that it would become nonvoting stock, or agreed to the unanimous consent provisions in the incorporation agreement and the other shareholders were willing to have the transferee substituted for his transferor as a voting shareholder.

Rouda is the president and general manager of the corporation and chairman of the board of directors. He has exclusive control of the day to day business of the corporation. Under Rouda's management the

corporation has grown and prospered, and during the months immediately preceding the present litigation profits reached the highest level in the corporation's history.

The parties had their first serious disagreement toward the end of 1952. The Crockers filed an action for dissolution of the corporation contending that Rouda had failed to devote his full time and energies to the business and had diverted to his own use the funds and property of the corporation and the services of its employees. Rouda then filed an action for declaratory relief contending that the Crockers had breached the incorporation agreement by failing to lend their credit to the corporation and by commencing the dissolution proceedings. These differences were compromised in March, 1954. In the settlement agreement Rouda agreed to pay \$15,500 to the Crockers and \$45,000 to the corporation, secured by a pledge of his stock. The parties thereupon released each other from all claims arising out of the subjects in dispute.

Notwithstanding the settlement of the parties' disputes and the return of business to a high level of prosperity, Rouda, in December, 1954, expressed his wish to withdraw from the corporation. Without the consent of the Crockers, he negotiated for a sale of the business and received six offers from interested parties. The Crockers stated that they were completely satisfied with the prosperous condition of the business and did not wish to sell. They would consent to a sale of the business only if Rouda paid them \$100,000 to release him from what they said was his contractual obligation to serve the corporation indefinitely. According to Rouda's testimony, he then suggested that the Crockers buy his stock for \$275,000 or an amount reached through negotiation, or if they did not buy within a certain time, that he would buy their stock for the same price. The Crockers were unwilling to buy Rouda's stock or to sell him theirs. This dispute culminated in an ultimatum from Rouda that if the Crockers did not agree to his proposal for a sale of stock

or of the business, he would dissolve the corporation.

As security for his promise to make payments under the settlement agreement of 1954, Rouda pledged all his stock to the Anglo-California Bank. In June, 1955, he redeemed the stock with money borrowed from the First Western Bank, and then immediately pledged the stock to First Western. He promised First Western that he would repay them with proceeds from the sale of the business, or, if the business was not sold, that he would dissolve the corporation and pay them from his distributive share. In the settlement agreement of 1954, Rouda promised to discontinue his personal investments and business activities to the Crockers, but the Crockers did not learn of the second pledge until after this action was commenced.

In July, 1955, Rouda, as holder of fifty per cent of the voting stock of Security Finance, executed and filed with the corporation his consent to voluntary dissolution. He then executed for the corporation and filed with the Secretary of State a certificate of election to wind up and dissolve. In August, 1955, he petitioned the superior court for judicial supervision of the winding up and dissolution. The petition states that the corporation is in the process of voluntary winding up and dissolution, and that judicial supervision is necessary because of serious differences of opinion between Rouda and the Crockers "with respect to conduct of the business of Security Finance Company, as well as with respect to a proper policy relating to salaries, dividends, financing, and sales of assets, as a result of which unanimous consent cannot be had." After a hearing on an order to show cause why the petition should not be granted, the court granted Rouda's petition and issued an order in which it assumed jurisdiction over the winding up of the corporation, directed that notice be given to shareholders and creditors, and appointed a referee to hear and determine any matters that might arise during the winding up. The Crockers appeal.

[1,2] At common law a corporation had no power to end its existence. The shareholders could surrender the charter, but actual dissolution depended on acceptance by the sovereign. Whether or not surrender of the charter of a prosperous corporation could be effected by a majority of the shareholders was long a subject of dispute. See *Bowditch v. Jackson Co.*, 76 N.H. 351, 82 A. 1014, 1016-1018, L.R.A. 1917A, 1174, appeal dismissed 239 U.S. 627, 36 S.Ct. 164, 60 L.Ed. 474; *Warren, Voluntary Transfers of Corporate Undertakings*, 30 Harv.L.Rev. 335-346; but see *People v. Ballard*, 134 N.Y. 269, 32 N.E. 54, 59; *Forrester v. Boston Consol. Copper & Silver Mining Co.*, 21 Mont. 544, 55 P. 229, 233. The fact that powers necessary for the attainment of corporate objectives were ordinarily vested in the majority did not necessarily mean that the minority should have no say on the fundamental issue of corporate life or death. In California, as in many other states, general statutory provisions authorize voluntary dissolution with the consent of a certain percentage of the shareholders.

Section 4600 of the Corporations Code provides that, "Any corporation may elect to wind up its affairs and voluntarily dissolve by the vote or written consent of shareholders or members representing 50 percent or more of the voting power." Section 4607 provides that, "If a corporation is in the process of voluntary winding up, the superior court * * * upon the petition of * * * (b) the holders of 5 percent or more of the number of its outstanding shares * * * may make orders and adjudge as to any and all matters concerning the winding up of the affairs of the corporation." Sections 4608 to 4619 provide that the jurisdiction of the court includes the determination of claims against the corporation and the rights of the shareholders in the assets, the settlement of directors' accounts, the appointment of referees, and other matters necessary for the equitable settlement of corporate affairs.

[3] The court has jurisdiction by virtue of section 4607 only if the corporation is "in the process of voluntary winding up," and the corporation is in the process of voluntary winding up only if a valid election to wind up has been made pursuant to section 4600. In the present case, therefore, in assuming jurisdiction over the corporation the court necessarily determined that Rouda had validly consented and exercised the corporate election, and that the corporation was in the process of voluntary winding up and dissolution.

[4] Shareholders representing fifty per cent of the voting power do not have an absolute right under section 4600 to dissolve a corporation. Thus, they have no right to dissolve a corporation to defraud the other shareholders (see *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185, 123 N.E. 148), to "freeze out" minority shareholders (see *Lebold v. Inland Steel Co.*, 7 Cir., 125 F.2d 369, 372, modified on rehearing, 136 F.2d 876, certiorari denied 316 U.S. 675, 62 S.Ct. 1045, 86 L.Ed. 1045), or to sell the assets of the dissolved corporation at an inadequate price. (See *J. H. Lane & Co. v. Maple Cotton Mills*, 4 Cir., 226 F. 692, 695-698, modified on rehearing 232 F. 421.) Under section 4600 the election to dissolve is the election of the corporation, not merely of shareholders representing fifty per cent of the voting power, although it is through their consent that the election is made. There is nothing sacred in the life of a corporation that transcends the interests of its shareholders, but because dissolution falls with such finality on those interests, above all corporate powers it is subject to equitable limitations. See *Hornstein, Voluntary Dissolution—A New Development in Intracorporate Abuse*, 51 *Yale L.J.* 64, 65-69. "The preamble or opening sentence of section 400, Civil Code [predecessor to section 4600], to the effect that 'if it is deemed advisable and for the benefit of any corporation that it be wound up and dissolved it may elect to terminate its business,' was eliminated by amendment in 1933. This was not intended, however, to raise any implication that the usual equit-

able obligations as to the exercise of good faith by the directors and shareholders in the exercise of the statutory power to dissolve were abrogated." *Ballantine and Sterling, California Corporation Laws* 446 (1949 ed.). The controlling issue, therefore, is whether Rouda's decision to dissolve the corporation was made in good faith.

[5] The Crockers contend that the order must be reversed on the ground that the trial court never passed on this issue. They contend that in the trial court Rouda proceeded on the theory that he had an absolute right to dissolution, that the trial court agreed with this theory, and that Rouda may not now change his theory of the case by asserting that the record contains evidence of good faith, which, they insist, they had no opportunity to controvert. There is no merit in these contentions. The issue of Rouda's good or bad faith in seeking dissolution was placed directly in issue by the Crockers' answers to Rouda's petition, and the trial court repeatedly indicated that it would receive evidence of bad faith if it were offered. Accordingly, it is clear that the trial court did not accept Rouda's contention that bad faith was immaterial, and by making that contention Rouda did not adopt it as an exclusive theory of his case. Thus, he introduced evidence of good faith and stated on at least two occasions that objections to questions asked by counsel for one of the Crockers would be withdrawn if the evidence was being offered on the issue of fraud. Facts bearing on Rouda's motivation were carefully elicited on both direct and cross-examination. Although the record is not clear, it may be true that as to some of this evidence the trial court indicated that it was admitted on the issue of friction between the parties and not on the issue of good faith. If the trial court erred in this respect, however, the error was invited by the Crockers who objected on the ground that the evidence had no relevancy whatever to any possible issue in the case.

[6,7] With respect to the issue of good faith there is evidence of the following

facts. For several years before this action, Rouda had been attempting to receive a fair return on his investment. He sought an increase in salary or in dividends. Since the Crockers would not agree to either, he sought to sell his stock to them, to buy their stock, or to sell the assets of the corporation. The Crockers refused to allow Rouda an increase in salary as his responsibilities grew unless they received corresponding increases although they were required only to attend approximately four directors' meetings a year. For attending these meetings, they each received \$500 per month. Rouda, however, was required to devote all his time to the business and received only \$1,456 per month. The Crockers were both in high tax brackets and did not wish to increase dividends. They would not buy Rouda's stock, sell theirs to him, or consent to a sale of the business unless Rouda promised to pay them \$100,000 as compensation for releasing him from his obligation to work for the corporation. Because of the restrictions placed on a transfer of the stock, Rouda was not able to sell his stock to outsiders at a price that fairly represented his investment in the corporation. Thus his purpose in dissolving the corporation was to protect his investment. He did not act in bad faith in doing so, for a shareholder representing the requisite voting power may protect his investment by dissolution (cf., *In re Evening Journal Ass'n*, 15 N.J.Super. 58, 83 A.2d 38, 41) when, as in this case, all alternative methods are foreclosed, no advantage is secured over other shareholders, and no rights of third parties will be adversely affected. (See, *Lattin, Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders*, 30 Mich.L.Rev. 645, 665.)

[8] The Crockers contend that since Rouda consented to the adoption of the

unanimous consent provisions and the restrictions on transfer of his stock, he is in no position to claim that he cannot realize his investment by way of dividends, salary, sale of assets, or sale of his shares and must therefore dissolve the corporation to realize that investment. His consent to the unanimous consent provisions, however, did not encompass consent to the abuse of these provisions by the Crockers to benefit themselves at Rouda's expense. Good faith on their part as directors was as essential as good faith on Rouda's part in seeking dissolution.

[9] The Crockers also object to the ruling of the trial court excluding evidence that Rouda knew that the corporation would suffer if it were dissolved. The court rejected the offer of proof on the ground that if Rouda had a legal right to dissolve, injury to the corporation was immaterial. Rouda established that dissolution was necessary to protect his investment and that it will give him no unfair advantage, for it will affect Rouda and the Crockers equally. Since, as noted above, there is nothing sacred in the life of a corporation that transcends the interests of the shareholders, the court properly concluded that if Rouda had a right to dissolve the corporation, injury to it was immaterial. Although it is true that Rouda's knowledge that dissolution would injure the corporation was relevant to the issue of his good faith and in turn to the issue of his right to dissolve, no prejudice appears from the trial court's exclusion of this evidence on the issue of good faith. Thus, there was other evidence in the record that Rouda knew that dissolution would be detrimental to the corporation and it is clear that all of the parties and the court so understood.

[10] The Crockers contend that in paragraph 13¹ of the settlement agreement

1. "13. *Future dissolution.* If at any time hereafter the parties become unable to reach unanimous consent with respect to the operations of the Security corporations, this shall entitle Rouda or either of the Crockers, if so advised, to require a dissolution or winding up of the

affairs of said corporation. It is agreed that notwithstanding any provision contained in the incorporation agreement, or in the articles or by-laws of the Security corporations, or in this agreement, nothing herein is intended to prevent any one or more of the parties hereto from tak-

Rouda waived any right to dissolve that he might have had under section 4600. They urge that since the parties failed to reach unanimous consent only as to dividends and salaries, but not with respect to the operation of the business, the first sentence of paragraph 13 precludes dissolution. The next sentence, however, expressly declares that notwithstanding any provisions in the settlement agreement, any party may take steps to dissolve the corporation pursuant to California law. Rouda's steps to dissolve were taken pursuant to California law.

The Crockers also contend that even if Rouda has a right to dissolve the corporation, no showing was made that would give the court jurisdiction under section 4607 to supervise the dissolution. They state that no conflict was shown that prevents the operation of the business and that Rouda is no longer seeking an increase in salary or dividends. They state that Rouda has not shown that conflict will arise during the dissolution of the corporation. They claim that court supervision will put them to needless expense and will result in unnecessary crowding of the court calendar.

[11, 12] Under section 403 of the Civil Code, the predecessor section to section 4607, it was held that if the shareholder has properly instituted dissolution, he is entitled to court supervision as a matter of right. In *re San Joaquin L. & P. Corp.*, 52 Cal. App.2d 814, 824-825, 127 P.2d 29. Although section 403 provided that the court shall take jurisdiction, whereas section 4607 provides that the court may take jurisdiction, the court in *In re Mayellen Apartments, Inc.*, 134 Cal.App.2d 298, 303-308, 285 P.2d 943 declared that section 4607 was drafted to reenact section 403 and that the shareholder was entitled to judicial supervision

as a matter of right. See also *Stubbs v. Jones*, 121 Cal.App.2d 218, 263 P.2d 100. It is unnecessary to decide whether court supervision can be invoked when there is no possibility of disputes arising among the shareholders during the dissolution, for the trial court in the present case could reasonably conclude that it was in the best interest of all the parties to have the court supervise the winding up of the corporation. The court, after a four day hearing, decided that it should assume jurisdiction, and the evidence supports this conclusion. Even though Rouda seeks no increase in salary or dividends during dissolution, there was evidence that the Crockers threatened to delay dissolution for ten to fifteen years and that they would not consent to a sale of the assets of the corporation unless Rouda paid them \$100,000. Furthermore, the past history of disputes between the parties, indicates that it was unlikely that they would agree on a course of action during dissolution that would be in their common interest.

[13] Finally, the Crockers contend that the corporation is not "in the process of voluntary winding up" because there was no special notice of a meeting of shareholders see, Corp.Code § 2201(e) and all the shareholders did not approve the dissolution in lieu of a special meeting. See, Corp.Code § 2239. Section 4600 provides for a vote or written consent. Sections 2201(e) and 2239 would apply only if the election to dissolve had been by vote rather than by written consent.

The orders are affirmed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE, and McCOMB, JJ., concur.

ing such steps as he or they may be advised, in their own discretion to accomplish a dissolution or winding up of the affairs of the Security corporations pursuant to the provisions of California law, at any time hereafter. Proceedings

looking toward dissolution or winding up of said corporations shall not be deemed to be a breach or violation of any agreement between the parties whatsoever.

* * *

49 Cal.2d 354

**SUBSEQUENT INJURIES FUND OF
CALIFORNIA, Petitioner,**

v.

INDUSTRIAL ACCIDENT COMMISSION;

Sierra Consolidated Mines, Inc., dba Silverado Mine; Lava Cap Gold Mining Co., a corp.; Darwin Lead Co., Inc.; U. S. Vanadium Co., a corp.; Mutual Gold Corp., a corp.; John N. Rosecrans and Henry W. Klipstein, dba Roseklip Mines; E. L. Cord; T. E. Connolly, Inc., and/or Hanrahan Co., a joint venture; Perry G. Sexton, an individual; Sierra Talc and Clay Co., a corp.; William B. Bonham, an individual dba White Mountain Talc Mine; L. D. Foreman & Co.; Tungstar Corp.; W. D. Goyne and H. C. Goyne, dba Goyne Bros.; Daniel G. Longtin Co.; A. L. Foss and J. L. Osborne, dba Surprise Mine; Owens Tunnell Contractors; Ray and Lloyd McMurray dba McMurray Mining Co.; Hinkle and Smith, co-partners dba Morning Glory Mine; State Compensation Insurance Fund; Industrial Indemnity Exchange, an inter-insurance exchange; Colonial Insurance Co., a corp.; Pacific Employers Insurance Co., a corp.; California Compensation Insurance Co., a corp., successors in interest to Limited Mutual Compensation Insurance Co., a corp.; Industrial Indemnity Co., a corp.; Argonaut Insurance Exchange, an inter-insurance exchange; Zenith National Insurance Co., a corp.; and Pat Costello, Respondents.

L. A. 24469.

Supreme Court of California.

In Bank.

Nov. 12, 1951.

Proceedings on petition for review of reimbursement award against the Subsequent Injuries Fund. The Supreme Court, Schauer, J., held that Labor Code section authorizes reimbursement from subsequent injuries fund to a carrier as well as to an employer, and that such authorization involves no unreasonable discrimination or unconstitutional gift of public funds.

• Award affirmed.

States ☞ 119

Workmen's Compensation ☞ 1030

Labor Code section authorizes reimbursement from Subsequent Injuries Fund to a carrier as well as to an employer; and no unreasonable discrimination or unconstitutional gift of public funds results because of such authorization. West's Ann. Labor Code, §§ 3754, 3759, 5500.5; West's Ann. Ins. Code, §§ 11651, 11652, 11653, 11662 (a, b).

—◆—

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., and F. G. Girard, Deputy Atty. Gen., for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, Edward A. Sarkisian, Los Angeles, Donald Gallagher and Loton Wells, San Francisco, for respondents.

SCHAUER, Justice.

Petitioner, State of California Subsequent Injuries Fund, seeks annulment of a reimbursement award against it made by respondent commission in a proceeding by various insurance carriers to secure, under the provisions of section 5500.5 of the Labor Code, apportionment of liability to an employee who in June, 1954, became permanently totally disabled from silicosis suffered as the result of successive employments over a period of some 40 years. We have concluded that the commission correctly determined that the section authorizes reimbursement from the fund to a carrier as well as to an employer, that such authorization is constitutional, and that the award should be affirmed.

Various aspects of section 5500.5 were considered by this court in the Erickson (State of California v. Industrial Acc. Comm. (1957), 48 Cal.2d 355, 310 P.2d 1) and Walters (State of California v. Industrial Acc. Comm. (1957), 48 Cal.2d 365, 310 P.2d 7) cases. In Erickson we held that the statute did not apply retrospectively so as to permit reimbursement where the silicosis (from underground metal mining exposures) had become dis-

abling prior to effective date of the statute. In Walters constitutionality of the reimbursement provisions was upheld, with the further ruling that under the statutory language reimbursement could be ordered only in a supplemental apportionment proceeding and not in the original proceeding in which award in favor of the employe was made.

In the present (Costello) case the fund urges both (1) that the language of the statute does not authorize reimbursement to an insurance carrier as distinguished from an employer, and (2) that if the statute does so authorize then it is to that extent unconstitutional.

1. Although the language used does not expressly permit reimbursement payments to a carrier, it does include a legislative declaration that "It is inequitable that total ultimate liability should fall on one or more such [underground metal mining] employers who happen to be solvent *or have solvent insurance carriers* within the commission's jurisdiction or in reach of its process." (Italics added.) If an employer does have a solvent insurance carrier then of course liability, as the term is commonly used, falls on the carrier rather than on the employer. But the liability is basically that of the employer; it is essentially that of the employer because it is the premiums paid by the many employers which support the insurance carriers who, in the aggregate, constitute the medium whereby the risks and costs of the individual employers are spread over the industry as a whole. Hence, while insurance carriers are normally spoken of as "underwriters," it is ultimately the employers (and the consuming public) who pay the toll. Therefore, it is reasonable to conclude that the quoted provision con-

templates reimbursement of the carrier as well as of the employer.

Moreover, as pointed out by the commission, various other statutory provisions indicate that no distinction is intended as between the employer and the carrier with respect to reimbursement rights. For instance, section 3759 of the Labor Code permits the commission to "enter its order relieving the employer from liability where it appears * * * that an insurer joined as a party * * * is liable * * *" Section 11662 of the Insurance Code provides for subrogation of the insurer to the rights of the employer.¹ Other provisions are that payment of compensation by either employer or insurer bars recovery (by the employe) from the other (Lab.Code, § 3754); that the insurer will be "directly and primarily liable" to a proper claimant for the compensation for which the employer is liable (Ins.Code, § 11651); that notice to, or knowledge of, the employer of injury, is notice to the insurer (Ins. Code, § 11652); that jurisdiction over the employer is jurisdiction over the insurer (Ins.Code, § 11653).

Further, the fund presents statistics indicating that in the year (1951) that section 5500.5 became effective only *one* underground metal mining operator was permissively self-insured in this state. If reimbursement is not allowed to carriers as well as to employers, then the anomaly would be presented that, at least in the year of enactment of the section, only *one* lawfully self-insured employer in the entire state, plus employers unlawfully not insured at all, would receive direct benefits—benefits denied to insured employers. Also, as mentioned by the fund (see also *State of California v. Industrial Acc. Comm.* (1957, Walters), 48 Cal.2d 365, 371, 310 P.2d 7, 11), insurance companies

1. Section 11662, Insurance Code: "Whenever any employer is insured against liability for compensation with any insurer, such insurer is subrogated to the rights of the employer to recover losses arising out of any of the following acts by the insurer:

"(a) Assuming the liability of the employer for compensation in the manner provided by the law relating thereto.

"(b) Payment of any compensation for which the employer is liable.

"Such insurer may enforce any such subrogated rights in its own name."

in fixing their rates take into account the inequity, declared by the statute to exist, where less than all contributing employments are forced to pay an award for disability resulting from silicosis. To deny to the carriers the reimbursement provided by section 5500.5 would likewise deny to employers who must pay the higher premiums which would then follow, the relief contemplated by the section. Such results clearly would *pro tanto* defeat rather than carry out the intent of the Legislature.

2. From the conclusions above announced it logically follows that the reimbursement provisions as applied to carriers do not breach constitutional proscriptions. As discussed in the Walters case (at page 372 of 48 Cal.2d, at page 11 of 310 P.2d), "with respect to the investment hazard [declared by the Legislature to inhere in the underground metal mining industry] the liability of the mining companies for silicosis, which results in the inequity found by the Legislature to exist, arises largely because of the exposure of miners to silicosis while employed in mines during years prior to the effective date of section 5500.5 [September, 1951]. Because of such liability the cost of operating the mines is greater because of higher premiums that California mining companies must pay for compensation insurance." It thus appears that the objective of lessening the investment hazard of underground metal mining operations reasonably may contemplate lessening of the insurance premiums which that industry must pay, and that the Legislature could properly determine that such objective could best be attained by requiring the reimbursement of carriers under the same circumstances as employers under the provisions of section 5500.5. As pointed out by one of the carriers here involved, prevailing premiums charged, and those to be charged in the future, are related to and computed upon losses recently paid and to be paid, even though most of the employee's exposure occurred during years prior to 1951. Consequently there is no merit in the argument of the fund that inasmuch as the liability for silicosis

arises largely from exposures occurring before 1951 no inequity exists with respect to insurance carriers because they were already compensated by the payment of premiums for risks assumed during years prior to 1951. It is to reduce immediately for current and future operations the quantum and inequities of such risks that the legislation was enacted. As declared in the Erickson case (State of California v. Industrial Acc. Comm. (1957), *supra*, 48 Cal. 2d 355, 361, 363, 310 P.2d 1, 4, 6), the law in force upon the date of injury (i. e., the date upon which the disease culminates in disability) determines both the employee's rights to compensation and the employer's rights to contribution from the fund. Inasmuch as the current and future insurance premiums which employers must pay are determined by compensation claims which carriers have been obliged to pay in the past (i. e., upon their claims experience), it is apparent that to deny reimbursement to carriers for compensation allocable to exposures occurring prior, but for disabilities arising subsequent, to 1951 would, as hereinabove suggested, deny to employers who would have to pay the higher premiums which would follow, the relief contemplated by the statute. The inequity to employers, sought by the Legislature to be corrected, would thus continue to exist. It may be further noted that in the Erickson case (at pages 358, 359 of 48 Cal.2d, at page 3 of 310 P.2d) the fund expressly disavowed any contention that section 5500.5 cannot be applicable to periods of silicotic exposures occurring prior to adoption of the section. Moreover, the anomaly mentioned hereinabove under point No. 1, with respect to favoring self-insured employers as well as those unlawfully not insured, if reimbursement of carriers is not authorized, would appear to raise a more serious constitutional question of unreasonable discrimination and classification as against insured employers, than is presented when reimbursement of carriers is permitted. We are convinced that, regardless of the dates of exposure, reimbursement of carriers where the date of injury occurs subsequent to the effective

date of section 5500.5 is not unreasonably discriminatory and is not a gift of public funds; it is, rather, as hereinabove pointed out, ultimately reimbursement of the employers, because the industry as a whole supports the carriers, and only by permitting reimbursement to carriers standing in the liability shoes of employers can uniformity of operation and equality of benefits in the industry be secured.

The conclusions we have reached on the merits of the controversy render unnecessary consideration of a procedural point raised by the commission.

The award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.



49 Cal.2d 322

Alice F. ROZAN, Plaintiff and Respondent,
v.

Maxwell M. ROZAN, Bank of Encino, a corporation, M. W. Truss, Edward Rosen (sued as John Doe I), Bernard Siegel (sued as John Doe II), Dorothy Ginsberg (sued as John Doe III), Lee McCormick (sued as John Doe IV), Doe V, a corporation, Doe VI Company, a corporation, Doe VII Company, a corporation, Defendants.

Maxwell M. Rozan, Appellant.
L. A. 24090.

Supreme Court of California,
In Bank.
Nov. 5, 1957.

Rehearing Denied Dec. 4, 1957.

Wife's action for divorce on ground of cruelty. The Superior Court, Los Angeles County, Harold C. Shepherd, J., rendered judgment adverse to defendants, and they appealed. The Supreme Court, Traynor, J., held that it had not been an

abuse of discretion to award wife sixty-five percent of the property acquired with community funds.

Modified and affirmed.

Opinion, 309 P.2d 947, vacated.

1. Husband and Wife ⇨246, 247

Marital interests in movables acquired during coverture are governed by law of domicile at time of their acquisition. West's Ann.Civ.Code, § 164.

2. Husband and Wife ⇨246

Interests of spouses in movables do not change even though movables are taken into another state or are used to purchase land in another state. West's Ann.Civ. Code, § 164.

3. Domicile ⇨10

In wife's divorce action, evidence sustained finding that husband had been domiciled in state when property involved was acquired. West's Ann.Civ.Code, § 164.

4. Husband and Wife ⇨264

In wife's divorce action, evidence would sustain trial court's finding that out-state oil properties had been purchased with community funds. West's Ann.Civ.Code, §§ 163, 164.

5. Divorce ⇨252

In wife's action for divorce on ground of extreme cruelty, it was not an abuse of discretion to award her sixty-five percent of out-state oil properties purchased with community funds. West's Ann.Civ.Code, § 146.

6. Divorce ⇨276(4)

In wife's divorce action, evidence would sustain trial court's finding that conveyances by which defendant had purportedly divested himself of title to real property had been without consideration and fraudulent as to plaintiff.

7. Courts ⇨29

A court of one state cannot directly affect or determine title to land in another;

but a court, with parties before it, can compel execution of conveyance in form required by law of situs, and such conveyance will be recognized there.

8. Judgment ⚡822(4)

When court has entered decree for specific performance of contract for sale of land in another state, but conveyance has not been executed, effect will be given to decree by courts of state wherein land is situated.

9. Divorce ⚡399(2)

California divorce court's adjudication that wife was entitled to certain out-state realty would be entitled to full faith and credit in foreign state to extent that it determined rights and equities of parties with respect to land in such state; but an action in foreign state would be necessary to effect any change in title to land.

10. Divorce ⚡255

Divorce court judgment would not be binding upon record title holders who were not parties to action wherein conveyances under which they purported to owe title were declared fraudulent as to plaintiff.

Maxwell M. Rozan, in pro. per.

Gustave L. Goldstein, Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action against her husband, Maxwell M. Rozan, for divorce, support, custody of their minor child, and division of their community property. Certain other persons involved in transactions with Rozan were named defendants. Appearances were made on behalf of defendants Rozan, Lee McCormick, and Bernard Siegel. Edward Rosen and M. W. Truss appeared *pro se*.

The trial court granted plaintiff an interlocutory judgment of divorce on the ground of extreme cruelty, awarded her the custody of the minor child, ordered defendant to pay \$75 per month for child support, \$250 per

month for plaintiff's support, and \$12,500 for attorney's fees. The court adjudged that the parties became domiciled in California in May 1948 and in any event not later than July 1948 and that the property thereafter acquired was community property and awarded plaintiff 65 per cent thereof. Defendant appeals.

Although defendant "does not challenge the lower Court for granting the divorce" and "is content to have the divorce granted to Respondent, so as to terminate the instant marriage" he contends that there was not sufficient evidence that he was guilty of cruelty to justify awarding plaintiff more than 50 per cent of the property, that certain oil properties outside of California adjudged to be community property were his separate property, and that the court erred in finding that there was no consideration for defendant's transfer of certain property, that certain transfers were made to defeat plaintiff's interest therein, that the parties became domiciled in California and in awarding plaintiff attorney's fees, alimony, and child support.

The reporter's transcript of 886 pages contains conflicting evidence with respect to all matters questioned by defendant, and it cannot reasonably be doubted that it contains substantial evidence in support of the findings and judgment. No useful purpose would be served in recounting the many incidents that support the court's finding of extreme cruelty. The amounts awarded for attorney's fees, alimony, and child support were not unreasonable under the facts as found by the trial court. Since the defendant is primarily concerned with the division of property, we shall review briefly the evidence that supports that division.

[1,2] The first finding essential to the division of the property is that plaintiff and defendant "established their residence and domicile in California in May, 1948, and in any event not later than July, 1948" and "that ever since they have been and still are residents of and domiciled in the State of California." A determination of the

domicile is essential, for marital interests in movables acquired during coverture are governed by the law of the domicile at the time of their acquisition. *Schechter v. Superior Court*, 49 Cal.2d 3, 314 P.2d 10; *In re Estate of Bruggemeyer*, 115 Cal. App. 525, 538, 2 P.2d 534; *Justis v. Atchison, Topeka and Santa Fe Ry. Co.*, 12 Cal. App. 639, 644, 108 P. 328; Civil Code, § 164; see Rest., Conflict of Laws § 290; Stumberg, Conflict of Laws [2d ed.] p. 313; Goodrich, Conflict of Laws [3rd ed.] p. 385. Moreover, the interests of the spouses in movables do not change even though the movables are taken into another state or are used to purchase land in another state. *Tomaier v. Tomaier*, 23 Cal.2d 754, 759, 146 P.2d 905; *Depas v. Mayo*, 11 Mo. 314, 319; see also *Beard's Ex'r v. Basye*, 46 Ky. 133, 146; *Avery v. Avery*, 12 Tex. 54; Rest., Conflict of Laws §§ 290, 291; Stumberg, Conflict of Laws [2d ed.] p. 314; Goodrich, Conflict of Laws [3rd ed.] p. 378.

Defendant contends that there is no evidence that he was ever in California before July of 1948 and that sending his pregnant wife to California to make a home there in May of 1948 did not establish his domicile in California. See *Sheehan v. Scott*, 145 Cal. 684, 690, 79 P. 350; 17 Pitts.L.Rev. 97. It is unnecessary to determine whether defendant was domiciled in this state prior to July 1948, for all the property involved was acquired subsequent to that date.

[3] The record shows that plaintiff and defendant resided in Glenwood Springs, Colorado until May 19, 1948. Plaintiff testified that in January of that year they learned that plaintiff was pregnant. They had a letter from defendant's sister-in-law inviting plaintiff and defendant to live with her and stating that she would take care of plaintiff and give her a good home until defendant made a fresh start in life. Plaintiff and defendant agreed that they would make their home wherever plaintiff wished and they decided that she should go to defendant's sister-in-law's place in Los Angeles. She left for Los Angeles and that

day or the next, defendant left for Canada. In July 1948 defendant came to Los Angeles, and he and plaintiff went house-hunting and took up their residence in Canoga Park, where they lived from August 1948 until December 1949. Defendant lived there when he was in town until December 1949, when they rented a furnished house at San Gabriel with an option to buy. They bought the house and thereafter lived there. Defendant was interested in oil lands and traveled extensively. In a deposition he stated "I moved out here [California] when Mrs. Rozan came out here to give birth to our son"; that he had voted in California "By absentee ballot at the last presidential election [1952]" and had considered this his residence since 1948. The foregoing evidence amply supports the trial court's finding of domicile not later than July, 1948.

The next essential finding on which the division of property depends is "that after plaintiff and defendant became domiciled in California, as a result of defendant's work, efforts, ability, and skills as an oil broker and operator, they acquired some money and property but that in the latter part of 1948 and in any event before May 1949 they lost everything so acquired by them from the latter part of 1948 until May 1949 and had none thereof and that sometime between December 1948 and May 1949, Rozan was obliged to apply to the Veterans' Administration for a pension in order to furnish plaintiff and Rozan their necessary living expenses and necessities of life." This finding is substantiated by the testimony of plaintiff as well as that of defendant, who stated "At that time I was hard pressed. I had properties but no income."

[4,5] The last finding on which the division of property depends is that the North Dakota properties "were acquired with community property and community property money." It is undisputed that these properties were acquired after 1949, at which time plaintiff and defendant had no funds. Defendant's testimony supports the finding that these properties were purchased with movables, for he testified that

he made a lot of money on his Canadian ventures as an oil operator and that it was with this money that the North Dakota properties were purchased. Both plaintiff's and defendant's testimony supports the finding that at the time of trial they still owned everything that they owned when they left Colorado in May of 1948, except two parcels that defendant transferred to a trust for his son and an interest that plaintiff sold. Plaintiff accounted for the expenditure of the proceeds received from the sale of that interest. It thus appears that the purchase money for the North Dakota properties was acquired by the efforts and skill of defendant as an oil operator subsequent to the establishment of the California domicile and was therefore community property. *Schecter v. Superior Court*, supra, 49 Cal.2d 3, 314 P.2d 10. Moreover there is a presumption that in the absence of evidence of gift, bequest, devise or descent, all property acquired by the husband after marriage is community property. Civ.Code, §§ 163, 164; *In re Estate of Duncan*, 9 Cal.2d 207, 217, 70 P.2d 174; *In re Estate of Jolly*, 196 Cal. 547, 553, 238 P. 353; *Nilson v. Sarment*, 153 Cal. 524, 527, 96 P. 315; *Wilson v. Wilson*, 76 Cal. App.2d 119, 125-126, 172 P.2d 568. There is no evidence that the purchase money was acquired by gift, bequest, devise, or descent. There is, therefore, substantial evidence to sustain the trial court's finding that the North Dakota properties were purchased with community property funds. It follows that the trial court could properly declare that the plaintiff was entitled to 65 per cent of such property as against the husband, for it is within the sound discretion of the trial court to assign the community property to the respective parties in such proportions as it deems just when a divorce is granted on the ground of extreme cruelty (Civ.Code, § 146).

After acquiring the real property in North Dakota, defendant divested himself of title thereto by means of various conveyances, and title was eventually put in the name of Eugene Rosen, defendant's nephew, either individually or as trustee of a pur-

ported trust for the minor child. The defendant contends that the trial court erred in holding that these were not actual transactions, but were without consideration and fraudulent as to the plaintiff. The trial court found that the purported transfers took place on or about the dates of recordation and not the dates in the deeds. This finding is supported by the evidence that many of the dates on the notarized deeds were dates that other evidence showed could not possibly be the dates on which the deeds were notarized. Thus, there was evidence that defendant was not even in North Dakota when some of the purported notarized dating took place. Most of the notarizing was done by the same notary, McCormick's secretary. McCormick was a party to certain of the North Dakota transactions that the court declared were fraudulent. Although McCormick was a co-defendant in this action, he did not appeal.

Other evidence also indicates that these transactions were not bona fide. In the Kvam transaction defendant purported to trade the Kvam property and the "five Wanberg acres" to McCormick in exchange for the Tripp County lease. The deal was purportedly closed at a time when McCormick did not own the Tripp County lease that he was giving in trade. At the same time, or within a day or two, the Kvam property was transferred to Eugene Rosen, nephew of the defendant, and McCormick accepted as payment Rosen's unsecured note for some \$49,000. He admitted that he knew nothing about Rosen's financial status and stated that Rosen had as much as told him that "he didn't have any money." McCormick had never made a title search on the Kvam property, and defendant had never made a title search on the Tripp County land, which was claimed to be worth \$53,500. The testimony of defendant and McCormick with respect to these transactions was vague and evasive and differed as to how and where the transactions were carried out.

It further appears that McCormick accepted the Rud lease, owned by defendant,

in payment for Rosen's \$49,000 note, although the value of the Rud lease did not exceed \$880. Much of the land was transferred to Eugene Rosen as trustee of a purported trust for the minor child, and admittedly there was no consideration therefor. All of these transfers were without the consent of the plaintiff.

[6] It is significant that since plaintiff began this action, defendant divested himself of title to all but one parcel of his land in North Dakota, some 18 parcels, and that each parcel was placed in the name of his nephew, Eugene Rosen, either individually or as a purported trustee. In his deposition taken at Silver Springs, Maryland, except for giving his name and address and identifying certain documents, Eugene Rosen refused to answer all questions on the ground that his answers might tend to incriminate him. The only property that defendant purportedly owns is the Tripp County lease, which the court found was transferred from McCormick to defendant to simulate consideration for the apparently valuable Kvam property and the five Wanberg acres. Both of these latter parcels were transferred the same day or within a day or two to Eugene Rosen. It is also significant that although defendant claims that some of the property transferred to his nephew individually was for a consideration, he cannot account for the consideration. Thus, there is abundant evidence to support the trial court's findings that these transactions were fraudulent as to plaintiff.

As to the \$2,500 note of M. W. Truss that defendant purportedly sold to McCormick, substantial evidence supports the trial court's finding that it was only a "wash" transaction for the purpose of depriving plaintiff of her interest in the note and the proceeds thereof and that the proceeds collected by the receiver in this suit are community property. Furthermore, such a finding, even if erroneous, was detrimental to McCormick and not to defendant, and McCormick has not appealed.

[7,8] Defendant contends finally that the judgment directly affects the title to land in another state and therefore exceeded the court's jurisdiction. A court of one state cannot directly affect or determine the title to land in another. *Fall v. Eastin*, 215 U.S. 1, 11, 30 S.Ct. 3, 54 L.Ed. 65; *Carpenter v. Strange*, 141 U.S. 87, 106, 11 S.Ct. 960, 35 L.Ed. 640; *Taylor v. Taylor*, 192 Cal. 71, 76, 218 P. 756, 51 A.L.R. 1074; *Melvin v. Carl*, 118 Cal.App. 249, 251, 4 P.2d 954; *Redwood Investment Co. of Stithton, Ky. v. Exley*, 64 Cal.App. 455, 458, 221 P. 973; *Launer v. Griffen*, 60 Cal. App.2d 659, 662, 141 P.2d 236. It is well settled, however, that a court, with the parties before it, can compel the execution of a conveyance in the form required by the law of the situs and that such a conveyance will be recognized there. *Muller v. Dows*, 94 U.S. 444, 449-450, 24 L.Ed. 207; *Watkins v. Holman*, 16 Pet. 25, 57, 41 U.S. 25, 57, 10 L.Ed. 873; *Corbett v. Nutt*, 10 Wall 464, 475, 77 U.S. 464, 475, 19 L.Ed. 976; *Massie v. Watts*, 6 Cranch 148, 160, 10 U.S. 148, 160, 3 L.Ed. 181; *Cole v. Manning*, 79 Cal.App. 55, 63, 248 P. 1065; *Tully v. Bailey*, 46 Cal.App.2d 195, 200, 115 P.2d 542; *Deschenes v. Tallman*, 248 N.Y. 33, 161 N.E. 321, 322; see *Rest., Conflict of Laws* § 97, comment a; *Currie, Full Faith and Credit to Foreign Land Decrees*, 21 U. of Chi.L.Rev. 620, 628-629. If the court has entered a decree of specific performance, but the conveyance has not been executed, the majority of states, including California, will give effect to the decree. *Spalding v. Spalding*, 75 Cal.App. 569, 580, 243 P. 445; *Redwood Investment Co. of Stithton, Ky. v. Exley*, 64 Cal.App. 455, 458, 221 P. 973; *Idaho Gold Min. Co. v. Winchell*, 6 Idaho 729, 59 Pac. 533, 535; *Matson v. Matson*, 186 Iowa 607, 622, 173 N.W. 127; *Meents v. Comstock*, 230 Iowa 63, 69, 296 N.W. 721; *Dunlap v. Byers*, 110 Mich. 109, 117, 67 N.W. 1067; *Deschenes v. Tallman*, 248 N.Y. 33, 161 N.E. 321, 322; *Roblin v. Long*, 60 How.Pr., N.Y., 200, 205; *Burnley v. Stevenson*, 24 Ohio St. 474, 479-480; *Mallette v. Sheerer*, 164 Wis. 415, 419, 160 N.W. 182; see *Stumberg, Conflict of Laws*

[2d ed.] p. 125. Thus in *Redwood Investment Co. of Stithton, Ky. v. Exley*, 64 Cal. App. 455, 459, 221 P. 973, 975, the court stated with reference to a Kentucky decree of specific performance to land in California: "It may be pleaded as a basis or cause of action or defense in the courts of the state where the land is situated, and is entitled in such a court to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud." There is no sound reason for denying a decree of a court of equity the same full faith and credit accorded any other kind of judgment. "Without exception, the courts recognize the validity of a deed executed under the compulsion of a foreign decree. But if the decree did not deal rightfully and constitutionally with the title to the land it would be voidable for duress. Recognition of the deed necessarily involves acceptance of the decree. Whatever intrusion on the state's exclusive control is implied in the recognition of the decree is accomplished through the recognition of the deed. A policy so easily evaded, so dependent on the success of the defendant in eluding the enforcement process of the foreign court, is a formal, lifeless thing, and the truth must be that foreign judicial proceedings of this type pose no real threat to the legitimate interest of the situs state." (Currie, *supra*, 21 U. of Chi.L.Rev. 620, 628-629.) Thus in the majority of states, such decrees are given effect as a *res judicata* declaration of the rights and equities of the parties. Cases *supra*; *Mills v. Mills*, 147 Cal.App.2d 107, 116-119, 305 P.2d 61; *Hicks v. Corbett*, 130 Cal.App.2d 87, 90, 278 P.2d 77; *Dodd v. Bell*, 180 Ga. 313, 178 S.E. 663, 664; *Dobson v. Pearce*, 12 N.Y. 156, 166; *Baughan v. Goodwin*, Tex.Civ.App., 162 S.W.2d 732, 736; *Hall v. Jones*, Tex.Civ. App., 54 S.W.2d 835, 836; see *Barbour*, *The Extra-Territorial Effect of the Equitable Decree*, 17 Mich.L.Rev. 527, 532; Currie, *supra*, 21 U. of Chi.L.Rev. 620, 629, 678-679; *Lorenzen*, *Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land*, 34 Yale

L.J. 591, 612. *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65, on which defendant relies did not hold otherwise. In that case the Washington decree directly affected title to land in Nebraska. A commissioner of the Washington court had executed a deed to that land and Mrs. Fall attempted to use this deed as a muniment of title in her action to quiet title against a grantee of the husband.

[9] In the light of the foregoing principles the judgment in the present case is *res judicata* and entitled to full faith and credit in North Dakota to the extent that it determines the rights and equities of the parties with respect to the land in question. An action on that judgment in North Dakota, however, is necessary to effect any change in the title to the land there. Thus, the judgment must be affirmed to the extent that it declares the rights of the parties before the court and modified to the extent that it purports to affect the title to the land.

[10] Neither Eugene Rosen, who holds record title, nor the minor child, who is the beneficiary of the purported trust, were parties to this action and the judgment is therefore not binding on them. Defendant and McCormick are bound, however, for they were parties to the action and appeared therein.

In several respects the judgment purports to affect title to the land and must therefore be modified. Thus, paragraph 11 declares that the Rollins' deed purporting to convey the Kvam property to McCormick is a nullity, that McCormick never acquired title, and that therefore Rosen never acquired title. Accordingly, the judgment is modified by striking paragraph 11 therefrom.

Paragraph 21 of the judgment awards 65 per cent of the North Dakota properties and the past, present, and future rents, issues and profits therefrom to plaintiff as her sole and separate property and awards 35 per cent thereof to Rozan subject to a lien for alimony, child support, and attorney's fees. This paragraph purports

to act directly on the property, and is therefore modified to read as follows: "21. It Is Further Ordered and Adjudged, that each and everyone of the aforementioned North Dakota properties mentioned and more specifically described in finding of fact No. 18 and each of the subparagraphs thereof, and the Kvam property, were acquired with community property funds of plaintiff and Rozan; that said properties were transferred to defeat plaintiff's rights as described in paragraph 18; that plaintiff is entitled to 65% of the aforementioned properties and of the rents, issues and profits thereof as against Rozan; that Rozan is entitled to 35% of the aforementioned properties and of the rents, issues and profits thereof as against plaintiff; and,"

Paragraph 31 (Cl.Tr. p. 92, lines 22-29) purports to declare a lien on Rozan's interest in the North Dakota land and is therefore modified to read as follows: "31. It Is Further Ordered and Adjudged, that plaintiff have, and is hereby given a lien for aforementioned alimony, child support and attorney's fees upon any and all separate property that Rozan now has in the State of California."

Paragraphs 7 and 18 of the judgment purport to act directly on the property by declaring that certain properties "were and still are the community property of plaintiff and Rozan;". The judgment is therefore modified by striking in paragraph 7 the words "became, were and still are the community property of plaintiff and Rozan" (Cl.Tr. p. 84, lines 27-28) and by striking in paragraph 18 the words "at all times herein mentioned were and still are the community property of plaintiff and Rozan" (Cl.Tr. p. 89, lines 6-7) and inserting in lieu thereof in each instance the words "were acquired with community property funds of plaintiff and Rozan".

The judgment is affirmed as modified. Defendant shall bear the costs on appeal.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

Clarence RADAR, Walter J. Henry, Catherine Henry and Jacob's Ambulance Service, a fictitious firm composed of Walter J. Henry and Catherine Henry, Plaintiffs and Appellants,

v.

Alpha C. ROGERS, as Administratrix of the Estate of George W. Rogers, Deceased, Defendant and Respondent.

L. A. 24421.

Supreme Court of California,
In Bank.

Oct. 30, 1957.

Action against administratrix of estate. The Superior Court, Los Angeles County, Walter R. Evans, J., sustained administratrix' demurrer to complaint without leave to amend, and plaintiffs appealed. The Supreme Court, Schauer, J., held that where complaint was filed against John Doe and Jane Doe as representatives of estate of deceased before representative was appointed, and complaint was not amended to alleged true name of administratrix until more than three months after claim was presented to and rejected by administratrix, plaintiffs' action was not barred by statute requiring that, when a claim is rejected by representative of decedent, suit be brought within three months thereafter.

Reversed and remanded with directions to overrule general demurrer.

Shenk and McComb, JJ., dissented.

Opinion, 302 P.2d 910, vacated.

1. Pleading $\S$ 279(1)

The general rule that where an action is prematurely brought, and original complaint must fall, a supplemental complaint has no place as a pleading is by no means absolute and universal in application and does not apply where there was a cause of action when original complaint was filed.

2. Limitation of Actions $\S$ 55(2)

Cause of action for injuries and property damage allegedly caused by negligence of party, since deceased, accrued when accident happened.

3. Executors and Administrators ⇨431(2)

The object of the statutory requirement of presentation and rejection of claims against estates, as a condition precedent to commencement of suits upon them, is to save to estates costs and expenses of suits to recover what would have been allowed and paid by administrator without suit. West's Ann.Prob.Code, § 714.

4. Abatement and Revival ⇨52

The cause of action against a decedent is the cause of action which survives against the personal representative. West's Ann.Civ.Code, § 956.

5. Executors and Administrators ⇨225(2)

Where complaint was filed against John Doe and Jane Doe as representatives of estate of the decedent before representative was appointed and complaint was not amended to alleged true name of administratrix until more than three months after claim had been presented to and rejected by administratrix but claim was presented within six months after first publication of notice to creditors, plaintiffs' action against administratrix was not barred by statute requiring that suit be brought within three months after date of rejection of claims by representative, in view of fact that substantial rights of estate were not affected by procedure followed by plaintiffs. West's Ann.Prob.Code, §§ 700, 707, 714, 716; West's Ann.Code Civ.Proc. § 464; West's Ann.Civ.Code, § 3510.

6. Abatement and Revival ⇨82**Executors and Administrators** ⇨443(7)

The defense that suit against administratrix was commenced before presentation and rejection of claim by administratrix is a matter of abatement, a defense which is not favored and must be made by plea, and in proper time, or it is waived. West's Ann.Prob.Code, § 714.

1. See also Prob.Code, § 715: "No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator [with an exception not here material]."

7. Abatement and Revival ⇨81**Pleading** ⇨106(1)

Matter in abatement must exist at the time of filing of pleading urging it, and if stated ground does not exist at the time of trial it may be disregarded.

Gray, Glass, Allen & Ransom, Dudley Gray and Gray, Glass & Allen, Gardena, for appellants.

Ball, Hunt & Hart and Loyal C. Pulley, Long Beach, for respondent.

SCHAUER, Justice.

Plaintiffs appeal from a judgment entered after a demurrer to their second amended complaint was sustained without leave to amend. Plaintiff Radar was allegedly injured and the property of plaintiffs Walter J. Henry and Catherine Henry damaged by the negligence of George Rogers, since deceased. The question is whether the action is barred by the following provision of section 714 of the Probate Code: "When a claim is rejected either by the executor or administrator * * * written notice of such rejection shall be given * * * to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due * * * [or] the claim shall be forever barred." 1

At the time plaintiffs' claims were presented to and rejected by the administratrix of the estate of George W. Rogers, the complaint in this action was already on file. At the time it was filed no personal representative of decedent had been appointed. The complaint named as defendants "John Doe and Jane Doe, as Administrator and/or Administratrix of the Estate of George Rogers, Deceased" and alleged "that the de-

Prob.Code, § 707: "All claims * * * for damages for physical injuries * * * or injury to property * * * must be filed or presented within the time limited in the notice [to creditors] * * *"

defendants John Doe and Jane Doe are sued herein as Administrator and/or Administratrix of the Estate of George Rogers, deceased, for the reason that the true name of the administrator and/or administratrix is unknown to the plaintiffs at this time." The complaint was not amended to allege the true name of the administratrix (who was appointed one year, less one day, subsequent to its filing) until more than three months after plaintiffs' claims were presented and rejected. We have concluded that inasmuch as the suit against the fictitiously named personal representatives was on file at the time plaintiffs' claims were rejected, plaintiffs have substantially met the requirement of section 714 that they "bring suit * * * within three months after the date of service of such notice [of rejection of their claims]." In the circumstances of this case, as hereinafter developed, the fact that the suit *was on file* not later than "three months after the date of service" of the notice of rejection is sufficient to defeat the plea in abatement and sustain the action.

Chronologically the factual situation is as follows:

December 15, 1952: The accident which gave rise to this action occurred. Rogers was killed in that accident.

March 11, 1953: Complaint was filed herein against "John Doe and Jane Doe, as Administrator and/or Administratrix of the Estate of George Rogers." As above set out more fully, it alleged as a ground for use of the fictitious names "that the true name of the administrator and/or administratrix is unknown to the plaintiffs at this time."

March 10, 1954: Defendant was appointed and qualified as administratrix.

March 12, 1954: Notice to creditors was first published.

August 12, 1954: Plaintiffs presented their claims to the administratrix. This presentation was timely within section 700

of the Probate Code (within six months after first publication of notice to creditors).

August 20, 1954: The administratrix gave notice of rejection of plaintiffs' claims. (It thus appears that defendant had notice of, and opportunity to voluntarily approve and pay, plaintiffs' claims; this fact becomes important, as is hereinafter developed.)

February 21, 1955: Plaintiffs filed a first amended complaint which named "Alpha C. Rogers, as Administratrix of the Estate of George W. Rogers," as defendant.

Defendant did not at this time plead the bar of the statute as a defense; instead she demurred to this complaint generally and specially, specifying as grounds that it failed to state facts constituting a cause of action and that it was uncertain, ambiguous and unintelligible in that it did not appear therefrom whether a claim had been filed in the estate proceeding. The demurrer was sustained with leave to amend.

April 4, 1955: Plaintiffs filed a second amended complaint alleging the presentation and rejection of their claims.

Defendant's demurrer to this second amended complaint was used as a vehicle for points and authorities which raised the contention that the suit was barred by limitation because it was not *instituted after*, and *within three months after*, the rejection of the claims, as assertedly required by section 714. Such demurrer was sustained without leave to amend.

The so-called amended complaints are, speaking technically, by code definition, supplemental complaints; that is, they allege "facts material to the cases occurring after the former complaint." (Code Civ.Proc., § 464; see *California Farm & Fruit Co. v. Schiappa-Pietra* (1907), 151 Cal. 732, 742-743, 91 P. 593.) From the second amended (or supplemental) complaint it appears that after, rather than before, this action was filed plaintiffs took the essential (to recov-

ery of judgment) step of presenting their claims to the administratrix.²

[1-3] It has been said that "The general rule is that where an action is prematurely brought, and the original complaint must fall, a supplemental complaint has no place as a pleading." (Walton v. County of Kern (1940), 39 Cal.App.2d 32, 34 [1], 102 P.2d 531, citing Morse v. Steele (1901), 132 Cal. 456, 458, 64 P. 690, and Lewis v. Fox (1898), 122 Cal. 244, 252, 54 P. 823.) But the rule of the Walton case is by no means absolute and universal in application. The statement quoted was made in connection with a holding that a supplemental complaint cannot aid an original complaint which was filed before a cause of action had arisen. Here there was a cause of action when the original complaint was filed. That cause of action accrued when the accident happened. Every fact essential to state a cause of action, at least in the absence of a plea in abatement, is well pleaded. As stated in Preston v. Knapp (1890), 85 Cal. 559, 561, 24 P. 811, "Appellant's counsel contend that, inasmuch as the complaint was not amended after the substitution of the executrix, by adding thereto an averment that the claim had been regularly presented to and rejected by the executrix, it is insufficient to support the judgment. But as no such objection was made in the court below, and as defendant expressly admitted on the trial that the claim had been presented to the executrix in due time, and that she had refused to act upon it, and made no objection on the ground that it was not presented in due form, it is too late to make the objection that the presentation and rejection of the claim were not alleged in the complaint, for the first time, on this appeal. (Hentsch v. Porter, 10 Cal. 555; Coleman v. Woodworth, 28 Cal. 567, 568; Bank of Stockton v. Howland, 42 Cal. 130; Drake v. Foster, 52 Cal. 225.) [Here, we recognize that defendant argued the asserted defect on demurrer in the trial court. But the opinion

continues:] The object of the statutory requirement of presentation and rejection of claims against estates, as a condition precedent to the commencement of suits upon them, is to save to estates of deceased persons the costs and expenses of useless suits,—suits to recover what would have been allowed and paid by the executor or administrator without suit. The merits of such claims do not depend in any degree upon their presentation and rejection before suit."

[4] At the time the complaint in the case at bar was filed, as is obvious from the facts above related, the claim here had not, and could not have, been presented to the personal representative of decedent's estate because no personal representative had been appointed, and no claim had or could then have been filed "in the office of the clerk of the court from which letters issued" (Prob. Code, § 700), for no letters had issued. Nevertheless, the cause of action was extant. "A thing in action arising out of a wrong which results in physical injury to the person * * * shall not abate by reason of the death of the wrongdoer." (Civ. Code, § 956.) The cause of action against the decedent is the cause of action which survives against the personal representative. (Smith v. Finley (1952), 112 Cal. App.2d 599, 600 [1], 246 P.2d 989.) Realism requires us to recognize the practical problem which plaintiffs faced. They believed they had a cause of action and in the exercise of diligence they wished to have their complaint on file before any question as to the running of an applicable statute of limitations could arise. Accordingly, they filed this complaint alleging the facts as above related. The desirability of the procedure followed by plaintiffs is not a matter which requires consideration or comment; we pass only on the ultimate questions of law essential to disposition of this appeal.

Persuasive here is Security-First Nat. Bank v. Bennett (1936), 17 Cal.App.2d 641,

2. The notice to creditors requires "all persons having claims against the decedent to file them * * * in the office of the clerk of the court from which letters

issued, or to present them * * * to the executor or administrator * * * " (Prob.Code, § 700.)

642-643, 62 P.2d 798. There a complaint was filed against seven defendants, one of whom was deceased at the time the complaint was filed. Plaintiff presented his claim to the executrix of the deceased defendant on August 8, 1933, and the claim was rejected on August 23, 1933. An amended and supplemental complaint in which the death of the deceased defendant was set out was filed on February 9, 1934. The appellate court rejected the contention that the action was barred by the provision of section 714 of the Probate Code that suit must be brought within three months after service of notice of rejection of claim. It is said that "The point now presented is highly technical and does not affect the substantial rights of the parties. Before the filing of the amended and supplemental complaint the executrix had ample notice of the claim and opportunity to approve it. There has been no miscarriage of justice. (Const., art. VI, sec. 4½.)" (See also *Grant v. Sun Indemnity Co.* (1938), 11 Cal.2d 438, 440, 80 P.2d 996.)

[5] Here too it would be highly technical to apply section 714 to bar this complaint, which was not filed too late but, at worst, prematurely. The substantial rights of the estate are not affected by the procedure followed by plaintiffs. The administratrix had ample opportunity, before the filing of the amended complaints, to approve plaintiffs' claims. The substance of the defect that the action had been brought before presentation and rejection of claim no longer existed when defendant by general demurrer to the amended and supplemental complaint sought to raise the issue. We do not believe that section 714 was ever intended to bar the action in this situation. We again quote the language of *Preston v. Knapp* (1890), *supra*, "The object of the statutory requirement of presentation and rejection of claims against estates, as a condition precedent to the commencement of suits upon them, is to save to estates of deceased persons the costs and expenses of useless suits,—suits to recover what would have been allowed and paid by the executor * * * without suit." We add, "When the

reason of a rule ceases, so should the rule itself." (Civ.Code, § 3510.) Here, the reason of the rule ceases because it appears from the very pleading which defendant relies on to show the facts which she invokes, that before she raised the plea she had had, and had rejected, every benefit the statute gave her.

Further illustrating a liberal approach to the claims requirements of the Probate Code is *Gregory v. Clabrough's Executors* (1900), 129 Cal. 475, 479, 62 P. 72. There an action was pending against Clabrough when he died. On his death a claim was duly presented to his executors but was neither approved nor rejected. It is held that "Section 1498 of the Code of Civil Procedure [now Prob.Code, § 714] can have no application to a case like the present, where the action was already pending when the claim was presented. All that is required of the plaintiff in such a case is simply to present his claim. (Code Civ.Proc., § 1502 [now Prob.Code, § 709].) The point intended seems to be that suit was not revived against the executors for over three months after the claim was rejected. But there is no provision of the code requiring that it should be revived within any definite period."

[6-7] The defense that suit was commenced before the presentation and rejection of claim "is simply matter of abatement—a defense which is not favored, and must be made by plea, and in proper time, or it is waived." (*Bemmerly v. Woodward* (1899), 124 Cal. 568, 574-575, 57 P. 561; see also *Verbeck v. Clymer* (1927), 202 Cal. 557, 562 [5], 261 P. 1017; *Seches v. Bard* (1932), 215 Cal. 79, 81 [2], 8 P.2d 835.) Here there is no occasion to consider whether the unfavored defense was waived, for it had ceased to exist at the time defendant sought to raise it. "A consequence of the disfavor with which such pleas are viewed is that matter in abatement must exist at the time of filing of the pleading urging it" (1 Cal.Jur.2d 29-30, § 3) and if the stated ground does not exist at the time of trial it may be disregarded. (*Archibald v. Iacopi* (1953), 120 Cal.App.2d 666, 669 [5], 262 P.2d 40.)

For the reasons above stated, we have concluded that the general demurrer was improperly sustained.

The judgment is reversed and the cause is remanded to the trial court with directions to overrule the general demurrer, and to entertain such further proceedings as may be appropriate.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

SHENK, Justice (dissenting).

It is the general rule, applicable in this case, that in order properly to commence an action there must first be a party then in existence capable of being sued and against whom a judgment may be entered. Secondly, facts must exist at that time which when alleged would be sufficient to support a judgment in favor of the plaintiffs. Here neither condition existed.

Section 714 of the Probate Code requires that the holder of a claim must "bring suit" in the proper court against the executor or administrator, within three months after the date of service of notice of rejection of claim or the "claim shall be forever barred." Under section 350 of the Code of Civil Procedure an action is "commenced" when a complaint is filed. However, this section must be construed with section 312 of the Code of Civil Procedure. That section provides that "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right. Code Civ.Proc., § 22. A cause of action cannot exist in vacuo. In order that a civil action be prosecuted there must be an existing person against whom the processes of law can operate. *Tanner v. Estate of Best*, 40 Cal.App.2d 442, 445, 104 P.2d 1084; *Bancroft's Code*

Pleading [1926] Vol. 1, p. 169. A complaint is based upon the theory that the plaintiff is entitled to judgment at the time of its filing. *Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley*, 217 Cal. 644, 658, 20 P.2d 940.

When this complaint was filed there was no one in existence against whom a judgment could be entered on the plaintiffs' claim. The necessary party defendant was the personal representative of the decedent's estate acting in her official capacity. Cf. Prob.Code, §§ 714, 573, 577; *Mesmer v. Jenkins*, 61 Cal. 151, 153. There was no personal representative appointed at that time and therefore there was no one against whom the plaintiffs could have proceeded.

A complaint naming a nonexistent defendant is fatally defective. Suing the nonexistent personal representative under a fictitious name could not breathe life into the complaint. The fictitious name statute applies where the plaintiff is ignorant of the true name or identity of a real person or a real entity against whom he has a cause of action. In such case the plaintiff may designate the defendant "by any name" and when the true name is discovered he may amend his pleading accordingly. Code Civ.Proc. § 474. The fictitious name statute was designed to stop the running of the statute of limitations on a cause of action where the identity of a real defendant is unknown at the time the complaint is filed. Where the complaint states a cause of action against such a real but unknown person the complaint may be amended even after the statute of limitations would have otherwise run. The action will then be deemed to have been commenced against the defendant as of the time the original complaint was filed. *Hoffman v. Keeton*, 132 Cal. 195, 64 P. 264; *Farris v. Merritt*, 63 Cal. 118.

The plaintiffs were not faced with any problem of having the general statute of limitations run on their claim. Section 353 of the Code of Civil Procedure, enacted in 1872, provides: "* * * If a

person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." The fact that there was no executor or administrator against whom they could proceed could not prejudice the plaintiffs insofar as the statute of limitations was concerned. It was tolled regardless of the time intervening between the death of the decedent and the appointment of his personal representative. *Hibernia Savings & Loan Society v. Boland*, 145 Cal. 626, 79 P. 365; *Daniglada v. De La Guerra*, 10 Cal. 386, 387. If the delay in the commencement of probate proceedings caused them any hardship the plaintiffs were not without a remedy. They could have had an administrator appointed under the provisions of section 422 of the Probate Code and presented their claim to him.

Once an administratrix was appointed, however, the plaintiffs were required to be vigilant in presenting their claim. This they did. The rejection of their claim was sufficient to put them on notice that under the law prompt action was required to enable them to pursue their right of action against the estate. This they did not do. They did not sue within due time after the rejection of their claim.

Section 714 of the Probate Code constitutes a special or short-term statute of limitations. *Cowgill v. Dinwiddie*, 98 Cal. 481, 485, 33 P. 439; *Benedict v. Haggin*, 2 Cal. 385, 387; *Estate of Wilcox*, 68 Cal. App.2d 780, 785, 158 P.2d 32; *Thayer v. Fish*, 49 Cal.App.2d 618, 620, 122 P.2d 358; *San Francisco Bank v. St. Clair*, 47 Cal. App.2d 194, 201, 117 P.2d 703; *Laukkare v. Abramson*, 9 Cal.App.2d 447, 449, 50 P.2d 478. It does not begin to run until after notice of rejection of the claim, or, at the claimant's election, until ten days after presentation of claim without any action having been taken thereon. Prob.Code, § 712.

Here the claim of the plaintiffs was rejected on August 20, 1954, and the short-term statute of limitations commenced to operate on that date. Statutes of limitation are recognized as being "vital to the welfare of society * * * they promote repose by giving security and stability to human affairs * * * they stimulate to activity and punish negligence." *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L.Ed. 807, quoted with approval in *Neff v. New York Life Ins.*, 30 Cal.2d 165, 175, 180 P.2d 900, 906, 171 A.L.R. 563. Generally it is held that as between parties acting in their own right the plea of the statute of limitations is a personal privilege. It may be waived and if not asserted, is deemed to have been waived. However, the administratrix, as here, is held to act not in her own right but as trustee for the benefit of creditors and heirs. She possesses no personal privilege to waive the defense of the statute. *Fontana Land Co. v. Laughlin*, 199 Cal. 625, 636-637, 250 P. 669, 48 A.L.R. 1308; *Reay v. Heazelton*, 128 Cal. 335, 338-339, 60 P. 977; *Boyce v. Fisk*, 110 Cal. 107, 117, 42 P. 473; *Hurlimann v. Bank of America*, 141 Cal.App.2d 801, 806, 297 P.2d 682; *Bryson v. Hill*, 107 Cal.App. 158, 160, 290 P. 52. She could not have waived the defense that section 714 of the Probate Code barred this action. That section is declarative of a public policy of the state for the efficient administration and the prompt settlement of estates for the benefit of heirs and beneficiaries as well as creditors. Its provisions are comparable to the three months' limitation provided in section 580a of the Code of Civil Procedure for the commencement of an action for a deficiency judgment. The provisions of that section have been held to be part of a legislative plan to lighten the burdens of trust-debtors and they may not be waived as they are not mere personal rights for the benefit of individuals. *Hatch v. Security First National Bank*, 19 Cal.2d 254, 259, 120 P.2d 869; *California Bank v. Stimson*, 89 Cal.App.2d 552, 554-555, 201 P.2d 39. The time provided in the section is reasonable. The legislature had the power to prescribe the term

of the limitation. The language it employed leaves no room for doubt. If the procedure prescribed is not followed the claim is "forever barred."

In order to state a cause of action against the estate a necessary prerequisite was that the claim be first presented to the personal representative of the estate and that it be rejected, or be deemed rejected by operation of law (Prob.Code, § 712). Prior to such rejection no cause of action could be stated. It is the general rule that where an original complaint upon a rejected claim fails because the action is prematurely brought, a supplemental complaint has no place as a pleading to sustain the action. *Morse v. Steele*, 132 Cal. 456, 458, 64 P. 690; *Walton v. County of Kern*, 39 Cal.App.2d 32, 34, 102 P.2d 531. There are no circumstances shown here which would justify a modification of this rule on the grounds of estoppel (cf. *Grant v. Sun Indemnity Co.*, 11 Cal.2d 438, 440, 80 P.2d 996) or waiver (cf. *Bollinger v. National Fire Ins. Co.*, 25 Cal.2d 399, 406, 154 P.2d 399) or other recognized grounds. The cases of *Gregory v. Clabrough's Executors*, 129 Cal. 475, 479, 62 P. 72, *Preston v. Knapp*, 85 Cal. 559, 561, 24 P. 811, and *Security First National Bank v. Bennett*, 17 Cal.App.2d 641, 642-643, 62 P.2d 798, cited in the majority opinion, are distinguishable on their facts.

The majority opinion states that "it appears from the very pleading which defendant relies on to show the facts which she invokes, that before she raised the plea she had had, and had rejected, every benefit the statute gave her." But the benefits the statute gave the administratrix were not merely to have the opportunity of approving or rejecting a claim before suit may be brought thereon. Other benefits and duties were specifically provided for. The statute gave the administratrix a right to consider that at the expiration of three months from the service of notice of rejection of the plaintiffs' claim no action could thereafter be brought. Whether the substantial rights of the estate were affected is not the issue. The legislative concern

for prompt settlement of estates is clearly expressed. The rights given to creditors and claimants must be pursued as provided by law. It cannot be said that the administratrix was dilatory in presenting her objections or that she had an opportunity to object at a time when the plaintiffs could have amended their complaint or when they could have dismissed and filed anew. She had no right or privilege to waive her objections. Her objections were in the nature of a plea in bar and not in abatement. The trial court properly sustained her demurrer to the second amended complaint without leave to amend.

For the foregoing reasons and for the additional reasons stated in the majority opinion of the District Court of Appeal of the Second District, Division Two (302 P.2d 910) I would affirm the judgment.

McCOMB, J., concurs.



154 Cal.App.2d 817

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Cordella BLAYDON and Carmen Pisano,
Defendants,

Cordella Blaydon, Defendant and Appellant.
Cr. 5913.

District Court of Appeal, Second District,
 Division 3, California.

Oct. 31, 1957.

Hearing Denied Dec. 23, 1957.

Prosecution for preparing false evidence, forgery, and offering false and forged instruments to be filed of record. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and denied a motion for new trial, and the defendant appealed. The Dis-

strict Court of Appeal, Vallée, J., held that substantial evidence supported conviction.

Judgment and order denying new trial affirmed.

1. Forgery $\S$ 44, 44(3)

Obstructing Justice $\S$ 16

Evidence, in a prosecution for preparing false evidence, forgery and for offering false and forged instruments to be filed of record, that signature of a witness on a will was forged, and that defendant handed instrument with the forged signature to an attorney for probate, and that he filed it with the county clerk for probate, constituted proof of the corpus delicti of the offenses charged. West's Ann.Pen.Code, $\S\S$ 31, 134, 470.

2. Criminal Law $\S$ 1160

Function of District Court of Appeal, on appeal from judgment of conviction and denial of a motion for new trial in regard to whether verdict was contrary to the weight of the evidence, ends if court finds substantial evidence supporting the verdict.

3. Forgery $\S$ 44, 44(3)

Obstructing Justice $\S$ 16

Substantial evidence sustained conviction for preparing false evidence, forgery, and offering false and forged instruments to be filed of record. West's Ann.Pen.Code, $\S\S$ 31, 134, 470.

4. Criminal Law $\S$ 1134(2)

In determining whether there is substantial evidence to support a verdict finding a defendant guilty, a reviewing court must disregard contrary evidence as well as contrary inferences and conclusions which were not, but which might have been drawn by the trier of fact.

5. Criminal Law $\S$ 721½(2)

In prosecution for preparing false evidence, forgery, and offering false or forged instruments to be filed of record, comment of district attorney in his argument, to the effect that defendant could have called an expert to meet testimony of experts called by the state in regard to a forged signature,

did not constitute misconduct, in view of fact a district attorney may comment on failure of a defendant to produce material witnesses who would substantiate defendant's story. West's Ann.Pen.Code, $\S\S$ 31, 134, 470.

6. Criminal Law $\S$ 730(7)

In prosecution for preparing false evidence, forgery, and offering false and forged instruments to be filed of record, query of district attorney in his argument, as to whether defendant had sufficient funds to hire a handwriting expert, was not prejudicial in view of fact defendant objected and court immediately stated that there was no evidence on such matter and instructed jury to disregard the query.

D. Brandon Bernstein, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., and Herschel T. Elkins, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Cordelia Blaydon and Carmen Pisano were charged with preparing false evidence, forgery, and offering false and forged instruments to be filed of record. In a jury trial they were convicted as charged. Cordelia Blaydon, referred to as defendant, appeals from the judgment and an order denying her motion for a new trial.

The preparation of false evidence charged was that defendant falsely prepared the signature of a witness to the will of Miss Georgina Hargitt. Pisano was charged with having aided and abetted in the commission of the offense. The forgery charged was that defendant counterfeited the signature of a witness to the will. Pisano was charged with having aided and abetted in the commission of this offense. The offering of false and fraudulent instruments to be filed of record charged was that defendant and Pisano knowingly procured and offered the will with the forged signature of a witness, to be filed in the superior court.

From July 23, 1954 to February 28, 1956 defendant acted as practical nurse for Georgina Hargitt. She was not relieved after January 1, 1955. On February 28, 1956 Miss Hargitt died at the age of 83 or 84. During the last year and a half of her life she had failed mentally and physically.

On February 28, 1956 or the day following, defendant telephoned C. W. Encoe, an attorney at law who had acted as Miss Hargitt's attorney and been her friend for 30 years, told him Miss Hargitt had passed away, had left a will naming him executor, and requested him to come to the house, which he did. When Mr. Encoe arrived defendant handed him two loose sheets of paper, which we will call the 1955 will. The body of the will was written in defendant's handwriting. It was signed by Miss Hargitt; two names appeared thereon as witnesses, Lola Button and Carmen Pisano. The name "Carmen Pisano" was signed by him. Lola Button and two experts testified the name "Lola Button" was not written by Lola Button. Lola Button was a lifetime friend of Miss Hargitt.

Mr. Encoe took the 1955 will, put a back on it, and filed it with the clerk of the superior court for probate. It purported to devise and bequeath a parcel of realty and a dog to defendant's daughter, to devise a parcel of realty to defendant's step-daughter, to make a number of other bequests and devises, and to devise and bequeath the residue to defendant. There were other purported bequests and devises. The address of each beneficiary was stated in the instrument. The value of the estate was about \$235,000.

Mr. Encoe testified that in February 1955 Miss Hargitt called him and asked him to come out and look at a proposed will she had prepared; he went to her home; Miss Hargitt handed him a paper, said it was in defendant's handwriting, and it was her proposed will; he read the paper; it gave the residue of Miss Hargitt's estate to defendant; he raised an objection because it contained a provision for monthly payments over a long period to a legatee, not defendant, and told Miss Har-

gitt that if she wanted such a will prepared it would have to be in the form of a trust; Miss Hargitt appeared to be of sound mind and alert at the time; he had prepared a will for her in 1950 which was executed.

On March 20, 1956 an investigator for the district attorney had a conversation with defendant in the presence of her attorney. Defendant told the investigator that on February 15, 1955 Miss Hargitt expressed a desire to execute a will; at Miss Hargitt's request she wrote a letter to Lola Button asking her to come to the Hargitt home; Miss Hargitt, Lola Button, Pisano, and defendant were present; she did not know how Pisano happened to be there; Miss Hargitt dictated and she wrote the body of the 1955 will in her handwriting; when Miss Hargitt completed the dictation, she (defendant) read it aloud; Miss Hargitt looked at it and signed it; Lola Button had it in her hand, seemed to be reading it, and signed it; and Pisano signed it; her daughter was in the Hargitt house at the time.

An expert called by the People testified Lola Button did not sign the name "Lola Button" on the 1955 will; he was not able to say that defendant signed the name "Lola Button"; there were similarities between the handwriting of Pisano and the signature "Lola Button"; he could not give a definite opinion as to who signed the name "Lola Button." Another expert called by the People testified Lola Button did not sign the name "Lola Button" on the 1955 will; he could not say that defendant wrote the name "Lola Button."

He testified further:

"Q. Now, Mr. Davis, one question: Can you tell me whether Carmen Pisano wrote the name Lola Button on Exhibit 1 [the 1955 will]? A. Well, I saw some characteristics and some of his writing that caused me to believe that he possibly could have, he was capable of it.

"Q. You couldn't give me an unqualified opinion in that respect, could you, Mr. Davis? A. No.

"Q. So actually you couldn't tell me who wrote the handwriting 'Lola Button'?"

"Mr. Stovitz: On Exhibit 1, counsel?"

"Mr. Whitehill: On Exhibit 1? A. No, as I stated in my opinion this is a definite attempt to forge the name and simulate the handwriting of Mrs. Button and that is one of the best ways to disguise your own writing is to write like somebody else. Whoever did it, I believe largely disguised it, as far as their own writing is concerned by trying to simulate the writing of Mrs. Lola Button.

"Q. But you couldn't tell me who wrote the name Lola Button on Exhibit 1, could you? A. No."

Defendant testified she was at the home of Miss Hargitt as her nurse from July 23, 1954 until she died in 1956; on February 14, 1955 Mr. Encoe came to Miss Hargitt's home and discussed a writing which had been dictated to her (defendant) which Miss Hargitt said was her last will in which she expressed a desire to leave Elizabeth McDowell \$50 a month as long as she lived; Mr. Encoe and Miss Hargitt discussed this and the use of the word "residue" instead of "balance." Lola Button was there at the time and commented on defendant's handwriting; the next day Miss Hargitt dictated the 1955 will to defendant. Miss Hargitt had only started dictating when Lola Button arrived. Before Miss Hargitt finished dictating Pisano came to the door. She was not positive whether she called him or whether Miss Hargitt called him. Miss Hargitt said, "Let's call Carmen now." Miss Hargitt talked to Pisano on the telephone. Miss Hargitt signed the instrument, Lola Button signed it standing, Miss Hargitt said to Pisano "Will you put your John Henry on my will" and Pisano signed; Miss Hargitt was a chain cigarette smoker and as Lola Button signed, Miss Hargitt acciden-

tally dropped some cigarette ashes on Lola Button's hand, Lola Button jumped back, and then resumed writing her name; her daughter was not in the Hargitt house at the time; after Pisano signed Miss Hargitt folded the will and put it in her pocket; that night she had her (defendant) put it in a ledger which she put in a Pullman case where it remained until Miss Hargitt passed away; at Miss Hargitt's request she destroyed the paper Miss Hargitt had shown Mr. Encoe the day before; Lola Button stayed, had dinner, and left about nine.

Pisano testified: Prior to February 1955 Miss Hargitt had been a customer at his place of business, a service station, and he had been to her home on several occasions making deliveries. On February 14, 1955, the day before the 1955 will was signed, defendant telephoned Pisano and asked him to come to the Hargitt home, that Miss Hargitt wanted him to sign a paper for her. Later that day defendant called him again and told him not to come out, that it was not necessary. The next day, immediately after lunch, defendant called him again and asked him to come out to the house, that Miss Hargitt wanted him to sign a will. He arrived at the Hargitt home about 1:30. When he arrived Lola Button was there. He was introduced to her. Pisano's testimony with respect to execution of the will was substantially the same as that of defendant.

Two or three days after Miss Hargitt's death Pisano contacted Mr. Encoe and told him Miss Hargitt had given him an envelope with instructions to deliver it to Mr. Encoe. Mr. Encoe had not known Pisano prior to that time. He went to a gas station and Pisano gave him a sealed envelope. In the envelope there were three statements dated February 17, 1955, signed by Miss Hargitt, and an undated check for \$5,000 payable to defendant.¹ The three state-

1. The statements read:

"I Georgina Hargitt—am dictating this to a young man I feel is sufficiently [sic] disinterested and has shown himself to be trustworthy in my dealings with him. There are very few people I can trust. I

have drawn up my will, and I ~~can~~ have had this young man, Carmen Pisano and my friend Lou Button sign as witness, and I want this paper given to my lawyer whom I have named executor (since Phyllis refused the honor) My lawyers name

ments were purportedly dictated by Miss Hargitt. They were written by Pisano except the signatures of Georgina Hargitt at the top and bottom, which were written by her. The face of the \$5,000 check was written by Pisano. Pisano testified: On February 17, 1955, two days after the 1955 will was signed, defendant telephoned him and asked him to come out, that Miss Hargitt wanted him to fill out a couple of letters for her. Pisano said he was dirty. Defendant said, "Well, make it as quick as you can." He did, defendant let him in, Miss Hargitt was in the living room, defendant did not remain in the room. Miss Hargitt asked him if he would write some letters for her.

is Mr. Encoe. I wish I could be here to enjoy the fireworks ~~Write smaller young man~~ I am entrusting these things to this young man and he has promised to keep them and present them to my attorney in the event of any difficulty before or after my death. I understand that Mrs. Pauline Peet is planning to sue my estate. I will not have it. She is a malicious person and has lied to me and to my friends. She came here soon after my sister Mayme passed on, and asked to stay 2 or 3 days. She stayed 2 years, like the man who came to dinner. She tried to run my affairs and I wouldn't have it. I made her very angry. I offered to pay her for any services rendered. She refused. I gave a private room, and bath, meals, and entertainment and cab fare.

"the date is Feb 17, 1955

"the time is 2 p m

"Georgina Hargitt"

"I Georgina Hargitt am setting forth these few things which trouble me and am entrusting these papers to the care of the young man Carmen Pisano. This paper in particular I would like in the hands of my attorney Mr. Encoe should the need arise in the near future or thereafter. If the time should come that I am stricken and do not have use of my faculties, I have provided a power of attorney for Phyllis Bennett I trust her completely, she is my good freind [sic] and I know she will help me. This is true of her mother, my nurse Mrs. Blaydon and I wish them to care for me in this event. I do not want Dr Goldberg appointed administrator over ~~any and all~~ ~~the~~ that of my affairs. Both Phyllis and Cory are reluctant to handle my

Miss Hargitt dictated the three statements to him and he wrote them. The name "Georgina Hargitt" was written by her. Miss Hargitt showed him a blank check and asked him to write "Mrs. Cordelia Blaydon, five thousand dollars and no/100," and the numerals \$5,000 on it. Later she signed the check, put the three statements and the check in an envelope, and sealed it. Mr. Encoe's name was written on the face of the envelope. He does not know who wrote it. Miss Hargitt gave him the envelope and told him not to give it to anyone but Mr. Encoe in case anything should happen to her. He kept the envelope unopened and delivered it to Mr. Encoe after Miss Hargitt passed away.

affairs and should they need help they are to consult with Mr. Encoe my attorney. If Dr Goldberg should suggest or would try to prove me incompetent or have me committed to any institution at anytime now or in the future, his inheritance is to be sold, and the proceeds to be presented to the childrens hospital. I do not trust this man, he is too interested in my affairs I have not named Alice or Joe McDonald in my will. I feel any services they have rendered, have been amply repaid by the simple process of allowing their rent to remain unchanged, despite all other rising costs. She says she is my freind [sic], but I have heard her talk behind my back.

"The date is Feb 17, 1955

"The time is 2 p m.

"Georgina Hargitt"

"Now the next thing I want is some protection for (Cory) Mrs. Blaydon when the vultures settle down. She has promised to stay with me to the end God willing. If & when the time comes I want this check deposited to Mrs. Blaydon's account for her use during the time my estate maybe [sic] in probate. If for some reason my check would be null and void I want provision made for Cory to receive not less than \$200.00 per month during probation period. I also want her to remain at my home at 1486 So Rexford during the time of probation also the executor to see that utilities are paid the same as the other real properties

"(The check is not dated.)

"This dat is Feb. 17, 1955

"the tim is 2 pm.

"Georgina Hargitt"

[1] It is first asserted there was no proof of the corpus delicti in that the failure to connect defendant with the physical act of forgery constituted a failure of proof. The point is without merit. The body of the instrument was admittedly in defendant's handwriting. There is ample evidence that the signature "Lola Button" was forged, that defendant handed the instrument with the forged signature to Mr. Encoe for probate, and that he filed it with the county clerk for probate. Such evidence constitutes proof of the corpus delicti of the offenses charged. Penal Code, §§ 31, 134, 470; *People v. Horowitz*, 70 Cal.App. 2d 675, 686-688, 161 P.2d 833.

[2-4] It is asserted there was no evidence defendant personally forged Lola Button's name or aided therein. The point is based on the testimony of the experts that they could not say that defendant signed the name "Lola Button." There is no direct evidence defendant forged the name or aided and abetted Pisano in doing so. We think there was ample evidence from which the jury could have found that defendant aided and abetted Pisano in forging the name. Defendant wrote all of the 1955 will except the name "Georgina Hargitt" on the first page and the date and the signatures "Georgina Hargitt" and "Carmen Pisano" on the second page. The signature "Lola Button" was a forgery. There were similarities between Pisano's handwriting and the forgery. There was evidence that during the last year and a half of her life Miss Hargitt's mind was not as clear as it had been in earlier years. At her death about a year after the instrument was signed, she was 83 or 84 years of age. Defendant's daughter was given Miss Hargitt's home place, appraised at \$25,000. Her step-daughter, whom Miss Hargitt had met only once or twice, was given a parcel of realty appraised at \$25,000. And defendant was given the residue, appraised at about \$144,000. Defendant's testimony relative to Lola Button's signing was in conflict with that of Lola Button and the two experts. Defendant's testimony was in conflict with the statement she made to the dis-

trict attorney's investigator. Defendant knew that signatures of two witnesses were necessary to the validity of a will. On the day Miss Hargitt passed away or the day following, defendant called Mr. Encoe and told him of her death, that she had left a will in which he was named executor, and asked him to come out to the house. Defendant gave him the instrument for the obvious purpose of having it probated, and it was admitted to probate. Pisano testified at the hearing. In 1950 Mr. Encoe had prepared a will for Miss Hargitt which was duly executed. The 1955 will was supposed to have been dictated by Miss Hargitt to defendant and was written in defendant's handwriting at a time when Mr. Encoe was available. The last line of the body of the 1955 will was squeezed in after Miss Hargitt signed it. Defendant testified she added the last line after Miss Hargitt signed at the latter's request. When defendant gave Mr. Encoe the 1955 will he asked her who Lola Button was. Defendant told him Lola Button was too ill to go to court. About six months before Miss Hargitt passed away defendant had the Hargitt telephone number changed to an unlisted number, and during that period Miss Hargitt's friends had difficulty gaining entrance to the house. During that time defendant refused to let Mr. Encoe see Miss Hargitt. On Miss Hargitt's passing Pisano produced three statements in his handwriting and a check for \$5,000 payable to defendant supposedly written two days after the will was purportedly executed. The facts related support the finding that defendant was guilty of the offenses charged. Defendant's argument to the contrary is largely one with respect to the weight of the evidence. Our function ends when we find substantial evidence which supports the verdict. A reviewing court must disregard contrary evidence as well as contrary inferences and conclusions which were not, but which might have been, drawn by the trier of fact.

[5,6] It is contended the district attorney was guilty of prejudicial misconduct in his argument to the jury. The district at-

torney commented to the effect that defendant could have called an expert to meet the testimony of the experts called by the People. There was no misconduct. (*People v. Fitzgerald*, 14 Cal.App.2d 180, 205, 58 P. 2d 718.) The district attorney may comment on the failure of the defendant to produce material witnesses who would substantiate his story. After commenting on the failure of defendant to call an expert the district attorney queried the jury, "Ladies and gentlemen, did Mrs. Blaydon have funds sufficient enough to hire a handwriting expert?" Defendant objected and cited the statement as misconduct. The court immediately said there was no evidence on that at all and instructed the jury to disregard the query. Defendant was not prejudiced.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, SCHAUER and McCOMB, JJ., dissenting.



154 Cal.App.2d 842

W. M. RINEHART, Plaintiff and Appellant,
v.

The FIRST CUPERTINO COMPANY, a partnership, John A. Cussen, Jr., and Barbara Woods Cussen, Defendants and Respondents.

Civ. 17399.

District Court of Appeal, First District,
Division 2, California.

Nov. 4, 1957.

Rehearing Denied Dec. 4, 1957.

Hearing Denied Dec. 30, 1957.

Suit for declaratory relief and a decree quieting title to an interest in real property wherein defendants cross-complained to quiet title. Judgment for defendants in the Superior Court, County of Santa Clara, M. G. Del Mutolo, J., and the plaintiff ap-

peals. The District Court of Appeal, Draper, J., held that denying cross-examination of spouses on ground of the statutory privilege was not prejudicial, where plaintiff was afforded full cross-examination without any limitation by reason of the claimed privilege and that the evidence supported the findings for the defendant.

Judgment affirmed.

1. Witnesses ⇨219(2)

Where affirmative relief is sought by spouses as joint plaintiffs, benefits of the code section that one spouse cannot be examined for or against the other without the latter's consent is waived and the same rule applies where defendants claim an interest and seek its determination by judgment. West's Ann.Code Civ.Proc. § 1881, subd. 1.

2. Witnesses ⇨219(2)

In suit to quiet title where answer alleged ownership in husband and wife and sought to establish their own title by way of defense, spouses sought affirmative relief and waived benefit of the privilege statutes. West's Ann.Code Civ.Proc. § 1881, subd. 1.

3. Appeal and Error ⇨1048(1)

In suit to quiet title, where spouses as respondents in seeking to establish their own title sought affirmative relief and thereby waived the privilege statute, ruling denying privilege was not prejudicial, where plaintiff failed to take advantage of opportunity to examine wife when opportunity to examine was offered. West's Ann.Code Civ.Proc. § 1881, subd. 1.

4. Appeal and Error ⇨1048(6)

In suit to quiet title, sustaining objections to testimony of respondent husband, upon the ground of statutory privilege, was without prejudice to plaintiff, where objection was sustained when plaintiff called the husband as an adverse witness and later same witness was called by respondents and plaintiff was afforded a full cross-examination without any limitation by

reason of claimed privilege. West's Ann. Code Civ.Proc. §§ 1881, subd. 1, 2055.

5. Quieting Title Ⓒ44(3)

In suit to quiet title on ground that defendants agreed to grant to plaintiff an interest in real property in return for the plaintiff's services as a broker in acquiring the land, evidence supported findings for the defendant.

6. Appeal and Error Ⓒ1071(5)

Fact that some of the findings made by the trial court were superfluous would not warrant a reversal.

Manny C. Gomez, Machado & Machado, San Jose, for appellant.

Charles A. Thompson, Robley E. Morgan, Santa Clara, for respondents.

DRAPER, Justice.

Plaintiff sought declaratory relief and decree quieting title, asserting that defendants had agreed to grant to plaintiff a one-fourth interest in real property in return for plaintiff's services as broker in acquiring the land. Defendants' answer denied plaintiff's claims, and asserted title in themselves. Defendants also cross-complained to quiet title. The cross-complaint was dismissed during trial. Defendants had judgment that plaintiff take nothing by his complaint, and that title be quieted in defendants. Plaintiff appeals.

Respondent The First Cupertino Company is a limited partnership consisting of respondent John A. Cussen as general partner and his wife, respondent Barbara Wood Cussen, as limited partner. This partnership acquired the land in question before this action was commenced.

During his rebuttal, appellant called Mrs. Cussen under Code of Civil Procedure, section 2055. After she had given her name and stated that she is the wife of the other individual respondent, counsel for her husband and herself invoked the rule that one spouse cannot be examined for or against

the other without the latter's consent (Code Civ.Proc. § 1881, subd. 1), and objected to further testimony by Mrs. Cussen upon that ground. The objection was sustained. Respondents assert that the privilege is waived only when husband and wife join in seeking affirmative relief, and not when they are joined as defendants. They point out that here the cross-complaint had been dismissed before Mrs. Cussen was called. Thus, they say, no affirmative relief was sought, and Section 1881(1) was properly invoked.

[1-3] It is unnecessary to determine, in this case, whether spouses who are joint defendants and who seek no affirmative relief may invoke this privilege. The rule is clear that, where affirmative relief is sought by the spouses as joint plaintiffs, the benefit of the code section is waived (In re Strand, 123 Cal.App. 170, 11 P.2d 89). The same rule applies where, as defendants, they claim an interest and seek its determination by judgment (Hagen v. Silva, 139 Cal.App.2d 199, 293 P.2d 143). Here the answer alleged ownership in respondents. It follows that, in seeking to establish their own title, even though by way of defense, they sought affirmative relief (Warden v. Stoll, 210 Cal. 374, 377, 291 P. 835). In doing so, they have waived the benefit of Section 1881(1). Appellant should have been allowed to question Mrs. Cussen. It does not follow, however, that the error was prejudicial. Shortly after the ruling complained of, and at the close of defendants' case, the following occurred:

"Mr. Machado [counsel for plaintiff-appellant]: Well, there's Mrs. Cussen, why don't you put her on the stand?"

"The Court: Anything further?"

"Mr. Machado: We submit it, your Honor.

"The Court: Do you rest, Mr. Morgan?"

"Mr. Morgan: We rest.

"The Court: Do you want to argue the case?"

"Mr. Morgan: Just a second before I rest. Mrs. Cussen will testify.

"Mr. Machado: Now, if your Honor please—

"Mr. Morgan: May I set aside my resting and let Mrs. Cussen testify? You asked me just a few minutes ago, why don't you let her testify.

"Mr. Machado: Now, your Honor please is this a game of chance or what?

"The Court: All right, you may be seated, Mrs. Cussen."

It is apparent that respondents' counsel wished to submit Mrs. Cussen to examination by appellant, thus withdrawing his previous objection. Appellant refused the offer. The court clearly treated appellant's comment upon this offer as a refusal of the opportunity to examine, and it was only after this rejection that the witness was permitted to leave the stand. Having failed to take advantage of this opportunity, appellant cannot now be heard to complain (*Walsh v. Parker*, 41 Cal.App.2d 435, 444, 106 P.2d 925; *Ford v. Carew & English*, 89 Cal.App.2d 199, 208, 200 P.2d 828; *Rickards v. Noonan*, 40 Cal.App.2d 266, 275, 104 P.2d 839).

[4] It was likewise error to sustain objection to the testimony of respondent husband, upon the ground of the privilege extended by Code of Civil Procedure, section 1881(1). But this error, also, is without prejudice to appellant. The objection was made and sustained when appellant called this respondent as an adverse witness (Code Civ.Proc. § 2055). Later, the same witness was called by respondents. Appellant was afforded full cross-examination, without any limitation by reason of the claimed privilege. This cross-examination covered all subjects which could conceiv-

ably have been gone into under Section 2055. It follows that there is no reversible error (*In re Estate of McCollum*, 59 Cal. App.2d 744, 752, 140 P.2d 176; *French v. Orange County Inv. Corp.*, 125 Cal.App. 587, 590, 13 P.2d 1046).

[5, 6] Appellant attacks the sufficiency of the evidence to support the findings. The trial court found that respondents, by letter of June 13, 1951, offered appellant a quarter interest in return for services to be rendered, providing also that appellant should pay one-fourth of any purchase price mortgage given by respondents. The letter called for written acceptance. The court found that appellant never accepted. It was further found that on February 17, 1954, respondents wrote to appellant offering him a quarter interest if he would pay 25% of the purchase-money encumbrance then due, but specifically providing that the letter should not be deemed an admission that appellant had any interest in the property. Appellant neither answered this letter nor made any contribution to payment of the encumbrance. Appellant alleged an oral agreement for transfer of the quarter interest to him, but this was denied and the trial court's finding was against appellant. Thus, aside from the problem of the statute of frauds, the determination of the fact issue disposes of appellant's claim under an oral agreement. It would serve no purpose to detail the evidence here. We have reviewed the record and find that it supports the findings. Appellant also asserts that the findings are contradictory. But at the most, some of the findings may be superfluous, and any such error would not warrant reversal.

The judgment is affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

154 Cal.App.2d 720

Wes AMBROSINI and Con Ferrasci,
Plaintiffs and Respondents,
v.

ALISAL SANITARY DISTRICT, a Cor-
poration, Defendant and Appellant.
Civ. 17706.

District Court of Appeal, First District,
 Division 2, California.
 Oct. 28, 1957.

Hearing Denied Dec. 23, 1957.

Action wherein the Superior Court, Monterey County, Anthony Brazil, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that complaint against sanitary district, for injuries to celery crop grown on land owned by one plaintiff, under a contract with the other plaintiff as result of overflow of sewer outfall line owned by district had sufficiently set forth causes in nuisance and inverse condemnation.

Affirmed.

1. Health ⇨18

Tort liability rules applicable to municipal corporations generally are applicable to sanitary districts. West's Ann.Health & Safety Code, §§ 6420, 6480-6499, 6511, 6512, 6514, 6515, 6517, 6522, 6654-6790; West's Ann.Const. art. 13, § 1.

2. States ⇨191(1.10)

Liability for acts constituting direct damage to property existed at common law as an exception to general rule of sovereign immunity. West's Ann.Gov.Code, § 53053.

3. Municipal Corporations ⇨736

A municipality may be held liable for creating and maintaining nuisance notwithstanding governmental activity is involved.

4. Health ⇨19

There is no statutory authority for constructing a defective outfall line, and, therefore, code section providing that nothing done under express statutory authority should be deemed a nuisance, could not be successfully interposed as defense to action against sanitary district whose defec-

tive outfall line allegedly constituted a nuisance. West's Ann.Civ.Code, §§ 3479, 3482.

5. Eminent Domain ⇨307(2)

Health ⇨19

In action to recover, on counts of nuisance and inverse condemnation, from sanitary district for damage to plaintiff's celery crop resulting from overflow of sewer outfall line, fact question was presented as to whether injury had been due to acts of district, as contended by plaintiff, or due to unusually heavy rainfall, as contended by defendant. West's Ann.Health & Safety Code, § 6400 et seq.

6. Nuisance ⇨4

Duration or recurrence of interference is merely one, and not necessarily the conclusive, factor in determining whether damage was so substantial as to amount to a nuisance, and a single act may constitute a nuisance.

7. Eminent Domain ⇨293(1)

Health ⇨19

Complaint against sanitary district, for injuries to celery crop grown on land owned by one plaintiff under a contract with the other plaintiff as result of overflow of sewer outfall line owned by district, sufficiently set forth causes of action in nuisance and inverse condemnation.

Rosendale, Thomas & Muller, Edson G. Thomas, Salinas, for appellant.

J. T. Harrington, Salinas, for respondents.

KAUFMAN, Presiding Justice.

Plaintiffs filed this action for damages to a celery crop grown on land owned by the plaintiff Ferrasci under a contract with the plaintiff Ambrosini, on the counts of nuisance and inverse condemnation, alleging that the damage was due to the overflow of a sewer outfall line owned by the defendant, a public corporation, organized pursuant to Health and Safety Code, section 6400 et seq. The defendant appeals from the judgment on a jury verdict rendered in favor of the plaintiffs on both counts; and

assigns as error the order of the trial court overruling defendant's demurrer, the orders denying defendant's motion for a non-suit, motion for a directed verdict, and motion for a judgment notwithstanding the verdict, as well as certain alleged errors in the instructions.

The facts, viewed most favorably to the plaintiffs, are as follows: Plaintiffs were the owners of a field of celery bordering on the Salinas-Monterey Highway and adjacent to a portion of the sewage outfall line installed, maintained and operated by the defendant district. The outfall line was constructed in 1941 along with the defendant's sewage disposal plant. The plant was designed for a daily flow of 1.1 million gallons. The normal "dry-flow" of sewage through the plant and into the outfall line was approximately 750,000 to 1,000,000 gallons per day with the flow varying in a day from 100,000 gallons to 1.5 million gallons. The sewage enters the outfall line after treatment at the plant, is carried through a concrete pipe line 18 inches in diameter, and discharged into the Salinas River at a point four miles from the plant. As originally constructed, the outfall line contained four pressure manholes which made it impossible for any sewage to escape from the outfall line through a manhole. In the fall of 1955, due to the growth of the population in the district and the increased flow of sewage in the outfall line which reduced the capacity of the pipe, the engineers of the defendant district recommended that the line be cleaned out by the installation of additional manholes. Fourteen additional non-pressure manholes were completed on December 2, 1955, and left unsealed, due to the cleaning operations. Manhole No. 12 which is located directly opposite plaintiff's celery field was one of the 14 non-pressure manholes constructed in 1955. There is also some evidence that the defendant district was in a strained financial condition at the time of the 1955 modifications.

The 1941 plans and specifications for the outfall line were prepared for a river flood level of elevation 46 feet. At the disposal plant, the elevation of the outfall line is 44

feet, but drops to 37 feet at the discharge point. The elevation of Manhole No. 12 is 43.02 feet.

During the month of December, 1955, the rainfall in the Salinas area was as follows:

December 1	— .37 inches
December 2	— .15 inches
December 3	— a trace
December 4	— .02 inches
December 5	— .09 inches
December 6	— .80 inches
December 7	— none
December 8	— .50 inches
December 9	— .04 inches
December 10-14	— none
December 15-17	— a trace
December 18	— .04 inches
December 19	— .44 inches
December 20	— .01 inches
December 21	— .03 inches
December 22	—1.19 inches
December 23	—2.34 inches
December 24	— .45 inches
December 25	— .02 inches
December 26	— .50 inches
December 27-29	— none
December 30	—1.78 inches

The monthly average was 8.96 inches; the monthly average from 1872-1954 for the month of December was 2.56 inches. On December 24, 1955, the plaintiffs' celery crop was mature and ready for harvest. Between 10 a. m. and 12 noon of that day, the plaintiff, Ferrasci, looked out and saw water at a rate he estimated to be 300 to 500 gallons per minute coming out of Manhole No. 12 and flowing to the side of the road and into the field of celery. He also saw water flowing down the side of the road from the direction of Salinas. He telephoned the defendant district and was told someone would come right away. By 1:00 p. m. that afternoon when the plaintiff again went to the manhole, no one had arrived, and the water was being forced out to a height of 5-6 inches, and was up to the white line in the middle of the highway. By 3:00 p. m. of December 24, 1955, a PGE employee observed water still coming from the manhole, and personnel of the de-

defendant district at the site of the manhole weighting down the manhole covers with tubs of sand and "doing a very good job under the circumstances" but there "was just so much water that they couldn't handle it at all." By about 4:30 p. m. of December 25, no more water was coming from the manhole. Two other witnesses testified that on December 24 they saw the water being discharged from Manhole No. 12 at a rate of 1,000 gallons or more per minute, and flooding the celery field. On December 24-25 about 4½ million gallons of water were going into the outfall line until it was plugged, due to the infiltration of storm waters which exceeded the designed capacity of the plant. As a result of the inundation of the plaintiffs' celery field with sewage water, the entire field was placed under a quarantine by an Inspector of the State of California pursuant to Administrative Code, title 17, section 7899.

Although the defendant assigns six separate grounds of error on appeal, the main questions to be determined are:

1) Is the defendant district subject to suit?

2) Did the plaintiffs' first amended complaint set forth a cause of action in nuisance and inverse condemnation?

3) Were there any errors in the trial court's rulings on the defendant's motions and in the instructions to the jury?

[1,2] As to the first issue, it is defendant's contention that it is a public corporation as distinct from a municipal corporation, and as such is a governmental agency of the state not liable in fact except under the Public Liability Act, Government Code, sections 53050-53056. Defendant relies on a quotation from *In re Werner*, 129 Cal. 567, 62 P. 97, to the effect that a sanitary district is not a municipal corporation but a public corporation. The distinction in the *Werner* case, however, was made to invalidate a penal ordinance passed by a sanitary district. Defendant then goes on to argue that as it is not a municipal corporation it is a governmental agency like irrigation districts, relying on *Western Assur. Co. of*

Toronto v. Sacramento & San Joaquin Drainage Dist., 72 Cal.App. 68, at pages 76-77, 237 P. 59, at pages 62-63, and cases cited. Irrigation districts are, by the statute which authorizes their creation, declared to be governmental agencies of the state. Water Code, § 20570.

Defendant district is organized pursuant to the Sanitary District Act of 1923, Health and Safety Code, sections 6400 to 6917, which provide that the district may make and enforce all necessary and proper regulations for the removal of garbage, the cleanliness of roads and streets and all other sanitary purposes not in conflict with the laws of this state (§ 6521). Under section 6523, violation of district orders and regulations are misdemeanors. The district attorney of the county is required to represent a sanitary district (§ 6492; 18 O.A.G. 99). Section 6512 sets forth the general powers of the district as follows:

"It may acquire, construct, reconstruct, alter, enlarge, lay, renew, replace, maintain, and operate such garbage dump sites and garbage collection and disposal systems, sewers, drains, septic tanks, and sewerage collection, outfall, treatment works and other sanitary disposal systems, and storm water drains and storm water collection, outfall and disposal systems, as in the judgment of the board shall be necessary and proper, and in the performance of these functions, either in or out of the district, it may join with any county or municipality or any other district or governmental agency.

"Before any garbage dump shall be established the location shall first be approved by the county health officer, and in addition, if the location is within two miles of any city the consent of the governing body of the city shall first be secured."

A sanitary district may also acquire real and personal property (§ 6514), make contracts (§ 6515), employ and pay necessary agents and assistants (§ 6517), sue and be sued in its own name (§ 6511), issue and refund bonds, make tax assessments (§§

6654-6790), and do many other things specifically enumerated as well as "any act necessary and proper to the complete exercise and effect of any of its powers, or for the purposes for which it is formed." (§ 6522.) The district is governed by an elective board (§§ 6480-6499) and organized within a county (§ 6420). For some purposes, a sanitary district is analogous to an irrigation district (*La Mesa Homes Co. v. La Mesa, etc., Irrigation Dist.*, 173 Cal. 121, 159 P. 593); for purposes of tax exemption, sanitary districts are included within the broad definition of municipal corporations of section 1 of article XIII of the State Constitution (*Rock Creek Water Dist. v. County of Calaveras*, 29 Cal.2d 7, 172 P.2d 863).

In the above case the court in listing the technical requirements of a municipal corporation stated at page 11 of 29 Cal.2d, at page 866 of 172 P.2d: "An irrigation district probably comes nearer than any other of the subordinate public corporations of the state to meeting the technical requirements defining a municipal corporation. It has its own directors and officers, conducts its own elections, can sue and be sued in its corporate name, issues bonds, levies, collects, and disburses its own revenues, acquires and holds property, both real and personal, in its own name, and in the management of its internal affairs is entirely independent of the county and state, aside from the control of general laws." The powers of a sanitary district as listed above would appear to be closely analogous to the above requirements; the powers set forth under section 6512 include both "governmental" and "proprietary" powers, so that we may safely conclude that the rules of tort liability as applicable to the defendant district are analogous to the rules applicable to municipal corporations. (Even if we were to conclude that the defendant was more analogous to a state agency, in this state the distinction between governmental and proprietary functions is apparently applicable to the state (*Guidi v. State of California*, 41 Cal.2d 623, 262 P.2d 3). Although plaintiffs' first amended complaint

states that action was instituted under the Public Liability Act of 1923, Government Code, section 53053, it is not necessary to consider in great detail defendant's arguments as to the act, since the liability for acts which constitute a direct damage to property existed at common law as an exception to the general rule of sovereign immunity. *Reardon v. City & County of San Francisco*, 66 Cal. 492, 6 P. 317; *Prosser on Torts*, 2nd Edition, Vol. 18, p. 779; *McQuillin, Municipal Corporations*, 3rd Edition, Vol. 18, §§ 53.122, 53.123, 53.124.

[3-7] As to the first cause of action, plaintiffs' first amended complaint, so far as relevant, alleges: "That as a proximate result of the carelessness and negligence of said defendant, in designing, maintaining and operating said sewage disposal line, the sewage waters originating at the sewage disposal plant of said defendant, and intended to be discharged into said Salinas River, did on the 24th, 25th, and 26th days of December, 1955, escape from, and were discharged from, a manhole located in said sewage pipe line, adjacent to the aforesaid real property, and inundated and flooded with sewage water, the aforementioned crop of celery." The verified claim, Exhibit "A", attached thereto alleges:

"That on the 24, 25, and 26 days of December, 1955, and subsequent thereto, sewage being transported and carried from the plant of Alisal Sanitary District by means of an outfall line leading to the Salinas River, escaped from said line and inundated the lands upon which the foregoing described crop of celery was growing, and as a result of said inundation, said crop of celery was totally destroyed and rendered unfit for human consumption.

"* * * That the inundation of said celery crop by sewage was proximately caused by the carelessness and negligence of Alisal Sanitary District and by the carelessness and negligence of the Board of said District, and the Superintendent in charge of the operations of said District.

"* * * That said crop of celery was totally destroyed to the damage of claimants in the sum of \$14,916.00

"* * * This claim is made under the provisions of Section 14 of Article I of the Constitution of the State of California, which prohibits the damaging of private property for public use without payment of just compensation, and under the provisions of California Government Code, Sections 1982 and 53053."

Defendant contends that where property is used entirely for governmental purposes there is no liability for nuisance but only liability for negligence. However, in this state, a municipality may be held liable for creating and maintaining a nuisance notwithstanding a governmental activity is involved. *Phillips v. City of Pasadena*, 27 Cal.2d 104, 162 P.2d 625; *Stanford v. City & County of San Francisco*, 111 Cal. 198, 43 P. 605; *Reardon v. City & County of San Francisco*, 66 Cal. 492, 6 P. 317; *Bloom v. City & County of San Francisco*, 64 Cal. 503, 3 P. 129; *Dick v. City of Los Angeles*, 34 Cal.App. 724, 168 P. 703.

The question, therefore, becomes whether defendant's acts here constitute a nuisance, which is defined in Civil Code, section 3479, as: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

Defendant, relying on Civil Code, section 3482, maintains that nothing which is done under express statutory authorization is a nuisance. However, that code section is not applicable here, as it cannot be said that the statute authorizes the construction of a defective outfall line. Defendant also seeks to bring this case within the rule of *Womar v. City of Long Beach*, 45 Cal.App.2d 643, 114 P.2d 704, 715, where the injury was due to a "set of unfortunate natural circum-

stances for which the law provides no remedy." However, whether the injury was due to the acts of the defendant when it made the 1955 changes in the outfall line, as contended by the plaintiff, or due to the unusually heavy rainfall, as contended by the defendant, was a matter of fact properly left to the jury and resolved in favor of the plaintiff here. We cannot disturb the jury's finding on appeal.

There is also no merit in defendant's contention that a single act is not a nuisance. *Prosser* states, "* * * the duration or recurrence of the interference is merely one—and not necessarily a conclusive—factor in determining whether the damage is so substantial as to amount to a nuisance," *op. cit.*, p. 397, note 90. Recovery for the unlawful destruction of crops was allowed in *Dick v. City of Los Angeles*, 34 Cal.App. 724, 168 P. 703. In *Vater v. County of Glenn*, Cal.App., 309 P.2d 844 (hearing granted) relied upon by the defendant, a hearing was granted by the Supreme Court and nothing said in that case may be regarded as a binding precedent. *Ponce v. Marr*, 47 Cal.2d 159, 301 P.2d 837.

As to the second cause of action, to which defendant demurred specially and generally, plaintiffs' amended complaint alleges as follows:

"That the concrete pipe line referred to in Paragraph III of said First Cause of Action, which said paragraph is incorporated herein by reference, was constructed for a public purpose, to-wit: for the purpose of carrying and transporting sewage and sewage waters from the sewage disposal plant, owned, operated and maintained by said defendant, to the Salinas River.

"* * * That as a direct and necessary result of the plan, design, maintenance and operation of said concrete pipe line, sewage and sewage water originating at the sewage disposal plant of said defendant, in said Alisal District, and intended to be carried and transported through the aforesaid concrete pipe line and finally discharged into the Salinas River, did, on the 24th,

25th and 26th days of December, 1955, escape from said concrete pipe line and were discharged from a manhole located therein and situated adjacent to the real property hereinbefore described; that said sewage and sewage water inundated and flooded the land upon which plaintiffs' said crop of celery was growing.

"* * * That as a proximate result of the inundation and flooding of said parcel of land with sewage and sewage waters on the said 24th, 25th and 26th days of December, 1955, the said crop of celery was totally destroyed and lost to plaintiffs; that said crop was reasonably worth the sum of Fourteen Thousand Nine Hundred Sixteen Dollars (\$14,916.00).

"* * * That no compensation has been paid or provided for plaintiffs for the damaging of said crop and that the action of defendant in flooding and inundating said land upon which said crop of celery was growing, without paying compensation therefor is a violation of provision of Article I, Section 14 of the Constitution of the State of California.

"* * * That by reason of the flooding and inundation of the land upon which said crop of celery was growing, plaintiffs have been damaged in the sum of Fourteen Thousand Nine Hundred Sixteen Dollars (\$14,916.00), no part of which has been paid."

We think these allegations clearly bring this case within Article I, section 14, of the State Constitution. Recovery on grounds of inverse condemnation against irrigation districts, which unlike defendant here are governmental agencies for damage done by seepage of water was permitted in *Tormey v. Anderson-Cottonwood Irr. Dist.*, 53 Cal. App. 559, 200 P. 814; *Hume v. Fresno Irr. Dist.*, 21 Cal.App.2d 348, 69 P.2d 483; *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal. 2d 123, 119 P.2d 717. Defendant contends here that the plaintiffs' property was not taken for a "public use." In this regard, in reversing the trial court for sustaining a

demurrer, our Supreme Court said, in *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, at pages 395-397, 153 P.2d 950, at page 955, in a concurring opinion:

"Defendant is a public corporation created by an act of the Legislature, known as the 'Los Angeles Flood Control Act', Stats.1915, p. 1502, as amended; Deering's Gen.Laws, Act 4463, to protect lands, including harbors and public highways from flood waters and to conserve the flood waters for useful purposes. § 2 of the act; *Los Angeles County Flood Control Dist. v. Hamilton*, 177 Cal. 119, 126, 169 P. 1028. These purposes are essentially public although beneficial to many private individuals (see *Los Angeles v. Los Angeles County Flood Control Dist.*, 11 Cal.2d 395, 404, 80 P.2d 479; *Los Angeles County Flood Control Dist. v. Hamilton*, supra, 177 Cal. at page 124, 169 P. at page 1028; *Cheseboro v. Los Angeles County Flood Control Dist.*, 306 U.S. 459, 465, 59 S.Ct. 622, 83 L.Ed. 921; see 29 C.J.S. Eminent Domain § 64, p. 852; *Gutierrez v. Middle Rio Grande Conservancy District*, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1274), and the Legislature properly vested defendant with the power of eminent domain. §§ 2(6), 16 of the act and § 16½ added by St.1941, p. 1658. Property taken or damaged for defendant's purposes is therefore 'taken or damaged for public use' in the sense of the constitutional provision. In the absence of contract the right to discharge water onto another's property may be based on property law or on the police power of the state. *Archer v. City of Los Angeles*, supra, 19 Cal.2d [19] at page 24, 119 P.2d 1. If the discharging of water incident to the construction of a public improvement cannot be sustained as the exercise of a right, it is a taking or damaging within the meaning of the constitutional provision of the property injured. *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 126, 119 P.

2d 717; Pacific Seaside Home for Children v. Newbert Protection Dist., 190 Cal. 544, 213 P. 967; Elliott v. County of Los Angeles, 183 Cal. 472, 475, 191 P. 899; Smith v. City of Los Angeles, 66 Cal.App.2d [562], 153 P.2d 69; Conniff v. San Francisco, 67 Cal. 45, 48, 7 P. 41; Jacobs v. United States, 290 U.S. 13, 16, 54 S.Ct. 26, 78 L.Ed. 142; United States v. Cress, 243 U.S. 316, 327, 37 S.Ct. 380, 61 L.Ed. 746; United States v. Lynah, 188 U.S. 445, 470, 23 S.Ct. 349, 47 L.Ed. 539; Hurley v. Kincaid, 285 U.S. 95, 104, 52 S.Ct. 267, 76 L. Ed. 637; Pumpelly v. Green Bay, etc., Co., 13 Wall. 166, 177, 20 L.Ed. 557; Eaton v. Boston, etc., Railroad, 51 N.H. 504, 12 Am.Rep. 147; see Franklin v. United States, 6 Cir., 101 F.2d 459; 128 A.L.R. 1195. The destruction or damaging of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. In erecting a structure that is inherently dangerous to private property, the state or its agency undertakes by virtue of the constitutional provision to compensate property owners for injury to their property arising from the inherent dangers of the public improvement or originating 'from the wrongful plan or character of the work.' Perkins v. Blauth, 163 Cal. 782, 789, 127 P. 50, 53; Kaufman v. Tomich, 208 Cal. 19, 25, 280 P. 130; Powers Farms v. Consolidated Irr. Dist., supra, 19 Cal.2d at page 127, 119 P.2d at page 717; Reardon v. City & County of San Francisco, 66 Cal. 492, 505, 6 P. 317, 56 Am. Rep. 109. This liability is independent of intention or negligence on the part of the governmental agency. Reardon v. City & County of San Francisco,

supra, 66 Cal. at page 505, 6 P. at page 317; Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, 200 P. 814, opinion of Supreme Court denying a hearing, 53 Cal.App. at page 568, 200 P. at page 818; Powers Farms v. Consolidated Irr. Dist., supra, 19 Cal.2d at page 126, 119 P.2d at page 717; Mitchell v. City of Santa Barbara, 48 Cal. App.2d 568, 572, 120 P.2d 131; Morrison v. Clackamas County, 141 Or. 564, 18 P.2d 814; Hooker v. Farmers' Irr. Dist., 8 Cir., 272 F. 600; see 10 Cal. Jur. 337; Stephenson v. Pioneer Irr. Dist., 49 Idaho 189, 288 P. 421, 69 A.L.R. 1231. The decisive consideration is the effect of the public improvement on the property and whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking. It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property, but the loss to the owner. Rose v. State of California, 19 Cal.2d 713, 737, 123 P.2d 505; City of Stockton v. Vote, 76 Cal.App. 369, 404, 244 P. 609; Santa Ana v. Harlin, 99 Cal. 538, 542, 34 P. 224; City of Redding v. Diestelhorst, 15 Cal.App.2d 184, 193, 59 P.2d 177; City of Pasadena v. Union Trust Co., 138 Cal.App. 21, 25, 31 P.2d 463; Temescal Water Co. v. Marvin, 121 Cal.App. 512, 521, 9 P.2d 335; see 18 Am.Jur., Eminent Domain, § 240 et seq. Defendant, therefore, cannot rely on the fact that the injury to the property was caused, not by a deliberate appropriation thereof, but by a collapse of defendant's structures. It is of no avail to defendant that the invasion of plaintiff's property in the manner in which it happened was not foreseeable. The provision in article I, section 14, that the compensation for the taking or damaging of property shall be paid in advance protects the interests of the

property-owner where advance payment is feasible under the circumstances; liability is not avoided simply because such payment is not feasible. The public purpose was not the mere construction of the improvement but the protection that it would afford against floods. The dangers inherent in the improvement would cause injury only when storms put the flood control system to a test. The injury sustained by plaintiff was therefore not too remote."

In *Bauer v. County of Ventura*, 45 Cal. 2d 276, at page 284, 289 P.2d 1, at page 6, the court said:

"'Public use' within the meaning of section 14 is defined as a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government. *Gilmer v. Lime Point*, supra, 18 Cal. 229. To make a use public in character, a duty must fall on the person or corporation holding the property appropriated by eminent domain to furnish the public with the use intended and the public must be entitled to use or enjoy the property taken. *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal.App. 556, 178 P. 150; see *Thayer v. California Development Co.*, 164 Cal. 117, 128 P. 21. Hence it is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use. The reasons for such a taking are obviously to provide adequate normal drainage, to control flood waters and to provide irrigation waters. The public becomes principally entitled to the use and enjoyment of the private property taken for such purposes."

Defendant further contends that the damage here was due at most to negligence, and not deliberate. However, the changes made in the outfall line are deliberate and here as in *Bauer v. County of Ventura*, supra, 45 Cal.2d 276, 289 P.2d 1, the damage resulted from a failure to appreciate the probability

that the outfall line, functioning as deliberately conceived, for a river flood level of 47 feet, and as altered in 1955 would result in some damage to private property. *Neff v. Imperial Irrigation Dist.*, 142 Cal.App. 2d 755, 299 P.2d 359, relied upon by the defendant, is distinguishable, as there the damage was not a natural and necessary consequence of the defendant's act. Here the evidence sustains plaintiff's position and his right to recover on grounds of inverse condemnation is sustained by *Bauer v. County of Ventura*, supra, and *Ward Concrete Products Co. v. Los Angeles Flood, etc.*, Dist., 149 Cal.App.2d 840, 309 P.2d 546.

We do not think the trial court erred in denying defendant's motions, nor can we find in the instructions given to the jury any errors of a harmful or prejudicial nature.

In view of the foregoing we conclude that the judgment finds ample support in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.



154 Cal.App.2d 601

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Betty TODD, Defendant and Appellant.

Cr. 3342.

District Court of Appeal, First District,
Division 2, California.

Oct. 22, 1957.

Prosecution for murder. Jury returned verdict of guilty of murder in first degree which was changed to second degree murder by the Superior Court, County of Alameda, Marvin Sherwin, J., and defendant appealed from judgment and order denying motion for new trial. The District Court of Appeal, Kaufman, P. J., held

that evidence sustained conviction of second degree murder, and no prejudicial error resulted from allegedly improper remarks of counsel.

Affirmed.

1. Homicide ⇨234(7)

Where evidence which tended to show that defendant killed deceased was entirely circumstantial, facts or circumstances were required to be not only entirely consistent with the theory of guilt but also inconsistent with any other rational conclusion, in order to prove a homicide by defendant.

2. Criminal Law ⇨1159(3)

It is not the function of appellate court to determine conflicts in evidence or to choose between different inferences which may be reasonably drawn from the evidence, and if there is substantial evidence in the record to support judgment of trial court, such judgment must be upheld.

3. Homicide ⇨151(1), 228(2)

In prosecution for homicide based entirely upon circumstantial evidence, proof was sufficient to establish homicide and requiring application of statute placing burden of proving circumstances in mitigation on defendant once homicide has been proven. West's Ann.Pen.Code, § 1105.

4. Homicide ⇨152

Effect of statutes delimiting degrees of homicide and statute placing burden upon defendant of explaining mitigating circumstances once homicide is proven, is to make every killing murder unless defendant proves the contrary. West's Ann.Pen.Code, §§ 187-189, 1105.

5. Criminal Law ⇨890

Where there was no substantial evidence from which it could be reasonably inferred that the killing was deliberate and premeditated, homicide could not be murder of the first degree and trial court properly exercised its discretion in modifying verdict of murder in the first degree reached by the jury. West's Ann.Pen.Code, §§ 189, 1181.

6. Homicide ⇨146

In murder of second degree, fact of malice is implied from the unlawful killing. West's Ann.Pen.Code, § 189.

7. Homicide ⇨254

Evidence sustained conviction of second degree murder. West's Ann.Pen.Code, § 189.

8. Criminal Law ⇨361(1)

In prosecution for homicide, there was no error by trial court in refusing defendant's request to permit her to show before the jury that counsel advised her not to testify.

9. Criminal Law ⇨721(1)

Failure of defendant to explain or deny by his testimony any evidence against him may be commented on. West's Ann. Const. art. 1, § 13; art. 6, § 19; West's Ann.Pen.Code, § 1323.

10. Criminal Law ⇨730(7)

In prosecution for homicide, where defendant's counsel had argued that certain of deceased's clothing had not been introduced in evidence and district attorney replied that such clothing had been buried with him, remarks of district attorney did not constitute prejudicial misconduct in view of court's instruction to jury to disregard statement.

11. Criminal Law ⇨730(7), 1171(3)

In prosecution of defendant for murdering her husband, where defendant's attorney suggested that she weighed about 100 pounds, remark of district attorney that her actual weight was 126 pounds did not constitute prejudicial error, especially in view of fact that defendant was in view of jury and court gave subsequent instructions respecting remark.

12. Criminal Law ⇨1037(1)

Where defendant did not object to remark of district attorney, question of its propriety could not be raised on appeal.

13. Criminal Law ⇨716

Counsel may cite a famous case in order to demonstrate a part of his argument.

14. Criminal Law ⇨721½(2)

In prosecution of defendant for murder of her husband, remark of district attorney on failure of defendant's sister to testify, where defendant had called sister only to show that she had been subpoenaed by prosecution, was not unfair under the circumstances.

15. Criminal Law ⇨1037(2)

Unless harmful results of misconduct of district attorney cannot be obviated by appropriate instructions of trial court, error cannot be predicated on appeal based on such alleged misconduct in absence of an assignment of such misconduct as error and a request to trial court to instruct jury to disregard it.

Smith & Parrish, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

The defendant Betty Todd was charged with the murder of her husband, Solomon Todd. The jury returned a verdict of guilty of murder in the first degree, which was changed to murder in the second degree by the trial court pursuant to its authority under Penal Code, section 1181. On this appeal taken from the judgment and the order denying defendant's motion for a new trial, it is contended that the evidence is insufficient to support the judgment, that the trial court erred in not permitting the defense to show before the jury that counsel advised the defendant not to testify and in allowing alleged prejudicial misconduct by the district attorney.

The record contains testimony which may be summarized as follows: Oakland police officer Lathrop testified that on Sunday, August 13, 1956, at 7:03 a.m. he received an emergency call, and proceeded to 3259 Peralta Street, the home of the defendant and her husband. Arriving at 7:10 a.m., he was directed into the house by Mrs.

Williams, the defendant's sister. He further testified: "Well, I walked to the door and I saw Mr. Todd lying on the Chesterfield and Mrs. Todd walking toward the front room—through another sitting room towards the front room where I was. And I walked up to Mr. Todd and checked his pulse and respiration and he was not breathing and had no pulse at that time.

"And Mrs. Todd was in the living room by that time and I asked her what had happened and she held out a beer can opener and she said, 'I stabbed him hard with this.' I took the beer can opener that she offered to me from her and put it in my pocket." The deceased was wearing a blood stained T-shirt with a small hole in it; a dark coat and pink shirt were lying on the bed in the front bedroom. The bed appeared to have been slept in. Officer Lathrop found no holes or stains in the pink shirt or coat. He further testified that the defendant then told him that her husband had come in drunk about 6:00 a.m., and after she asked her husband where he had been and he refused to answer a fight had started between them; that, during the struggle, her husband had hit her on the head and had "gigged at her with something." The defendant did not have a bruise on her head nor did her clothing appear to have been in a fight. The furniture in the apartment did not appear to have been disturbed. The officer thoroughly searched the premises and found no other weapon. There was no blood on the beer can opener.

The testimony of the doctor who performed the autopsy disclosed that Solomon Todd died of a cardiac tamponade due to a stab wound which entered a branch of the coronary artery. The wound was about 4½ inches deep and could not have been made by a beer can opener but only by a long sharp instrument such as an ice pick or butcher knife or scissors. In a subsequent experiment on a body the doctor was unable to produce a similar wound with a beer can opener. The wound could have been inflicted anywhere from three minutes to five hours before the death and was of such a

nature that it would not have caused pain and would have enabled the deceased to appear normal and walk around for a considerable period of time without knowing he had been hurt. The blood of the deceased had an alcohol measurement of .196, a sufficiently high percentage to indicate that the deceased was under the influence of alcohol. The autopsy also revealed three recently incurred superficial lacerations which could have been caused by a beer can opener or fingernail. A microscopic diagnosis of the wound tract revealed the presence of polymorphonuclear leukocytes which are generated only if a person lives after the infliction of a wound and normally do not appear until three hours after a wound has been inflicted.

The activities of the deceased during the hours before his death were as follows: after 4:00 p.m. on the afternoon of Saturday, August 12, wearing a dark suit and pink shirt, Todd went to the home of Frank Wright, a friend and co-worker at the cannery, who lived nearby. Around 5:00 p.m. the two men left Wright's residence in Wright's car and proceeded to Allen's Cafe, which was a short distance from the Todd home. There they drank beer, ate hamburgers and played records until midnight. Around midnight, Todd left his friend, stating he was going next door to the Victory Club and would return shortly. Wright, who had been on similar jaunts with Todd in the past and knew Todd to be a heavy drinker, waited at Allen's Cafe until after 2:00 a.m. Then, fearing that Todd might have been "rolled" as on a prior occasion, Wright searched for Todd at his home, at the Victory Club and other haunts, giving up the fruitless search at 5:00 a.m. Wright testified that during the course of the evening Todd had not been in any fights.

Shortly after 1:00 a.m., Todd (who never left Allen's Cafe), apparently unseen by Wright, joined the table of another co-worker at the cannery, Lonnie Durham who had not previously been friendly with Todd. On the Saturday evening in question, Durham was at Allen's Cafe with his wife,

Margie, and his sister-in-law, Mrs. Raymond. Durham introduced Todd to his companions. Sometime before 2:00 a.m. the foursome left Allen's Cafe in the Durhams' car to obtain some whiskey. After obtaining a half pint of whiskey which was consumed by all four of them, they drove to several other cafes, all of which were closed. At 24th and Market Streets, they finally found a place which was open, obtained another half pint of whiskey, which was consumed chiefly by the two men, and some coffee. As they were leaving, they noticed that the car had a flat tire. While they were having the tire fixed at a filling station on Market and San Pablo, Todd went to the rest room for five to ten minutes. The foursome then proceeded to a barbecue place on 7th and Market Streets, and ate. As it was after 4:00 a.m. by then, Todd asked to be taken home, saying he had to work two shifts the following day. He was taken home in the Durham car, with Mr. and Mrs. Durham sitting in the front seat, Mrs. Durham driving, and Todd and Mrs. Raymond sitting in the back seat. As the car pulled up in front of Todd's home, they noticed a car parked in front of the house and Todd said, "There is my car there." " * * * that's my wife. Keep driving." The car proceeded to follow them and Mrs. Durham kept on driving for some distance until the car ceased to trail them. They then dropped Todd at 30th and Peralta about a block from his home around 5:00 a.m. Todd began to walk in a direction away from his home. After dropping Todd, Mr. Durham took the wheel and drove by the Todd home. The car which had previously been trailing them began to follow them again, subsequently pulled up alongside, and a lady in an angry tone said, "Where's Todd?" When Mr. Durham replied, "What Todd?" she said, "You wasn't the one driving," and drove off. The Durhams and Mrs. Raymond then drove home and never saw Todd alive again. Both of the Durhams as well as Mrs. Raymond testified to all of the above facts as well as to the fact that Todd did not appear drunk, was in a good humor,

and had not been in any fights in the course of the evening.

Todd was next seen walking toward his home between 6:00 and 6:15 a.m. by Mrs. Eliza Walker who lived in the apartment below the Todds and usually left for work at that time. Mrs. Walker testified that Todd was walking as if he had "a couple of drinks," was "happy as a field ox" and spoke to her in a friendly fashion and did not complain about having been stabbed. He was still wearing his pink shirt and dark coat.

Defendant's first contention on appeal is that there is not substantial evidence to support the judgment of murder in the second degree. Penal Code, section 1105, provides as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

[1-3] The first question, therefore, is whether in the instant case the proof indicates a homicide by the defendant. There is no question as to the existence of a homicide here as the deceased died as a result of a stab wound. The evidence which tends to show that the defendant killed her husband is entirely circumstantial. Therefore, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion. *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8. The defendant contends here that the testimony of the expert who performed the autopsy is consistent with her theory that the wound could not have been inflicted by the beer can opener, and was inflicted several hours before the deceased arrived home, probably during the time the deceased was with the Durhams or during the hour which elapsed after he had been last seen by the Durhams and was first seen by Mrs. Walker. The lack of any stains or tears in the pink shirt and coat

does not support the defendant's theory. Furthermore, the jury could disbelieve the testimony of the expert witness. The defendant did not offer any evidence to rebut that offered by the prosecution. It is not for this court to determine conflicts in the evidence or to choose between different inferences which may be reasonably drawn from the evidence. If there is substantial evidence in the record to support the judgment of the trial court, the judgment must be upheld. *People v. Reed*, 38 Cal.2d 423, 240 P.2d 590. We conclude, therefore, that this is a proper case for the application of Penal Code, section 1105.

[4] The next question is the more difficult one of the degree of the homicide. "Murder," as defined in Penal Code, section 187, "is the unlawful killing of a human being, with malice aforethought." Penal Code, section 188, provides: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." The effect of sections 187-189 and Penal Code, section 1105, construed together, is that every killing is murder unless the defendant proves the contrary. *People v. Wells*, 10 Cal.2d 610, 76 P.2d 493.

Penal Code, section 189 provides: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree." The difference between murder in the first degree and murder in the second degree and manslaughter was well explained by the court in *People v. Bender*, supra, 27 Cal.2d 164, at pages 181 and 182, 163 P.2d 8, at page 18:

"1. Manslaughter * * * a willful act * * * characterized by the presence of an

intent to kill engendered by sufficient provocation and the absence of premeditation, deliberation, and (by presumption of law) malice aforethought.

"2. Murder of the second degree: a willful act characterized by the presence of malice aforethought and, at least ordinarily, by the specific intent to kill, and by the absence of premeditation and deliberation.

"3. Murder of the first degree: a willful act characterized by the presence of malice aforethought and by a deliberate and premeditated intent to kill, or by one of the means, or by the perpetration or attempt to perpetrate one of the felonies, enumerated in the statute."

[5] In the instant case the homicide could not be murder of the first degree as there is no substantial evidence from which it can be reasonably inferred that the killing was deliberate and premeditated. Therefore, the trial court properly exercised its discretion in modifying the verdict of murder in the first degree reached by the jury. As stated in *People v. Cesena*, 18 Cal.App.2d 727, at page 729, 64 P.2d 732, 733: "In giving consideration to the important matter of the sufficiency of the evidence to support the jury's verdict, the trial court, in ruling on a motion for a new trial, is not bound by conflicts in the evidence (*Moyer v. Dresch*, 2 Cal.App.2d 655, 38 P.2d 849), and the duty is imposed upon it then to consider such additional and not unimportant features as the credibility of witnesses, their manner and appearance in testifying, and the proper weight to be accorded to the evidence. While the solemn verdict of a jury should not lightly be vacated the responsibility nevertheless rests with the court again to review the cause and only after such review to decide the application for a new trial. *Olinger v. Pacific Greyhound Lines*, 7 Cal.App.2d 484, 46 P.2d 774. If such review produces a conviction of evidentiary insufficiency to support the verdict, it is the plain duty of the trial court to set it aside and order a new trial. *People v. Bacos*, 14 Cal.App.2d 338, 349, 58 P.2d 221."

[6, 7] The question, therefore, is whether the trial court properly exercised its discretion in denying the motion for a new trial and reducing the offense to murder in the second degree. The gist of the defendant's argument is that there was no evidence of malice. However, as pointed out in *People v. Ross*, 34 Cal.App.2d 574, at page 578, 93 P.2d 1019, in murder of the second degree, the fact of malice is implied from the unlawful killing. Defendant offered no evidence of provocation or sudden passion, as was present in the cases chiefly relied upon by her, *People v. Bridgehouse*, 47 Cal.2d 406, 303 P.2d 1018, and *People v. Kelley*, 208 Cal. 387, 281 P. 609. (See also *People v. Sheran*, 49 Cal.2d 101, 315 P.2d 5. According to the testimony of the police officer, the defendant admitted stabbing her husband with the beer can opener. In *People v. Semone*, 140 Cal.App. 318, 320, at page 323, 35 P.2d 379, 382, the court said: "When an unlawful act which results in death is deliberately performed by an assailant who knows that his conduct endangers the life of another, and it is executed without provocation or sudden passion, which would reduce the offense to manslaughter, malice is presumed. Under such circumstances the killing constitutes murder of the second degree * * *" We are, therefore, in agreement with the respondent's argument that neither *People v. Kelley* or *People v. Bridgehouse*, supra, are proper authority for holding in the present case that the defendant was as a matter of law guilty of only manslaughter. Penal Code, section 1181, subsection 6, provides as follows: "When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed." In construing this section our Supreme Court said in *People v. Thomas*, 25 Cal.2d 880,

at pages 904 and 905, 156 P.2d 7, 20: "While the *power* granted to the appellate court is equal to that given the trial court the circumstances which will justify its exercise in a particular court are those which are appropriate to typical functioning of that court. In other words, upon an application to reduce the degree or class of an offense, a trial judge may review the *weight* of the evidence but an appellate court should consider only its *sufficiency as a matter of law*." We do not think that in the instant case the evidence is legally inadequate to support a judgment of murder in the second degree.

[8] Defendant's second contention on appeal is that the trial court erred in not permitting her to show before the jury that counsel advised her not to testify. Defendant relies on *People v. Simmons*, 28 Cal.2d 699, 172 P.2d 18, and *In re Plummer*, 79 Cal.App.2d 651, 180 P.2d 771, neither of which appear applicable here. Defendant also contends that the trial court erroneously refused her proffered instructions on this matter and in permitting the comment of the District Attorney on defendant's failure to take the stand. In this matter the jury was instructed as follows:

"It is a constitutional right of a defendant in a criminal case that she not be compelled to testify. Thus, whether or not she does testify rests entirely in her own decision. As to any evidence or facts against her which the defendant can reasonably be expected to deny or explain because of facts within her knowledge, if she does not testify, the jury may take that failure into consideration as tending to indicate the truth of such evidence, and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

"The failure of a defendant to deny or explain evidence against her does not, however, create a presumption of guilt, or, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the

crime and the guilt of the defendant beyond a reasonable doubt.

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence, and upon the failure, if any, of the People to prove every essential element of the charge against her, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a failure against her on any such essential element."

[9] The above instructions were proper, and there was no error in the denial of defendant's proposed instructions. In this state, the failure of the defendant to explain or deny his testimony may be commented on. Calif. Constitution, article I, section 13; article VI, section 19; Penal Code, section 1323; *People v. De Paula*, 43 Cal.2d 643, 276 P.2d 600. In ruling on the motion for a new trial the court admitted affidavits showing that defendant was advised not to testify by her attorney, so that the matter was properly considered by the court in ruling on the motion. Nor can we see that the defendant here has in any way been prejudiced in not being permitted to place the matter for the jury. Rather it would appear to introduce only collateral matters. There is, therefore, no merit as to defendant's second contention.

Defendant's third and final contention on appeal is that the presence of prejudicial misconduct by the district attorney necessitates reversal.

[10] The first of these took place after defendant's counsel argued that the pink shirt worn by the deceased was not produced in evidence. The district attorney in his argument replied as follows: "That shirt had no marks on it at all, nor the coat. Counsel says, 'Why isn't it here?' 'It had been examined.' You know where it is? It was buried with Sollie Todd, that's where it is. Do you think that I am not telling you the truth. You have his body externed and you will find that pink shirt and the coat." The following colloquy then took place:

"Mr. Parrish: Counsel's argument is outside the record.

"The Court: Yes.

"Mr. Vukota: He asked the remark, he said, 'Where is the coat and the shirt? Why isn't it here?' I'm just answering his remark.

"The Court: No, but you cannot speculate on what the exhibits would show if they had been introduced in evidence which were not introduced in evidence.

"Mr. Vukota: Oh, wait a minute, your Honor—one officer, Mr. Lothrop, testified that he saw the coat and the shirt on the bed, and—correct me if I'm wrong—he said he looked at it, examined it, there were no tears or marks of blood on the coat or shirt. He said they were laying on the bed.

"Mr. Parrish: Your Honor, you may have missed the point of my objection. I—he was telling this jury that it was interred with Mr. Todd. There is no evidence to that effect whatsoever.

"Mr. Vukota: You asked where it was. I thought I would tell you, to save you from worrying about it.

"Mr. Parrish: Well, maybe I will get a ruling.

"The Court: The jury will be instructed that counsel can't tell you things like that. Counsel could take the witness stand if he wanted to explain the absence of any object, if he thought it was necessary to do so. But you cannot speculate what a witness would have testified to had he taken the witness stand."

In view of the court's subsequent instruction to the jury to disregard the statement and the right of the prosecution to reply to an erroneous assertion of fact made by defense counsel, while erroneous, there was no prejudice to the defendant in this statement.

[11] The second relates to the weight of the defendant, which defendant's attorney in his argument suggested was about 100

pounds. In reply, the district attorney agreed, "You want to know her actual weight? One hundred and twenty-six pounds." There was no objection made to this remark. Furthermore, the statement was prompted by defendant's counsel when he asked the defendant to stand up in front of the jury and said: "This is the defendant. This is Betty Todd. And he wants you to think that this little girl—I look at her, you look at her; I estimate her weight at around 100 pounds. It may be more or it may be less. She's about five foot four and a half. And that strong boy there, she's supposed to have done him in. A big roustabout laborer, 177 pounds, healthy as a field ox, and he comes home with a load of booze and gets in a fight with this little girl, and she's supposed to have murdered him." Furthermore, any harm to the appellant resulting from the statement was negated by the fact that the defendant was in view of the jury (*People v. Lama*, 129 Cal.App.2d 391, 276 P.2d 816) and the court's subsequent instruction.

[12] The third relates to the following remark of the district attorney in his argument: "And when the doctor said it was an icepick, or something similar to that, he said 'an icepick, or a sharp pair of scissors, or a knife,' and he didn't eliminate other similar instruments. He wasn't fooling. She used an icepick, and she knows how to use one." As defendant did not object to this matter it cannot now be raised on appeal. *People v. Codina*, 30 Cal.2d 356, 181 P.2d 881.

The fourth relates to the following argument made by the district attorney: "If your child or your spouse has pains in the side, the right side, and you think an appendectomy should be performed, do you call the Police Department—and would they come up? And then would you say, 'I stabbed him,' if you didn't do it?"

[13] "Now, we don't need eye witnesses. If we did, nine-tenths of our cases you wouldn't have any alternative but to find them not guilty. And again let me state this to you, you're all aware of the amount of eye witnesses that saw the killing in the

Abott case." However, it is the rule that counsel may cite a famous case in order to demonstrate a part of his argument. *People v. Johnson*, 99 Cal.App.2d 717, 222 P.2d 335.

The fifth relates to the following statement by the district attorney: "* * * and they'll say, 'John Doe was killed. Go downstairs and try his best friend for murder.' We don't do it that way.

"When you're through with your jury service, if you want to travel around and see how we operate come on upstairs, in some of these cases, and see what is done. You're entirely welcome to. You can follow me around, and you'll see.

"Why didn't she take the stand and explain what occurred at home when he came home? Why did she say, 'I stabbed him' if she didn't? Which would be the more reasonable, a John Doe killed him, or did the defendant? All reasonableness, if you want to classify it as that, points to the defendant. In fact, from the evidence itself, proof is beyond all possible doubt that the person that took away Mr. Todd's life was his own wife, and nobody else.

"And I respectfully request that when you go up into the jury room, that you bring back a verdict of guilty of murder of the first degree * * *" Defendant also did not object to this remark and therefore waived the right to raise it on appeal. *People v. Codina*, 30 Cal.2d 356, 181 P.2d 881; *People v. Kirkes*, 39 Cal.2d 719, 249 P.2d 1, relied upon by the defendant, in which the district attorney stated his belief in the defendant's guilt, is not applicable here.

As indicated above, the district attorney's comment on defendant's failure to testify was proper.

[14, 15] The sixth and final one relates to the district attorney's comment on the failure of appellant's sister, Mrs. Williams, to testify. However, this remark was invited by the defendant's calling Mrs. Williams only to show she had been subpoenaed by the prosecution. In the case of *People v. Gonzales*, 151 Cal.App.2d 112, 311 P.2d 53, 56, the district attorney was

permitted to say that the testimony of a certain witness was absolutely false. It does not appear that the comment by the prosecution here was unfair under the circumstances. As further stated by the court in the *Gonzales* case, supra, "The rule is established that unless the harmful results of misconduct of the district attorney cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in this court on such alleged misconduct in the absence of (a) assignment of such misconduct as error; and (b) a request to the trial court to instruct the jury to disregard it." There is therefore no merit in defendant's third contention.

In view of the foregoing the judgment and order denying the motion for new trial must be affirmed.

Judgment affirmed.

Order denying motion for new trial affirmed.

DOOLING and DRAPER, JJ., concur.



154 Cal.App.2d 580

Joseph B. JANISSE and Viola Janisse,
Plaintiffs and Respondents,

v.

WINSTON INVESTMENT COMPANY, a
corporation, Adolph P. Schmidt, Walter
J. Schmidt, Defendants and Appellants.

Civ. 17385.

District Court of Appeal, First District,
Division 1, California.

Oct. 22, 1957.

Action for an accounting and other relief involving a claim by plaintiffs that a promissory note signed by them was usurious. From a judgment of the Superior Court, Alameda County, Richard H. Chamberlain, J., finding that the transaction was

usurious, the defendants appealed. The District Court of Appeal, Peters, P. J., held that the transaction wherein defendants, although actual lenders of money, purported by use of a dummy third person to be mere assignees of note at a large discount was usurious, that the plaintiffs were not estopped from claiming that transaction was usurious and that there was no error in admission of documents relating to other transactions in which defendants had participated.

Judgment affirmed.

1. Appeal and Error ⇨996, 1010(1)

Where substantial evidence or reasonable inference from evidence supports findings, appellate court cannot substitute its judgment for that of trial court.

2. Usury ⇨119

Whether a particular transaction is or is not usurious is a question of fact.

3. Usury ⇨119

Where form of transaction makes it appear to be nonusurious, trier of fact must determine whether intent of contracting parties was that disclosed by form adopted, or whether such form was a mere sham and subterfuge to cover up a usurious transaction.

4. Usury ⇨16

In determining whether transaction was usurious, court may look beyond form of transaction and ascertain its substance.

5. Usury ⇨117

Evidence indicating that defendants, in paying \$3,055 for purported assignment of \$4,700 note, were actually making the loan and that payee was a mere third party used to give pretense of legality to the transaction established that the transaction was usurious. West's Ann.Civ.Code, §§ 1916-2, 1916-3; West's Ann.Const. art. 20, § 22.

6. Appeal and Error ⇨994(3)

Credibility of defendants and of other witnesses was for the trial court.

7. Usury ⇨113

Where issue is whether transaction constitutes an illegal attempt to collect usurious interest, presumption is in favor of legality. West's Ann.Const. art. 20, § 22.

8. Usury ⇨103

Defense of estoppel may be applicable to a charge of usury.

9. Usury ⇨103

Since borrower and lender are not in pari delicto in a usurious transaction, an estoppel does not arise merely because borrower knew of usurious nature of transaction, took initiative in seeking loan, and paid usurious interest without protest.

10. Usury ⇨103

Where defendants advanced \$3,055 to obtain a \$4,700 note and utilized a third person as payee of note from whom they took purported assignment, borrowers were not estopped from subsequently claiming the transaction was usurious, even though they receive but \$2,765.50 and continued to make payments which included interest. West's Ann.Const. art. 20, § 22.

11. Evidence ⇨134

In action for accounting involving issue of usury, documents relating to other transactions identical in pattern in which defendants were involved were admissible on issue of claimed good faith of defendants. West's Ann.Const. art. 20, § 22.

12. Criminal Law ⇨370, 371(1, 12)

Evidence ⇨134, 137, 138

Evidence of other transactions is admissible to show motive, intent, knowledge, plan, and absence of mistake, in both civil and criminal cases.

13. Evidence ⇨129(5)

In action involving alleged usurious transaction, evidence of other usurious transactions in which defendants had participated would be admissible regardless of whether borrowers in those transactions had made complaints. West's Ann.Const. art. 20, § 22.

14. Evidence ⇐129(5)

In action involving alleged usurious transaction, documents relating to other identical transactions in which defendants were involved were admissible without introduction of evidence showing background of execution of documents, where irregularities were apparent on face of the documents. West's Ann.Const. art. 20, § 22.

Paul G. Dobbins, San Francisco, for appellants.

Clarke Weigand, Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiffs brought this action for an accounting and other relief, alleging that a promissory note signed by them was usurious. Defendants claimed to be bona fide purchasers of the note. The trial court found that the transaction was usurious and that defendants knew that it was, and entered its judgment reducing the principal of the note by the amount of the interest paid and by treble the amount of interest paid during the year preceding the filing of this action. Defendants appeal, contending that plaintiffs are estopped from urging the usury, that evidence was improperly admitted, and that the trial court erred in finding the transaction to be usurious.

Article XX, §§ 22,¹ of the state Constitution, adopted in 1934, fixes the maximum rate of interest that may be charged on loans of the type here involved at 10 per cent per annum. The Usury Act (2 Deering's Gen.Laws, Act No. 3757, West's Ann. Civ.Code, § 1916-1 et seq.) in section 2, provides that if excessive interest is provided for in a transaction, the entire interest provision is void, while section 3 provides that the person paying excessive interest may recover treble the amount of the interest paid during the year preceding the filing of the action.

In the present case plaintiffs executed a promissory note to one Gudmundsen for

\$4,700 but received, less charges, but \$3,055. The note provided for 6 per cent interest. Defendants are the assignees of the note and claimed to be bona fide purchasers of it for value. If the transaction was one in which defendants purchased, in good faith, a \$4,700 note at a discount for \$3,055 it would, of course, not be a usurious transaction. But if the payee was, in fact, a dummy, and if, in fact, the form of the transaction was a sham and subterfuge to cover up the fact that defendants actually loaned the money to plaintiffs, as found by the trial court, then the "discount" was in fact interest and the transaction obviously usurious.

[1-4] In determining whether the findings are supported, the usual appellate rules prevail. If there is any substantial evidence or any reasonable inference from the evidence to support the findings, the appellate court cannot substitute its judgment for that of the trial court. *Brocke v. Naseath*, 134 Cal.App.2d 23, 285 P.2d 291, 51 A.L.R.2d 1083; *Murphy v. Ablow*, 123 Cal. App.2d 853, 268 P.2d 80. It is a question of fact as to whether a particular transaction is or is not usurious. *Middlekauf v. Vinson*, 106 Cal.App.2d 204, 234 P.2d 742. Where the form of the transaction makes it appear to be non-usurious, it is for the trier of the fact to determine whether the intent of the contracting parties was that disclosed by the form adopted, or whether such form was a mere sham and subterfuge to cover up a usurious transaction. *Martyn v. Leslie*, 137 Cal.App.2d 41, 290 P.2d 58; *Anderson v. Lee*, 103 Cal.App.2d 24, 228 P.2d 613. The trial court may look beyond the form of the transaction and ascertain its substance. *Batchelor v. Mandigo*, 95 Cal.App.2d 816, 213 P.2d 762.

It was found that on October 29, 1952, the defendants orally agreed to lend to the plaintiffs \$3,055; that Augusta Kent, a licensed real estate broker, made the arrangements between the parties; that Mrs. Kent acted as a broker in the transaction "for and with full knowledge and approval and consent of defendants"; that the note

1. There are two sections with this number.

was made payable to one Gudmundsen and was secured by a deed of trust on the home of plaintiffs; that the note and deed of trust were dated November 7, 1952, and on that date were "assigned" to defendants; that the note was for \$4,700 payable at the rate of \$47.50 a month, which payment included interest at 6 per cent; that such payments were to continue until December 15, 1957, when the total balance still owing became due and payable; that defendants paid for the "assignment" the sum of \$3,055, from which a commission of \$275 was deducted and paid to Mrs. Kent; that other expenses were deducted so that plaintiffs received but \$2,765.50 for their \$4,700 note; that Gudmundsen was knowingly used as a dummy in the transaction "solely for the purpose of concealing the usurious nature of the transaction" and "in accordance with previous understanding and arrangement between defendants and Augusta T. Kent"; that defendants knew at the time "they purported to purchase the note and at the time said note was executed that no consideration had been or would be given for said note by the said payee * * * and intended to collect usurious interest upon the loan to plaintiffs"; that up to April of 1955 plaintiffs paid to defendants \$1,377, all of which should be credited to principal; that plaintiffs are entitled to other credits as provided in the statute; that the balance owing defendants is \$614.12, without interest.

The court also found that when defendants purported to purchase the note they knew that no such note or deed of trust was in existence; that they knew such documents had not yet been executed and knew that Mrs. Kent would thereafter have such a note executed payable to a dummy; "that defendants did not purchase the note * * * in good faith, but did so with full knowledge that it was executed as evidence of the agreement that they had previously made to loan plaintiffs \$3055.00 in consideration of the repayment of \$4700.00 and interest."

Based on these findings the court adjudged that plaintiffs owed defendants a balance of \$614.12; that such balance could be repaid at the rate of \$47.50 per month, without interest; that defendants were enjoined from accelerating the note or foreclosing the deed of trust as long as the payments are made.

[5] The evidence, and the reasonable inferences therefrom, overwhelmingly support the findings. The defendants are the directors and sole owners of the Winston Investment Company, and are licensed real estate brokers engaged in the purchase of first and second deeds of trust. In 1950 or 1951 Mrs. Kent, also a real estate broker, became acquainted with defendants, and until sometime in 1954 dealt with them in the purported sale and purchase of some 24 notes and deeds of trust. Mrs. Kent subsequently was convicted of grand theft. She testified that in her dealings with defendants she did not act as their agent and did not receive any salary or commissions directly from defendants. She, in fact, received her commissions by deductions from the loans made to the borrowers. One of the defendants testified that he terminated his relationship with Mrs. Kent in 1954 because of her improper activities in connection with another loan transaction.

In October of 1952 plaintiffs, who already had a first loan on their home, desired to borrow money to enter a business deal with B. Scott Gudmundsen. The latter had heard of Mrs. Kent and of the fact that she loaned money on second mortgages, and sent plaintiffs to her. Plaintiffs told her that they wanted to borrow \$3,500, with their home as security. Mrs. Kent then telephoned defendants, told them someone had been in who "wanted a loan," and asked defendants to come to Oakland to see the home offered as security. She told defendants that there was a first deed of trust on the property, but did not tell them that there was a second deed of trust because "there wasn't one until we made it." On October 28th or 29th defendants came to Oakland, met Mrs. Kent, and went

with her to plaintiffs' home. Mrs. Kent introduced one of defendants to Mrs. Janisse and told her that they "had come to see the house about the loan." Mrs. Janisse showed them about the house. The defendant asked her all about the first loan on the property, but made no mention about, and asked no questions concerning, any second note or second lien. In response to a query from Mrs. Janisse as to whether they would get the loan, Mrs. Kent and this defendant both said that "they thought we would."

Mrs. Kent testified that after this visit the defendants decided "how much they would let her have"; that she then called Mrs. Janisse and told her "they would make the loan," and gave her the details; that Walter Schmidt decided that the note must be for \$4,700 with the actual loan around \$3,000; that Gudmundsen's name was put on the note instead of Schmidt's because "to sell the note it had to be made to a third party." In describing defendants' methods of operation Mrs. Kent testified that defendants always "looked at all the property before they could say how much money they could loan on it."

[6] The defendants denied some of the testimony of Mrs. Kent and of Mrs. Janisse, claiming that the transaction was simply one in which Mrs. Kent had a \$4,700 note of plaintiffs that she wanted to sell, and that defendants bought it at a discount. The credibility of defendants and of the other witnesses was for the trial court. That court has, in effect, found that defendants did not tell the truth about the nature of the transaction. That finding is overwhelmingly supported.

The evidence shows that after defendants and Mrs. Kent left plaintiffs' house they went to the home of Clifford Dupree to investigate a similar transaction. Dupree refused to go through with the deal when he learned that he would only get \$1,900 and would have to pay back \$3,800.

Defendants then returned to their San Francisco office. Under date of October 29, 1952, they wrote a letter of instructions to the Alameda County-East Bay Title Insurance Company² depositing \$3,055 for a note to be secured by a second deed of trust on the plaintiffs' home, and enclosing a request for notice of default signed in blank. The letter also stated that the note was to be for \$4,700 and "said note is [to] be payable at \$47.50 per month, including interest at six per cent per annum, and said note is to be due in full five years from date of note." No mention was made as to who was the holder of this note, the letter directing that "This loan is to be assigned to the Winston Investment Company." Mrs. Kent prepared the note and deed of trust and they were not executed by the parties until some 10 days later.

Gudmundsen testified that early in November, 1952, Mr. Janisse told him to go to the title company. This he did and was told by a title company employee that he was to sign a number of papers as a third party, that he would not be liable in the transaction, and was not to receive anything, but that he had to sign the documents if plaintiffs were to get any money. One of the documents he then signed was an "assignment" of the \$4,700 note and deed of trust to the defendants. He testified that he did not understand the nature of the transaction and did not receive any money out of it.

Mr. Janisse testified that he understood that the \$4,700 note represented the loan, plus a \$1,000 bonus to the lender, plus all the accumulated interest. He did not know that interest was being deducted from his monthly payments until after he had made several of them. He then protested, in vain, but continued to make the payments because he feared that otherwise he would lose his home.

Plaintiffs introduced into evidence the documents relating to four other transactions handled by defendants and Mrs. Kent

2. We make no comment about the activities of the title company in this transaction, other than to recount the facts, because

the title company is not a party to this proceeding.

in a manner similar to the instant case. In these transactions, as in the instant case, it was obvious that the "assigned" deed of trust and note were not in existence until defendants purported to buy them. In one of these transactions the note and second deed of trust were made directly to defendants instead of to a dummy. These resulted in a series of letters to the title company trying to correct the form of the transaction. In several of these letters defendants expressed the fear that unless the form of the transaction was corrected they would be subject to a charge of usury. Upon directions from defendants the form of the transaction was changed by the title company to make it appear that defendants were not the lenders of the money, but the assignees of an existing note and mortgage.

[7] We have recounted the findings and evidence at some length, not because we have any doubts that they disclose a deliberate and illegal attempt to collect a usurious rate of interest, but because we think that the public interest will be served by exposing in full this illegal attempt to mulct a necessitous borrower. While the presumption in such cases is in favor of legality (*Garrick v. J. M. P., Inc.*, 150 Cal. App.2d 232, 309 P.2d 896; *Lindsey v. Campbell*, 132 Cal.App.2d 746, 282 P.2d 948), here the presumption was clearly rebutted. It is obvious from the record that defendants engaged in a thinly veiled scheme to make it appear that they were the purchasers of the note at a big discount, when in fact they were the lenders of the money. The method used to camouflage the nature of the transaction was crude and illegal. Such tactics should not be condoned. They should be fully exposed to the end that necessitous people will not, in the future, be defrauded by such a scheme, and so that the beneficent purposes of the usury statute will not be evaded. In fact, the appeal, insofar as the contention is made that the transaction was not usurious, approaches the frivolous. It is too obvious to require detailed demonstration that Gudmundsen was a dummy; that defendants knew it; that defendants de-

termined whether a loan should be made to plaintiffs and for how much; that defendants then determined the figure to be inserted in the Gudmundsen note; and that defendants, in fact, made the loan to plaintiffs.

[8,9] Defendants make only a token argument to the effect that the transaction was not usurious. Their major argument is that the doctrine of estoppel is a good defense to the charge of usury, and that, under the facts, plaintiffs are estopped from making the charge. It can readily be admitted that, under proper facts, the defense of estoppel is applicable to a charge of usury in this state. *Lindsey v. Campbell*, 132 Cal.App.2d 746, 282 P.2d 948; *Martin v. Ajax Construction Co.*, 124 Cal.App.2d 425, 269 P.2d 132; *Martyn v. Leslie*, 137 Cal.App.2d 41, 290 P.2d 58; *Stock v. Meek*, 35 Cal.2d 809, 221 P.2d 15. But these same cases establish that the borrower and lender are not *in pari delicto* in a usurious transaction, and that an estoppel does not arise simply because the borrower knew of the usurious nature of the transaction, took the initiative in seeking the loan, and paid usurious interest without protest. See also *Williams v. Reed*, 48 Cal.2d 57, 307 P.2d 353.

[10] Defendants contend in their briefs, and argued at oral argument, that the transaction was a legitimate business deal; that defendants in good faith simply purchased an existing \$4,700 note at a discount for \$3,055; that all this was accomplished through Mrs. Kent who was the agent of plaintiffs and not of defendants; that the transaction was a fraudulent scheme contrived by plaintiffs and their agent Mrs. Kent and not by defendants. If these were the true facts, undoubtedly defendants' defense would be tenable. But they are not the facts found by the trial court and overwhelmingly supported by the record. Mrs. Kent acted as a broker in arranging the loan. This was done with the knowledge, approval and consent of defendants. Defendants knew there was no second loan on the property until they fixed the amount,

and the amount of the note. As already pointed out, defendants were in fact the lenders and not Gudmundsen, and defendants knew this and arranged for it. Under such circumstances no possible basis for an estoppel exists.

[11] Equally without merit is defendants' contention that the trial court committed prejudicial error when it admitted the documents in four other transactions in which Mrs. Kent and defendants were involved. They contend that these instruments had no connection with the instant case, and if they were intended to show usury and bad faith in other transactions, the background of the execution of these documents should have been introduced. Plaintiffs correctly maintain that these four transactions were identical in pattern and closely related in time to the instant case, and that the evidence was admissible on the issue of the claimed good faith of defendants. As was said in *Milana v. Credit Discount Co.*, 27 Cal.2d 335, at page 341, 163 P.2d 869, at page 872, 165 A.L.R. 621: "All of the negotiations, circumstances and conduct of the parties surrounding and connected with their contracts may be material in determining whether the form thereof covered an intent to violate the usury law, and the burden of establishing evasion must be met by evidence clearly showing the intent."

[12] It is well settled that evidence of other transactions to show motive, intent, knowledge, plan, and absence of mistake, in both civil and criminal cases, is admissible. Thus in *The Atkins Corporation v. Tourny*, 6 Cal.2d 206, 57 P.2d 480, case, the court held that evidence of other similar frauds committed by defendant at about the same time as the challenged transaction should have been admitted on the issue of intent. See also *People v. Morani*, 196 Cal. 154, 236 P. 135; *People v. Sindici*, 54 Cal.App. 193, 201 P. 975; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 184 P. 672, 12 A.L.R. 1007.

[13, 14] Defendants concede that there may have been irregularities on the face of these collateral transactions, but seek some

comfort in the fact that there was no evidence that the borrowers in these transactions ever complained about them prior to the filing of this suit. Obviously, if the transactions were in fact usurious, they would be relevant on the issue of intent regardless of the presence or absence of a complaint. The contention that plaintiffs should have introduced evidence of the background of these transactions is also without merit. The irregularities were apparent on the face of the documents. If defendants wanted to rebut this prima facie showing on the issue of intent they should have introduced the rebutting testimony. There was no error in the admission of the testimony.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



155 Cal.App.2d 52

Matter of the ESTATE of Lina L. RIGHTMIER, Deceased.

**Emeline Bolter, Petitioner and Appellant,
Leverna May Hatfield, Administratrix of the
Estate of Lina L. Rightmier, Deceased,
Respondent.
Civ. 9201.**

District Court of Appeal, Third District,
California.
Nov. 7, 1957.

Rehearing Denied Nov. 22, 1957.

Hearing Denied Dec. 30, 1957.

Proceeding on petition by collateral heir, who claimed she was entitled to distribution of estate of decedent, who died intestate leaving neither spouse nor issue. From adverse judgment of the Superior Court, Stanislaus County, David L. Bush, J., the petitioner appealed. The District Court of Appeal, Warne, J. pro tem., held that where decedent died intestate and without issue or spouse, all of property

which came to decedent as a surviving joint tenant with her predeceased spouse and which was originally acquired with community funds, was awarded to issue of predeceased spouse rather than to decedent's collateral heirs.

Judgment affirmed.

1. Husband and Wife Ⓒ264

In proceeding on petition filed by collateral heir, who claimed she was entitled to distribution of estate of decedent, evidence sustained finding that all property in names of decedent and her predeceased spouse, or in which they had any interest at time of death of predeceased spouse was property obtained by them during their marriage and was property purchased with community funds except contribution of \$5,000 by decedent. West's Ann.Prob.Code, § 1080.

2. Husband and Wife Ⓒ274(1)

Where decedent died intestate and without issue or spouse, all of property which came to decedent as a surviving joint tenant with her predeceased spouse and which was originally acquired with community funds, was awarded to issue of predeceased spouse rather than to decedent's collateral relatives. West's Ann.Prob. Code, § 228.

Busick & Busick, by Charles O. Busick, Sacramento, for appellant.

Carlos J. Badger, Modesto, for respondent.

WARNE, Justice pro tem.

This is an appeal from the judgment in a proceeding under section 1080 of the Probate Code, awarding respondent all the assets of the estate of Lina L. Rightmier, deceased, except the sum of \$5,000.

Appellant is one of the collateral heirs of the deceased, who died intestate, leaving neither spouse nor issue. Respondent is the daughter of the deceased husband.

[1] Lina L. Rightmier was formerly the wife of Charles Sydney Elam who died on March 5, 1919. His estate was set over to Lina being under \$1,500 in value. The entire estate consisted of a lot in Ceres, California, appraised at the value of \$1,300. It appears that Lina L. Rightmier had a bank account in her own name in the bank of Ceres, which was never more than \$406. Her separate property at that time did not exceed the sum of \$1,706, so far as the evidence shows, when she married David Lee Rightmier on September 28, 1920, approximately 15 months after the death of her first husband. David died some 31 years later on June 21, 1951, and during all of that time he lived with his wife, Lina. During their marriage the property they accumulated was nearly all placed in joint tenancy. The property which Lina had at the time of her marriage to David went into the joint tenancy as did moneys in an unknown amount which David received in settlement of a personal injury claim and certain property which he had inherited from his father. It also appears that David was working at the time of his marriage to Lina; that he had an automobile, at least, and he continued to work for a good part of the time he was married to Lina. There is no showing that Lina worked during the marriage or that she received anything by way of gift or inheritance. On the death of David his property, according to the inventory and appraisal on file in his estate, consisted of estate property appraised at \$3,520 and joint tenancy property consisting of real and personal property totaling \$75,784.

All bank accounts and bonds were held in joint tenancy by David and Lina.

In the proceeding for the probate of the estate of David Lee Rightmier, it was determined that all of the property standing in his name alone and the joint tenancy property in his and Lina's name was community property, except for a contribution by Lina of \$5,000 to the joint tenancy property of the parties.

On July 23, 1951, Lina was adjudged an incompetent person and continued as such to the day of her death on September 4, 1955. It is therefore obvious that she could not have been gainfully employed nor have contributed anything to her estate which was not there at the time of David's death. In fact, the record shows that the estate decreased after the death of David.

The trial court found: "That all of the property in the names of David Lee Rightmier and Lina L. Rightmier or in which they had any interest at the death of the said David Lee Rightmier was property obtained by said persons during their marriage, and except for the contribution by the said Lina L. Rightmier of \$5,000, was property purchased with community funds * * *." We feel that there is substantial evidence to sustain the trial court's finding and the judgment.

Regardless of appellant's contention that "there could be no passing of a community interest from David Lee Rightmier to Lina L. Rightmier for the reason that the property was taken in joint tenancy and that Lina L. Rightmier's title was derived from the original grant and was her separate property and not a community interest," the case is governed by the following provisions of section 228 of the Probate Code, as amended in 1939: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and * * * came to the decedent * * * on the death of such spouse by right of survivorship * * * in a joint tenancy between such spouse and the decedent * * * such property goes in equal shares to the children of the deceased spouse * * *."

"In determining the character of property for the purpose of applying §§ 228 and 229 of the Probate Code, it is the source of its acquisition, and not the nature of its ownership immediately before death, which is controlling. In re Estate of Abdale, 28 Cal.2d 587, 170 P.2d 918; In re Estate of

Perkins, 21 Cal.2d 561, 134 P.2d 231; In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042.

* * * * *

"Regardless of * * * intent, if it is clear that the source of acquisition was * * * community property, upon the death of the wife whose husband has predeceased her, the property standing in her name will be distributed according to the provisions of § 228 * * * of the Probate Code. In other words, § 164 of the Civil Code creates no presumption as to the source of acquisition of property." In re Estate of Reizian, 36 Cal.2d 746, 749-750, 227 P.2d 249, 250.

[2] The decedent having died intestate, without issue or spouse, all of the property which came to Lina as a surviving joint tenant with her predeceased spouse, which was originally acquired with community funds, was properly awarded to the issue of the predeceased spouse rather than the decedent's collateral relatives. In re Estate of Taitmeyer, 60 Cal.App.2d 699, 712, 141 P.2d 504; In re Estate of Nielsen, 65 Cal. App.2d 60, 61-62, 149 P.2d 737.

With respect to the \$5,000 which the trial court found the decedent had contributed to the purchase price of the joint tenancy property, appellant claims that she should have been allowed, in addition, a proportional amount of the increase in value of the property and profits realized therefrom. What these amounts are, if any, does not appear in the record, nor is there any direct evidence that the decedent contributed any amount toward the purchase of the joint tenancy property other than applying on a trade the separate property which came to her from the estate of her first husband which was not in excess of the value of \$1,500. It would appear that appellant profited by the award of \$5,000 and is not in a position to complain.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

154 Cal.App.2d 624

Florence BUTLER, Plaintiff and Respondent,**v.****Joe Dominic PELUSO, Samuel Stewart
McClelland, et al., Defendants.****Joe Dominic Peluso, Appellant.**
Civ. 22349.District Court of Appeal, Second District,
Division 2, California.

Oct. 22, 1957.

Rehearing Denied Nov. 18, 1957.

Action for personal injuries sustained by plaintiff who was walking on sidewalk when struck by defendant's automobile. Judgment for \$40,000 in favor of plaintiff was entered in Superior Court, Los Angeles County, Wallace L. Ware, J., and defendant appealed. The District Court of Appeal, Moore, P. J., held that award of \$40,000 to 70 year old woman who suffered fractured pelvis, four broken ribs, brain concussion and ankle injury with resulting severe, excruciating pain was not so excessive as to indicate that jury was motivated by prejudice or passion.

Affirmed.

1. Damages ⇨208(2)

In action for personal injuries sustained by plaintiff who was walking on sidewalk when struck by defendant's automobile, question whether plaintiff's testimony as to her pain and suffering was true was for jury.

2. Appeal and Error ⇨1004(1)
Damages ⇨208(1)

It is the office of the jury to investigate and determine the extent of injuries suffered by a wrongful act and a jury verdict will not be disturbed unless it is out of reasonable proportion to the injuries.

3. Appeal and Error ⇨1004(1)

Before an appellate court can interfere with the verdict on the ground that it is excessive, the excess must either appear as a matter of law, or be such as to suggest, at first blush, passion, prejudice or corruption on the part of the trier of fact.

4. New Trial ⇨162(1), 163(2)

A trial judge who hears a motion for new trial on ground of excessive verdict has a duty to reduce the amount of the judgment if he believes it to be excessive, but if he denies the motion, he thereby approves the amount of the award.

5. Damages ⇨208(2)

Pain and suffering are not subject to precise measurement by any scale; their appraisal in terms of money must be left to the jury.

6. Damages ⇨130(3)

Award of \$40,000 to 70 year old woman who suffered fractured pelvis, four broken ribs, brain concussion and ankle injury with resulting severe, excruciating pain was not so excessive as to indicate that jury was motivated by prejudice or passion.

7. Damages ⇨127

In awarding damages, the type of injury and value of the dollar at the time of the injury must be considered by the jury in appraising the value of the detriment suffered by the plaintiff.

George P. Kinkle, Los Angeles, for appellant.

Joseph Schecter, Los Angeles, for respondent.

MOORE, Presiding Justice.

From a judgment of \$40,000 for personal injuries suffered by respondent, appellant seeks a reduction of the amount or a reversal for a new trial on the amount. The sole question posed by the appeal is whether the amount of the judgment is excessive.

In February 1955 respondent, then a woman of seventy years, while lawfully walking on the sidewalk along Western Avenue at Third Street in Los Angeles was wrongfully struck by defendant McClelland's automobile as a result of the negligent operation by appellant of his car at the intersection. She was struck by the vehicle as it hurtled onto the sidewalk and pinned her to the ground. Her head protruding, she lay face down in a pool of blood which

flowed from her head. She was released by an automobile jack in the friendly hands of the witness Hirsch who conducted a service station nearby. By the automobile on her chest she was caused intense pain and fright.

She was transported to the General Hospital where she remained for ten days; spent a few days at home and then was placed in the California Hospital from which she was discharged after ten days and was returned to her home where she was bedridden for six weeks.

[1,2] In his brief appellant insists that special attention be given to all subjective symptoms and practically argues that each should be demonstrated to be true as related by respondent and that it be shown to this court to have resulted from the impact caused by appellant. The trouble with such contention is that it is an argument he should have made to the jury. They were the finders of the facts. If in their attempt to determine the extent of respondent's injuries that resulted from the automobile collision, they heard the full report by respondent as they were authorized to do, then it was their duty to consider such testimony as to her pain and suffering and if they found it to be true, they properly took it into account in evaluating her injuries. It is not the function of this court to fix values or to weigh the testimony of witnesses who related conditions that resulted from a tortious act. But it is the office of the jury to investigate and determine the extent of injuries suffered by a wrongful act and their verdict will not be disturbed unless it is out of reasonable proportion to such injuries.

Prior to the accident respondent was a healthy, vigorous person; had never suffered a serious illness; had never been in a hospital for treatment. She lived alone. She never had assistance in managing her affairs; did her own housework and usually walked three blocks to do her marketing and bore all bundles to her home. She attended church services and visited friends and entertained them and her relations. Not

only was she vigorous of body but her mental faculties were unimpaired.

When struck by the automobile she was knocked unconscious. She sustained a brain concussion. On regaining consciousness she was suffering intense pain. Her fractured pelvis immobilized her while in the hospital and caused "terrible" pain. Four ribs on her right side were fractured; at the time of trial those fractures were stinging and the pain from them caused her entire back to ache. Despite her improvement, she still has backache when she walks and seldom attempts ambulatory exercise. Therefore, she cannot do her shopping, three blocks from home. The brush burn and bruises on her left side also were sore. The pain in her breastbone was so intense that she had extreme difficulty in breathing and this continued for two months after she left the hospital. The blow on her head and the cut sent pain through her head thereafter and such pain continued to sting her head. Her bladder was paralyzed for five days and when she became able to pass urine, the act was accompanied by pain. Her ankle was, by the accident, made unusable and it has not become completely normal and free from pain.

While respondent was confined to her bed at home for the six weeks after returning from the hospital, she was for ten days attended by a nurse, after which her daughter removed from Palm Springs, lived near, and cared for her mother constantly for three months and continues to serve her.

As a result of the pain she suffers, respondent's activities have been restricted. When she stands long, her pelvic area begins to pain her and also when she attends to her household chores. Because of such pain, respondent cannot take her long, accustomed walks. Because of her fright at the time of the accident, she fears to walk on the sidewalks and is "scared to death" to ride in an automobile.

At the hospital Dr. Rolland found respondent suffering severe pains in her chest and in the fractured pelvis and she had dysuria, painful urination, which con-

tinued for a month. She had acute tenderness along the right side of her chest, over the breastbone, over her pelvis and in the region of the bladder. X-rays revealed fractures of the fourth, fifth, sixth, seventh and eighth ribs, a comminuted fracture of two portions of the right side of the pelvis, with several splintering fragments. All muscles and soft tissues in the areas of all fractured bones had been damaged. Also, Dr. Rolland found respondent suffering from frustrated breathing, a condition designated "dyspnea." She had sustained a separation of the ribs from the breastbone and a cerebral concussion. The doctor administered sedatives to respondent. He testified that during the healing process of fractured ribs, the victim suffers pain for about three months and that during the healing of the pelvis pain lasts four months. The healing of respondent's ribs was followed with an offset in their alignment at the points of fracture, and a slight offset resulted from the pelvic fracture.

From the foregoing, it is evident that respondent experienced severe, excruciating pain. At once this projects the inquiry as to her sincerity and accuracy in reporting her sufferings. This is answered by the verdict which fixed her damages at \$40,000; by her physician who described her as "a very noncomplaining lady"; by appellant's medical witness who testified that he did "not in the least" gain the impression that respondent did not tell the truth about her injuries: "I thought she was a very cooperative, real type of individual." In denying the motion for a new trial, the judge said: "This woman has suffered excruciating pain and she is not the kind that elaborates. On the other hand, I thought she was exceedingly conservative, which in my way of analyzing testimony, gives it greater value than as though she were up here padding her case. She didn't do any of that." Furthermore, there was no incident during the trial when either respondent or her counsel made an attempt to exaggerate or magnify her injuries or suffering. See *McNulty v. Southern Pacific Co.*, 96 Cal.App.2d 841, 847, 216 P.2d 534. In such a situation as is

presented by this action, the problem of measuring human pain and suffering is not easy of solution. But where the introduction of every item of evidence is attended by a frigid objection by opposition; where exaggerated statements of witnesses will be excepted to, it is not easy to get a false or colored report of facts accepted by a jury of experience and sound discretion. Since there is no fixed standard of compensation, it is reasonable to sustain the verdict of a jury of honorable citizens if it is compatible with human experience and sound discretion. *Harris v. Los Angeles Transit Lines*, 111 Cal.App.2d 593, 598, 245 P.2d 35.

[3,4] Before an appellate court can interfere with a judgment on the ground that it is excessive, "the excess must either appear as a matter of law, or be such as to suggest, at first blush, passion, prejudice or corruption on the part of the trier of the fact." *Holder v. Key System*, 88 Cal.App.2d 925, 939, 200 P.2d 98, 106. The judgment based on a verdict is further secured by the process of the motion for a new trial. When such motion has been denied by the trial judge who has heard the testimony and observed the witnesses, the parties and their counsel, it is his duty to reduce the amount of the judgment if he believes it to be excessive. If he denies the motion he thereby approves the amount of the award. But an appellate court has no such powers. *Holmes v. Southern California Edison Co.*, 78 Cal. App.2d 43, 51, 177 P.2d 32.

In *Johnston v. Long*, 30 Cal.2d 54 at page 76, 181 P.2d 645, at page 658, the court conceded: "The verdict is undoubtedly high" (\$87,575) but (1) because "it is not the function of a reviewing court to interfere with the jury's award * * * unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it * * * raises a presumption that it was the result of passion and prejudice" and (2) the trial court found that the verdict was not excessive when it refused to disturb the judgment.

[5] In *Mendoza v. Rudolf*, 140 Cal. App.2d 633, 636, 295 P.2d 445, 447, it was

held that the jurors, as well as the trial judge, "may use their personal experiences and knowledge in arriving at the amount of damages to be awarded under the facts of a particular case, and that damages may be awarded for pain, anxiety, inconvenience, annoyance, interference with the comfort of plaintiff and his family, and disadvantage suffered by reason of a defendant's acts * * *" Facts of the several classes present elements of damage of such infinite variety and appeal so differently to men that definite rules cannot be laid down for guidance but the amount must be left to the sound discretion of the trial court to be exercised after a consideration of all the facts in the case. See *Thompson v. Simonds*, 68 Cal.App.2d 151, 162, 155 P.2d 870. Pain and suffering are not subject to precise measurement by any scale. Their appraisal in terms of money must be left to the jury. *Sexton v. Key System Transit Lines*, 144 Cal.App.2d 719, 722, 301 P.2d 612. Where plaintiff had been struck by a train, was unconscious for some time, regained consciousness and for twenty minutes groaned and was in severe pain, the appellate court observed that a "person in great pain and suffering can live a veritable lifetime in but a brief interval * * * We could not undertake to substitute our judgment for that of the jury and the trial court that \$20,000 was not excessive compensation for Miller's conscious pain and suffering * * *." *Miller v. Southern Pacific Co.*, 117 Cal. App.2d 492, 509, 256 P.2d 603, 613.

[6,7] Appellant cites a number of decisions for the purpose of demonstrating that the verdict returned in this action is excessive: *Duvall v. Transcontinental and Western Air, Inc.*, 98 Cal.App.2d 106, 219 P.2d 463; *Pederson v. Carrier*, 91 Cal. App.2d 84, 204 P.2d 417; *Paolini v. City & County of San Francisco*, 72 Cal.App.2d 579, 164 P.2d 916; *Crumback v. Murdock*, 74 Cal.App.2d 127, 168 P.2d 25; *Propper v. Chicago, Rock Island & Pacific R. Co.*, 237 Minn. 386, 54 N.W.2d 840, 35 A.L.R.2d 459;

Kelley v. Illinois Central R. Co., 352 Mo. 301, 310, 177 S.W.2d 435; *Gladstone v. Fortier*, 22 Cal.App.2d 1, 70 P.2d 255. It is not made certain from the facts in those decisions that the award in the case at bar is unreasonably more than careful study and sound judgment would dictate. While the sum might be greater than other juries and different courts would have determined to be just, yet, without erroneous rulings of the court or inflammatory argument of counsel, the jury fixed its verdict at \$40,000. The law leaves the assessment of damages to the unbiased judgment of the jury. Before its verdict can be set aside by an appellate court, it must appear "so excessive as to indicate that the jury was motivated by prejudice or passion." *Germ v. City & County of San Francisco*, 99 Cal.App.2d 404, 421, 222 P.2d 122, 134; *Aldrich v. Palmer*, 24 Cal. 513, 516; *Risley v. Lenwell*, 129 Cal.App.2d 608, 645, 277 P.2d 897. This is especially so where, in denying a motion for a new trial, the trial judge declined to reduce the amount of the verdict. This occurred in the case at bar. The judge was positive and emphatic in his refusal to alter the verdict. Awards in other cases do not furnish a criterion for the proper award in the instant matter. In each case, the type of the injury and the value of the dollar at the time of the injury must be considered by the jury and not what another jury or court has allowed a different person for a different injury.

That the economic conditions of the state and the value of the dollar at the time of the verdict should be considered by the jury in appraising the value of the detriment suffered by the plaintiff is too well established to require citation of authorities. See *Estrada v. Orwitz*, 75 Cal.App.2d 54, 60, 170 P.2d 43; *Gist v. French*, 136 Cal.App.2d 247, 274, 288 P.2d 1003.

The judgment is affirmed.

FOX and ASHBURN, JJ., concur.

155 Cal.App.2d 22

In the Matter of the ADOPTION OF Penelope Jean McLAUGHLIN and Dennis Allen McLaughlin, Minors.

James Wesley DUNN, Jr., Petitioner and Respondent,

v.

Hugh W. McLAUGHLIN, Objectloner and Appellant.

Civ. 22163.

District Court of Appeal, Second District, Division 3, California.

Nov. 6, 1957.

Rehearing Denied Dec. 2, 1957.

Hearing Denied Dec. 30, 1957.

Proceeding by mother's present husband for adoption of children who had been awarded to mother by divorce decree, which required father to pay a certain sum each month for care, support and education of children. From adverse decree of the Superior Court, Los Angeles County, John Gee Clark, J., the father appealed. The District Court of Appeal, Shinn, P. J., held that evidence was insufficient to support finding that the children had been abandoned by their father, who was delinquent in his support payment.

Decree reversed.

Adoption ⇐7

In proceeding by mother's present husband for adoption of children who had been awarded to mother by divorce decree, which required father to pay certain sum for care, support and education of children, evidence was insufficient to support finding that children had been abandoned by their father, who was delinquent in support payments. West's Ann.Civ.Code, § 224; West's Ann.Welfare & Inst.Code, §§ 701, 775.

Smith, Van Dyke & Hildreth, Los Angeles, for appellant.

Gerrit Pos, Alhambra, for respondent.

SHINN, Presiding Justice.

This is an appeal by Hugh W. McLaughlin, father of a girl aged 7 and a boy aged

6, from an order of adoption in favor of James Wesley Dunn, Jr., the present husband of McLaughlin's divorced wife.

The mother of the children had consented to the adoption and joined in the petition. By the divorce decree she was awarded custody of the children and the father was ordered to support them. The ground of the petition for adoption, based upon section 224 of the Civil Code, was that the father had wilfully failed and neglected for a period of over one year, immediately prior to September 22, 1955, to pay for the care, support and education of the children as provided in the decree, or otherwise, although able to do so. The father filed objections to the petition in which he denied wilful failure to pay for the care, support and education of the children, when able to do so, and it was further alleged that he did not consent to the adoption.

Section 224 of the Civil Code in relevant part provides: "A legitimate child cannot be adopted without the consent of its parents if living; however, after the custody of any child has by any judicial decree, been given to the mother, and the father for a period of one year shall wilfully fail to pay for the care, support and education of such child when able to do so, then the mother alone may consent to such adoption * * *"

It is apparent from the statements of the court during the trial that the court determined that McLaughlin had failed for a period of a year immediately preceding the filing of the petition, September 22, 1955, to pay anything for the support of the children; that fact was clearly shown by the evidence; by the decree of divorce rendered January 25, 1951 he had been ordered to pay \$120 per month; February 16, 1953 the amount was reduced to \$90 per month to take effect when he had brought his payments up to date. By the decree he was given the right to visit the children but the order provided that he should have no right of visitation while in arrears in the required payments. At the time of the trial he was in arrears in the amount of some \$1,600.

The sole factual question was whether McLaughlin had had the ability to pay for the care, support and education of the children and had wilfully failed to do so. At the commencement of the trial the court stated that this was the sole issue. Thereupon the attorney for McLaughlin interjected as another issue, whether the best interests of the children would be promoted by the proposed adoption, stating that there was a broad issue in addition to the one stated by the court. From that time on confusion reigned during the hearing which was, indeed, broad. The evidence, in major part, related to the father's visiting the children, communicating with them by telephone, letter or postcard, disputes as to whether he was in arrears in his payments at various times, whether he had given the children presents and they had been allowed to accept them, whether the children came home disturbed after visiting with him, the mother's reasons for objecting to the visits and, in general, whether the welfare of the children would be promoted by the proposed adoption. There was no dispute as to the payments that had been made both before and after the order and there was evidence respecting the father's ability to support the children. But this latter issue was confused, if not obscured, by the evidence and the arguments of counsel upon irrelevant matters.

The court filed no findings or conclusions but made a decree of adoption which recited that the father had abandoned the children and that it was in their interests that they be adopted by the petitioner. Not only did the court fail to find that the father had ability to provide for the care, support and education of the children but, when questioned by McLaughlin's attorney, stated that he was not making that finding. During the argument Mr. Gilbert, the attorney for McLaughlin, asked, "Then do I understand, your Honor, that the finding of this Court is that this man wilfully failed to support his children?" to which the court replied, "Not support. I will not go so far as to support, but that he failed to communicate.

"Mr. Gilbert: I think that a necessary part of this is that the man wilfully failed to support his children. That is the issue.

"The Court: That is one of the issues. There is more than one issue.

"Mr. Gilbert: There has to be a finding.

"The Court: He did not have the ability—there is no question about it—to comply with the Court order, because he was not making enough money for that purpose, but he was making enough money to have made, at least, a token payment."

The question whether McLaughlin had abandoned the children was not in issue. The petition did not allege that he had abandoned them, but only that he had wilfully failed to support them. In addition to that ground for granting adoption without a parent's consent, section 224 of the Civil Code provides another ground, namely, if the parent whose consent to the adoption has not been given has been judicially deprived of the custody and control of the child by order of the Juvenile Court, declaring such child to be free from the custody and control of such parent as provided in the Welfare and Institutions Code. Chapter 2 of that code contains the Juvenile Court law, of which section 701 is a part. That section sets forth the conditions in which it may be judicially declared that a child has been abandoned by its parents or either of them. Section 775 provides that jurisdiction in a Juvenile Court proceeding for the purpose of obtaining a judicial declaration that a child has been abandoned is invoked by the filing of a petition. This is followed by a citation and a hearing and in proper cases by a written order depriving the parent or parents of custody and control. There had been no such proceedings. It may also be noted that the particular situation here involved, namely, where the mother has been awarded custody of the child, is governed by section 224 of the Civil Code and not by section 701 of the Juvenile Court law. The latter does not provide that a child may be declared to have been abandoned by its father if for the period of a year or other-

wise he wilfully fails to provide for the care, support and education of a child whose custody has been awarded to the mother. It is unnecessary to discuss the matter further. The evidence should have been confined to the sole question whether McLaughlin had wilfully failed for a period of a year to provide for the children when able to do so. If that issue was determined at all it was not determined in favor of the petitioner. The decree is not supported by the finding that the children had been abandoned by their father.

The decree of adoption is reversed; neither party to recover costs of appeal.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



155 Cal.App.2d 142

Mary Jane Porter DUQUE, Plaintiff and Appellant,
v.

Romauldo DUQUE, Defendant and Respondent.
Civ. 5567.

District Court of Appeal, Fourth District,
California.

Nov. 8, 1957.

Post-decretal proceeding for modification of support provisions of divorce decree. The Superior Court of San Bernardino County, Jesse W. Curtis, Jr., J., denied the relief sought, upon the ground that execution of a contract between the parties had deprived the court of jurisdiction, and an appeal was taken. The District Court of Appeal, Stone, J. pro tem., held that jurisdiction conferred upon courts by statute may not, consonant with public policy, be divested by private agreement of parties.

Reversed.

1. Divorce $\Rightarrow$ 245(1), 309

Court may modify either an interlocutory or final decree of divorce insofar as alimony or support payments are concerned. West's Ann.Civ.Code, § 139.

2. Divorce $\Rightarrow$ 245(1), 309

Where amount of future payments of support is an inseverable part of property settlement agreement approved by divorce court, consent of both of contracting parties is necessary to modification; but if such agreement is not incorporated in and made a part of interlocutory or final decree and court does not approve of agreement as fair and equitable or rule on contractual relations of parties, court retains jurisdiction to modify alimony award. West's Ann. Civ.Code, § 139.

3. Courts $\Rightarrow$ 30

Jurisdiction conferred upon courts by statute may not, consonant with public policy, be divested by private agreement of parties.

D. Larry Thorne and Harold A. Bailin, Cucamonga, for appellant.

Roland C. Rutledge, Ontario, for respondent.

STONE, Justice pro tem.

On October 30, 1944, appellant Mary Jane Porter Duque was granted an interlocutory decree of divorce from respondent Romauldo Duque by the Superior Court of California, in and for the County of San Bernardino. In that default proceeding the court awarded plaintiff custody of the two then minor children of the parties and ordered that defendant pay the plaintiff the sum of \$50 a month for the support of said children and the sum of \$50 a month for the support and maintenance of herself. No mention was made in the decree of any community property belonging to the parties. A final judgment of divorce was entered on November 6, 1945. The court therein repeated verbatim its order as stated in the interlocutory judgment. Thereafter, on June 30, 1952, the parties entered

into an understanding labeled "Agreement" purporting to vary the provisions of the divorce decree relating to support and maintenance and to divide certain real property which was theretofore held by the parties as joint tenants. The said "agreement" expressly stated at page 2 thereof that the parties mutually agreed to thereby modify the terms of the divorce decree and to reduce the monthly sum due plaintiff for her own support and maintenance from \$50 per month to \$30 per month. The real property was to be deeded to the two children as joint tenants with a life estate reserved to the plaintiff. All unpaid support and maintenance or alimony claims were waived by the document. The agreement has never been submitted to any court for a determination as to whether or not it was fair and equitable and has never been by court order incorporated into or by reference made a part of either the interlocutory or final decree of divorce. During June of 1956, plaintiff secured an order to show cause why defendant's support payments should not be increased to \$100 per month. There was no court reporter present at the hearing but the stipulated statement of facts reveals the following proceedings:

"The plaintiff, Mary Jane Porter Duque, was called to the stand by her attorney as his first witness when the matter came on for hearing. Before Mrs. Duque could be sworn, counsel for defendant objected to the introduction of evidence upon the ground that the Court did not have jurisdiction to hear and determine the matter. After making his objection, defendant's attorney offered to orally argue the issue of jurisdiction at that time. Plaintiff's attorney thereupon asked leave of the Court to submit the question upon the filing of written points and authorities rather than the presentation of oral argument at the time. The court thereupon ordered that the matter be submitted upon the filing of written points and authorities and allowed time to each party to comply."

No testimony or evidence other than a copy of the purported property settlement agreement was presented to the court. The court denied the application for modification of the final decree upon the ground that execution of the contract between the parties deprived the court of jurisdiction.

[1-3] In a divorce action the court has continuing jurisdiction pursuant to Civil Code, Section 139, in so far as alimony or support payments for the wife are concerned. The court may modify either an interlocutory or final decree of divorce in that respect. However, a property settlement agreement settling the property rights of the parties which makes the amount of future payments of support an inseverable part of the agreement may not thereafter be modified without the consent of both the contracting parties if the agreement is approved by the court. *Helvern v. Helvern*, 139 Cal.App.2d 819, 294 P.2d 482. If the property settlement agreement is not incorporated in and made a part of the interlocutory or final decree and the court does not approve the agreement as fair and equitable or rule on the contractual relations of the parties, the statutory power of the court under Civil Code, Section 139 to modify its order awarding alimony is not affected by the fact the parties entered into such agreement. *Ross v. Ross*, 1 Cal. 2d 368, 35 P.2d 316.

In this case the contract was entered into some six years subsequent to the entry of the final decree and was completely extrajudicial in that it was never presented to any court for approval. Until such time as a contract executed by the parties to a divorce action and as an adjunct to such divorce action has been passed upon by the court, jurisdiction is retained by the court under Civil Code, Section 139.

It would be against public policy to permit parties by private agreement to deprive a court of jurisdiction which is conferred upon it by statute. 12 Cal.Jur.2d page 295, section 95; 13 Cal.Jur.2d page 603, section 91.

The order denying the application for modification of the interlocutory decree is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



155 Cal.App.2d 161

A. C. MALONE, Plaintiff and Respondent,
v.

Irene E. MALONE, Defendant and Appellant.
Civ. 22528.

District Court of Appeal, Second District,
Division 1, California.

Nov. 12, 1957.

As Modified on Denial of Rehearing
Dec. 5, 1957.

Hearing Denied Jan. 6, 1958.

Action by husband to set aside transfers of property to the wife. From a portion of the judgment of the Superior Court of Los Angeles County, McIntyre Faries, J., the wife appeals. The District Court of Appeal, Doran, J., held that the evidence justified the judgment setting aside the transfers.

Judgment affirmed.

1. Appeal and Error ☞1011(1)

Where there is a conflict of evidence, a reviewing court is bound by the decision of the trier of facts.

2. Husband and Wife ☞45

Evidence justified setting aside transfers of stock from husband to wife on the ground that the transfers were obtained by undue influence.

Johnson & Johnson, Long Beach, and Moore & Moore, Los Angeles, George R. Johnson, Long Beach, for appellant.

F. A. Knight and Donald P. Lane, Long Beach, for respondent.

DORAN, Justice.

The action herein was instituted by the respondent husband, aged about 85 years, to set aside certain transfers of property

to the appellant wife, aged 54 years. Mrs. Malone has appealed from that portion of the judgment based upon findings that 11,500 shares of common stock of Hancock Oil Company had been obtained from respondent by undue influence exercised by the appellant wife, and ordering a return of such stock to respondent.

It is appellant's contention that "There is no evidence that any of the gifts was in any way the result of the exercise of undue influence by Mrs. Malone upon her husband. There is no evidence that the 1954 gift was in any way different from any of the preceding gifts".

The trial court found that Mr. Malone "was the owner, as his separate estate, of a large amount of property consisting substantially of stocks in various corporations", and that for the past five years, "was suffering from progressive physical and mental senility, nervous disorders and from extreme physical tremors, and his mental faculties became and were so impaired that he was and is easily influenced by those in whom he had and has confidence". The record discloses substantial evidence, including the testimony of expert witnesses, in support of these findings. Mr. Malone also testified as a witness, so that the trial court was able to make an appraisal of his then condition.

The parties to this action were married on August 29, 1929, and lived together until the appellant wife left the respondent on May 31, 1955. After the marriage, respondent engaged in no business of any kind, but through capital possessed at the time of marriage, and the increase thereof, particularly Hancock oil stock, Mr. Malone acquired an estate of approximately \$1,500,-000.

It appears from the record that in 1948, respondent abandoned a downtown office and moved books and papers to the family residence. Thereafter, Mrs. Malone acted as respondent's agent and assistant, became familiar with the financial affairs, and kept the tax records relating thereto. It was during this period that the transfers in question were made. As found by the trial

court, the wife acted as the husband's "confidential agent", and "made practically all of his deposits in banks and has drawn almost all of the checks in the withdrawal of funds from the bank accounts". The husband, during this period, "reposed full and complete confidence and trust in the defendant".

Originally the parties had a common safe deposit box, but in 1952 the wife obtained a separate box in which were kept the stocks acquired from the husband. Likewise, until 1954, all income was deposited in a joint bank account, but in January, 1954, Mrs. Malone opened a separate bank account. In June of that year, the joint account was closed; thereafter, the only existing account was that maintained in the wife's name. At first, the husband was authorized to draw on this account, but on May 27, 1955, this privilege was cancelled by the wife without the husband's knowledge.

During this period occurred a number of transactions whereby stocks and other property were transferred to the appellant wife. Certain real property was likewise placed in joint tenancy between the parties. Although the husband had for many years been represented by an attorney, in respect to certain of these transfers the husband received no independent legal advice.

In respect to certain other transfers of Hancock oil stock to the wife, the trial court found that these were valid, but concluded from the evidence "That the defendant holds 11,500 shares of the common stock of the Hancock Oil Company in trust for the plaintiff, and should in good conscience and equity, retransfer the same to the plaintiff".

Asked as to why earlier gifts were made to appellant, Mr. Malone replied: "At her continual begging for it. I got tired of it. The old axiom of a constant drop of water will wear a hole in a rock". And in reference to all the gifts of Hancock Oil shares made in 1952, 1953 and 1954, Mr. Malone testified: "Oh, she was asking me—she said it would save on the taxes. The gift taxes were so much less than the inheritance tax. That was her contention".

It is respondent's contention that "Respondent was constantly begged and importuned by appellant to make transfers until he became worn out by it and gave in".

There was also evidence to the effect that the wife represented to the husband that there was no indebtedness, although such was not the case. Likewise, there was evidence that the wife had induced the husband to make a large loan to some relatives, taking back a promissory note in the wife's name alone, and had later collected the money. A judgment requiring a return of this money to the husband, was later complied with. As hereinbefore indicated, there was medical and other testimony to the effect that the husband was suffering from senility and in a condition where "he was and is easily influenced by those in whom he had and has confidence", as found by the trial court.

The end of the husband and wife relation occurred in May, 1955, when the wife learned that Mr. Malone had executed a new will eliminating Mrs. Malone and her relatives as beneficiaries. About this same time the wife learned that the husband had, by conveyance to a third person, destroyed the joint tenancy previously created by Mrs. Malone's request. Mrs. Malone, accompanied by a sister, then attempted to have the husband make a new will drawn by someone other than the husband's attorney, and upon Mr. Malone's refusal so to do, Mrs. Malone moved out of the family home.

There can be no disagreement concerning the definition of undue influence since Section 1575 of the Civil Code provides that it consists "1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage over him; 2. In taking unfair advantage of another's weakness of mind." In respect to the relation of husband and wife, Section 158 of the Civil Code makes it clear that transactions between such parties are subject "to the general rules which control the actions of persons occupying confidential relations with each other".

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Fred R. COGGAN, Defendant and
Appellant.

Cr. 5947.

District Court of Appeal, Second District,
Division 1, California.

Nov. 7, 1957.

[1, 2] In the instant case, therefore, the only question is whether such undue influence was practiced by Mrs. Malone in obtaining from Mr. Malone the 11,500 shares of Hancock oil stock. This is a question of fact which the trial court, after a trial consuming 11 days, resolved in favor of respondent's contention that such undue influence had been practiced by the appellant. The rule is well established that where there is a conflict of evidence, a reviewing court is bound by the decision of the trier of facts. Such is the situation in respect to the present inquiry.

As pointed out in respondent's brief, the case of *Stewart v. Marvin*, 1956, 139 Cal. App.2d 769, 294 P.2d 114, 116, bears a marked resemblance to the present litigation. In the *Stewart* case a husband, aged 62, was persuaded by the wife, aged 42 years, to place certain property in joint tenancy. The husband consented to this transaction, according to the testimony, because of regard for the wife and because of persistent nagging, and "in order to have a little peace." The trial court vacated the transfer on the ground that the husband "did not have independent advice, and did not apprehend the result of his acts; that he was affected to a substantial extent, by senility, and was not in complete control of his faculties". Although appellant has sought to distinguish the facts of this case from those here existing, the fundamental principle remains the same.

The appellant has cited certain items of evidence which might seem to support the contentions made. This is, of course, immaterial since the record discloses substantial evidence sustaining the findings of the trial court. Nor is there any merit in appellant's argument that because certain other transfers were held valid, the one in question should be so treated. No reversible error has been pointed out, and no merit is found in any of the appellant's contentions.

The judgment is affirmed.

WHITE, P. J., and FOUNT, J., concur.

Defendant was convicted of two counts of grand theft and of violating Corporations Code by destroying, altering, mutilating or falsifying corporate records with intent to defraud. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Drapeau, J. pro tem., held that it is not function of reviewing courts to weigh evidence and that evidence sustained convictions.

Judgment affirmed.

1. Criminal Law ⇨260(11)

Function of reviewing courts is not to weigh evidence, and when finding of fact is attacked on ground that there is not any substantial evidence to sustain it, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support finding of fact.

2. Corporations ⇨324

Embezzlement ⇨44(1)

Evidence sustained conviction of two counts of grand theft and conviction for violating Corporations Code by destroying, altering, mutilating, or falsifying corporate records with intent to defraud. West's Ann.Corp.Code, § 3020(b).

Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Herschel T. Elkins, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

Defendant in this case was charged with six counts of grand theft, and with one count of violating subdivision (b) of section 3020 of the Corporations Code of this state—destroying, altering, mutilating, or falsifying corporate records with intent to defraud.

He was found guilty by a judge of the Superior Court of two counts of grand theft, counts 1 and 6, and of count 7, violating the section of the Corporations Code named. He was found not guilty of the other counts. An allegation of having suffered a prior felony conviction, for which he served time in the penitentiary, was found to be true.

He appeals from the judgment, and from "the order denying a Motion for New Trial * * *." The record, however, does not show that a motion for a new trial was made.

Defendant's only ground of appeal is that there was no substantial evidence to support the three counts of which he was convicted.

Defendant was secretary and treasurer of two corporations: Belco Products Corporation and Cochrane-Barron Company. The corporations maintained one office together. Irving M. Cochrane was president of both corporations.

Defendant's duties were to keep the books of the two corporations, to act as general manager, to prepare checks, and to handle their bank accounts. He was authorized to sign checks for Belco only, and then only with another officer of that corporation.

The facts will be stated separately as to each count.

Count 1. Defendant prepared a check for \$350.28, payable to himself. He signed this check, and, at his request, the vice-president of the Belco corporation, Mr. Miller, also signed it. He told Mr. Miller that he had made the check payable to himself so that he could buy an adding machine for cash, and get a discount for the company.

He deposited the check in his own bank account, and the corporation never got the adding machine for which the check was written.

Defendant testified on his trial that he gave the money to a jobber named Weldron, who was to purchase the adding machine; but he couldn't get Weldron to come to Los Angeles and testify. In any event, Weldron never appeared, nor could he be found.

[1] Of course, a different finding of not guilty could have been made from defendant's testimony. But, as has so often been said, it is not the function of reviewing courts in California to weigh the evidence. As our Supreme Court has said, "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact." *Grainger v. Antoyan*, 48 Cal.2d 805, 313 P.2d 848, 850.

[2] Tried by this rule, it is obvious that the evidence in this case supports defendant's conviction of this count.

Count 6. Among the records of Belco corporation were sales invoices for purchase orders totaling \$495. The purchaser's check in payment for these orders was endorsed by defendant; the check was deposited in his account; and the money never was received by the corporation.

Defendant testified that he considered this a loan, authorized by Mr. Cochrane, and that he repaid the money. But there was testimony to the contrary. The money was not received by Belco. And Mr. Cochrane testified that he did not authorize defendant to endorse the check or to deposit it in his own bank.

Again, it is obvious that defendant's conviction of this count is supported by substantial evidence.

Count 7. Destroying corporate records.

When defendant's employment was terminated, his successor couldn't find the

bank statements necessary to reconcile the corporate books.

Defendant had been authorized to pick up the statements from the bank, and he receipted for them. He brought in the September, 1955, Cochrane-Barron statement, but he never brought in the October or November statements. He said he may have taken them home to work with them, but if he had, he couldn't find them.

The check for \$350.28 for the adding machine was missing; also the original invoices for the purchase orders involved in count 6.

The evidence as to this count is not as convincing as in counts 1 and 6. But, in view of all the facts in the case, we cannot say that there was no substantial evidence to support the conviction. See *People v. Burman*, 138 Cal.App.2d 216, 291 P.2d 49.

The judgment is affirmed; the purported appeal from the non-existent order denying defendant's motion for a new trial is dismissed.

WHITE, P. J., and FOURT, J., concur.



**Matter of the ESTATE of Frances R.
HOWELL, Deceased.**

**Walter HOWELL, Contestant and Appellant,
v.**

**Mary F. O'MALLEY, Mary C. O'Malley, Rita
A. O'Malley, Margaret Beacham, Ellen
Tobin, Margaret Pohl, and Frances Mur-
phy, Legatees and Respondents. ***

Civ. 22512.

**District Court of Appeal, Second District,
Division 1, California.**

Nov. 7, 1957.

Rehearing Denied Nov. 29, 1957.

Hearing Granted Dec. 30, 1957.

Proceeding in the matter of the estate of the deceased involving a contest of the

* Opinion vacated 324 P.2d 578.

will of the testatrix. From an adverse judgment in the Superior Court of Los Angeles County, Wilbur C. Curtis, J., the contestant appeals. The District Court of Appeal, Drapeau, J. pro tem., held that the will must be admitted to probate where it was executed in accordance with the statute.

Judgment affirmed.

1. Wills ⚡166(1)

When a will is made as prescribed by law, it will not be denied probate unless it is clearly shown that it was not of the testator's free agency, that he did not know what he was doing or that he was a victim of fraud or that he was subjected to such undue influence that the will was really another's. West's Ann.Prob.Code, § 50.

2. Wills ⚡82

While a court may deplore effects of a will, it is not empowered to set it aside for that reason alone.

3. Wills ⚡302(1)

Evidence justified a finding that a will executed on printed forms and by which the testatrix revoked a former will giving all her property to her only son and scattered it among others and left her son to pay the bills and expenses of her last illness was executed in compliance with the statute and entitled to probate. West's Ann.Prob.Code, § 50.

Paul R. Hutchinson, Los Angeles, for appellant.

A. J. O'Connor, George J. Hider, Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

There is but one question in this case: Was the will of Frances R. Howell executed in accordance with the requirements of section 50 of the Probate Code?

The will was admitted to probate. Petition to revoke the order was denied. This is an appeal from that judgment.

The first page of the will is on a printed form. Some of the blanks in it were filled

in with typewriting; other blanks were filled in with handwriting.

The form has a printed headline, "Last Will and Testament."

Then, in printing and in typewriting, it declares that it is decedent's last will, and revokes all former wills by her made.

Then, all in typewriting, and numbered "First," it gives to decedent's son \$1,000, for funeral expenses and masses.

Then, again all in typewriting, and numbered "Second," it gives bonds to grandchildren.

Here the typewriting of bequests leaves the first page, and continues on the second page with the concluding language of paragraph "Second." On this second page, and all in typewriting, there follow nine numbered bequests—to decedent's son, to her daughter-in-law, to her sister, to nieces and nephews, to grandchildren, and to friends.

On page three, the typewriting of bequests goes on, giving in a paragraph numbered "Twelfth," household and personal effects to decedent's son and daughter-in-law, with a direction to pay all outstanding bills.

We return now to the first page of this will, where the typewriting of bequests left it.

Decedent appoints her son and her sister executors, says that she signed the will on the day it was made, and subscribes her name in handwriting.

Then follows an attestation clause signed by three witnesses, and at the bottom of this first page decedent, for good measure, again signs her name.

She also signed her name at the bottom of the typewriting on page two.

The clerk's transcript does not show that testatrix signed her name at the bottom of page three; but it was stipulated when the case was argued in this court that she did.

We suppose that so long as time shall last laymen will try to do a lawyer's work for themselves, for that is a not unnatural manifestation of human nature. But see what was done in this case. The will we

are considering revokes a former will by which testatrix gave all of her property to her only son, scatters it among persons who had less claim to her bounty, and leaves her son to pay her bills and expenses of her last illness.

If this lady had talked with a lawyer, and had been told what would be the effect of her numerous bequests, perhaps she might have written a very different will. As it is, there has resulted expenses of litigation in probate, and bitterness of feeling that will disrupt a family for all time. It adds no comfort for anyone to reflect that whoever sold the form was paid "two bits."

[1,2] However, no matter what the consequences of a will may be, we are bound by long-established law. When a will is made as prescribed by law, it will not be denied probate unless it is clearly shown that it was not of the testator's free agency; that he didn't know what he was doing; or that he was the victim of fraud; or that he was subjected to such undue influence that the will was really another's, not his own. And though we may deplore the effects of the will here under consideration, we are not empowered to set it aside for that reason alone.

[3] Was the will executed in accordance with the provisions of section 50 of the Probate Code?

That section in part reads as follows: "Every will * * * must be subscribed at the end thereof."

No matter how the will is read, it was subscribed by the testatrix.

We are of the opinion that we should start at the beginning of the will, go forward with the numbered paragraphs on pages 1, 2 and 3, and then go back to page 1, with its attestation clause and signatures of decedent.

This situation is similar to the one considered by this court in *Re Estate of Chase*, 51 Cal.App.2d 353, 124 P.2d 895. In that case the will started on a printed blank, continued in handwriting on three pages, and concluded with the attestation clause

and decedent's signature on the reverse side of the printed blank. This court held that that was sufficient to support the finding of the probate court.

The son finally suggests that the type-writing of the bequests was not a part of the will when it was executed by his mother and the attesting witnesses.

This is negated by the fact that the typewriting starts on page 1 of the form, and that his mother signed pages 2 and 3 also.

Moreover, one of the attesting witnesses testified that there were three papers to the will. And another attesting witness testified that when she signed the attesting clause on the form "there was something turned over."

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



155 Cal.App.2d 145

P. I. WILSEY & COMPANY, Plaintiff
and Appellant,
v.

COUNTY OF SAN BERNARDINO,
Defendant and Respondent.

Civ. 5581.

District Court of Appeal, Fourth District,
California.

Nov. 8, 1957.

Rehearing Denied Nov. 26, 1957.

Hearing Denied Dec. 30, 1957.

Action to recover building permits and inspection charges paid under protest by the plaintiff. From an adverse judgment of the Superior Court of San Bernardino County, Carl B. Hilliard, J., the plaintiff appealed. The District Court of Appeal, Stone, J. pro tem., held that where the United States as lessor acting through the Navy entered into a lease with a private corporation on condition that lessee construct a housing project to revert with the land to the govern-

ment at the end of 75 years, contractor building the houses was properly required to secure permits from the county or pay county inspection charges.

Judgment affirmed.

1. Taxation — 6

The United States government is sovereign and the state and its political subdivisions do not have the power to tax or regulate a federal agency unless the federal government divests itself of sovereignty in the particular aspect of the government involved and it may do that by the constitution or by act of congress.

2. Counties — 21½

Where the United States as lessor acting through the Navy entered into a lease with a private corporation on condition that the lessee construct a housing project to revert with the land to the government at the end of 75 years, contractor building the houses was properly required to secure permits from the county or pay county inspection charges, since being in privity with the lessee, the contractor could not claim the benefit of the government's sovereign immunity. National Housing Act, § 805 as amended 12 U.S.C.A. § 1748d; 10 U.S.C.A. § 2667.

Holbrook, Tarr & O'Neill, W. Sumner Holbrook, Jr., and Francis H. O'Neill, Los Angeles, for appellant.

Albert E. Weller, County Counsel, J. B. Lawrence, Deputy County Counsel, San Bernardino, for respondent.

STONE, Justice pro tem.

The United States Government, as lessor, acting through the Department of the Navy, entered into a lease with Marine Palms Housing Corporation, a California corporation. The government leased certain lands in San Bernardino County for a period of 75 years at a rental of \$100 per year upon the condition the lessee construct a housing project consisting of approximately 493 units, the housing units to revert

with the land to the government at the end of 75 years. The housing units were primarily for the use of military personnel and civilian employees of the military, but under certain conditions could be rented to the general public. Thereafter Marine Palms Housing Corporation, the lessee, entered into a contract with the appellant construction company to erect 493 housing units on the leased premises. Respondent county collected a total of \$3,822 for building permits and inspection charges which fees were paid involuntarily and were accompanied by a written protest.

Appellant contends that because the Navy owned the land subject to the lease and because the housing units would become the property of the government upon completion, subject to the 75-term of the lease, the houses were the property of the government. Therefore, appellant contends the contractor building the houses could not be required to secure permits from the county of San Bernardino or pay the county inspection charges. Appellant bolsters his position by pointing out that the lease provides that the 493 units should be constructed substantially in accordance with detailed plans and specifications submitted by the Department of the Navy, to be approved by the Federal Housing Commissioner.

[1] The United States Government is sovereign and the state and its political subdivisions do not have the power to tax or regulate a federal agency unless the federal government divests itself of sovereignty in the particular aspect of government involved. It may do that by the constitution or by act of Congress. The lease in this case provides:

"That, under authority of the Act of August 5, 1947 (61 Stat. 774; 34 U.S.C. 522a), and Title VIII of the National Housing Act, as amended (63 Stat. 571; 12 U.S.C. 1748-1748h), the Secretary of the Navy has determined that the lease of the hereinafter described premises will effectuate the purposes of the said Title VIII, and the Secretary, in

consideration of the observance and performance by the Lessee of the covenants and conditions hereinafter set forth. * * *

The two enabling statutes referred to in the lease determine whether or not the United States Government, and more particularly the Navy Department, retained sovereignty and immunity from licensing or inspection in so far as the housing units in question are concerned.

Looking first at the applicable portion of Title VIII, which is set forth in 12 U.S.C.A. § 1748d, the following language is found:

"§ 1748d. *Lease of property; terms and conditions.*

"Whenever the Secretary of the Army, Navy, or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this subchapter, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force."

Thus Congress empowered the Secretary of the Army, Navy or Air Force to determine what government land could be leased and upon such terms and conditions as will "in his opinion, best serve the national interest". The other Act of Congress pursuant to which the lease was executed, is embodied in 34 U.S.C.A. § 522a,¹ which authorized the Secretary of the Navy to select land "not for the time required for public use" and to lease it "upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest". Pursuant to this authority the Secretary of the Navy determined the land covered by the lease in question was not required for public use and leased it to Marine Palms Housing Corporation, a private corporation, and as a condition thereof

1. Now 10 U.S.C.A. § 2667.

provided in paragraph 7 of the lease as follows:

"7. That the Lessee shall comply with all laws, ordinances, and regulations that are applicable to the leased premises with regard to construction, sanitation, licenses or permits to do business, and other matters."

The Secretary of the Navy specifically made payment by the lessee of fees of the nature here in question a condition of the lease. The appellant was not a party to the lease nor did appellant have a contract with the Navy. Being in privity with the lessee, the appellant cannot claim the benefit of the sovereign immunity of the United States Government. The authority of the Secretary of the Navy to require the lessee to pay license and inspection fees can also be implied from the fact that Congress made the interest of the lessee taxable. 34 U.S.C.A. § 522e.²

[2] To require appellant to pay permit and inspection fees for the housing units to be built for the lessee is consonant with the holding of the United States Supreme Court in *Offutt Housing Company v. County of Sarpy* [Nebraska] 351 U.S. 253, 76 S.Ct. 814, 100 L.Ed. 1151. That case involved a similar lease for 75 years and the court held that as the improvements had an estimated useful life of only 35 years the entire worth of the improvements was the lessee's and the lessee was subject to state taxation on the full value of improvements. Certainly, in our case the cost of permits and inspection fees for the housing units constitute a legitimate cost chargeable to the 75-year leasehold interest. (See also *Fort Dix Apartments Corporation v. Borough of Wrightstown*, 3 Cir., 225 F.2d 473; *De Luz Homes, Inc. v. County of San Diego*, 45 Cal.2d 546, 290 P.2d 544.)

Appellant cites the case of *Hall v. City of Taft*, 47 Cal.2d 177, 302 P.2d 574, in support of its position. In that case a contractor building a public school building was not required to obtain a city permit and pay a fee therefor. The instant case can readily

be distinguished from the *Hall* case wherein the Supreme Court of this state determined that the State of California was engaged in a sovereign activity in the construction and maintenance of school buildings, and that the state had not relinquished this sovereign power by the Constitution or any legislative enactment. It should also be noted that in the *Hall* case the construction contract was between a builder and a school district, a political subdivision of the state while in the case before us the contract was between a builder and a private corporation.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Jack HYDE, Defendant and Appellant.*
Cr. 5892.

District Court of Appeal, Second District,
Division 3, California.

Nov. 8, 1957.

Hearing Ordered Dec. 30, 1957.

Defendant was convicted of receiving stolen property. The Superior Court of Los Angeles County, Mark Brandler, J., entered judgment and order denying new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was sufficient to show that defendant knew that he was dealing with stolen property.

Judgment and order affirmed.

1. Receiving Stolen Goods ☞8(4)

In prosecution for receiving stolen property, evidence was sufficient to show

2. Now 10 U.S.C.A. § 2667.

* Opinion vacated 331 P.2d 42.

that defendant knew that he was dealing with stolen property. West's Ann.Pen. Code, § 496.

2. Receiving Stolen Goods §9(1)

In prosecution for receiving stolen property, whether defendant knew that the goods were stolen property was a question of fact to be resolved from all the circumstances in evidence. West's Ann.Pen. Code, § 496.

3. Receiving Stolen Goods §8(4)

In prosecution for receiving stolen property, it is unnecessary for the people to prove actual and positive knowledge of defendant that the goods were stolen property; the element of guilty knowledge may be shown by evidence from which such knowledge may be inferred; such knowledge may be inferred from the circumstance that when questioned about the ownership of the stolen property the defendant gave false and evasive answers. West's Ann.Pen.Code, § 496.

4. Receiving Stolen Goods §9(1)

In prosecution for receiving stolen property, although defendant denied having had guilty knowledge that the goods were stolen property, the effect to be given to his testimony was a matter for determination of the jury; the jurors were not required, as a matter of law, to give credence to testimony of witness who asked defendant to transport the goods that he did not tell defendant that he thought the goods had been stolen. West's Ann.Pen. Code, § 496.

5. Criminal Law §507(1)

In prosecution for receiving stolen cameras, officers who testified as to statements made by defendant while defendant was being questioned about his possession of the stolen cameras were not accomplices and their testimony was not required to be corroborated. West's Ann.Pen.Code, §§ 496, 1111.

6 Criminal Law §1036(1)

The admissibility of evidence allegedly obtained by means of an unlawful search and seizure will not be reviewed on appeal in absence of proper objection in trial court.

7. Arrest §63(4), 71

Where officers saw defendant commit a traffic violation and automobile door was standing open and when the officer looked inside he saw gunny sacks and at least one camera and defendant gave evasive replies to police officer's questions, the officer had right to halt the automobile and to conclude that cameras were stolen property and that defendant was implicated in the theft, and officer could arrest defendant and lawfully seize the cameras as an incident of the arrest.

8. Criminal Law §1036(1)

Where defendant did not assert that he was coerced into making a confession or any admission of guilt because of police brutality, defendant could not claim that alleged beatings deprived him of a fair trial.

Jack Hyde, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

By amended information Jack Hyde was charged in Count I with burglary and in Count II with receiving stolen property. It was also alleged that he had suffered two prior felony convictions and had served separate terms of imprisonment in state prison therefor, to wit, convictions of robbery in California in 1947 and 1952. Defendant pleaded not guilty and admitted the prior convictions as alleged in the amended information. Trial was to a jury which found him guilty of receiving stolen property but not guilty of burglary. Defendant's motion for a new trial was denied. Probation was likewise denied and Hyde was sentenced to state prison for the term prescribed by law. He appeals from the judgment and the order denying him a new trial.

The conviction of receiving stolen property was based upon evidence of the following facts. On the morning of August 11, 1956, between 70 and 80 pieces of

camera equipment of the value of over \$13,000 were found to be missing from the Pan Pacific Camera Company in Los Angeles. Mrs. Libby Kaner, owner of the store, testified that the missing equipment had been on the shelves at closing time on the preceding evening and that she had given no one permission to remove the items. Among the missing equipment was a Reflecta camera, a Dittar camera and a Revere stereo camera.

At about 11 p. m. on the night of August 16, Officers Johnson and Atkisson of the Los Angeles Police Department were on duty in a patrol car at the intersection of Pico Boulevard and Clark Drive in the City of Los Angeles. They observed two cars, one closely following the other, make a left turn from Clark Drive onto Pico Boulevard. The two cars then turned south off Pico onto Robertson Boulevard. Both automobiles failed to stop for a pedestrian who was attempting to cross Robertson in the crosswalk. The officers stopped the nearest automobile and Johnson stepped out of the patrol car to speak to the driver. Officer Atkisson drove on alone and halted the other automobile about half a block away.

Officer Johnson testified that as he approached the car defendant stepped out, leaving the door standing open, and asked what was wrong. Johnson told him that he had failed to stop for a pedestrian in a crosswalk; defendant said that he had stopped. At the officer's request defendant exhibited his driver's license. Johnson asked defendant who owned the car and Hyde said it belonged to his wife. Johnson looked on the steering column for the registration slip but did not find one. Defendant showed the officer a registration slip which he carried in his wallet.

Johnson then shined his flashlight into the interior of the car and observed six gunny sacks which completely filled the rear floor and seat. He saw a camera protruding from one of the sacks and some shiny metal beneath it. Johnson asked defendant what was in the sack. Hyde said he was moving to a rented house in

Culver City and that the sacks contained personal belongings. He then admitted that there were cameras in the gunny sacks. Johnson asked defendant what business he was in and Hyde replied that he was a camera salesman. Johnson said that it was strange for a man in the camera business to carry cameras around in a gunny sack in the back-end of his car. Defendant said: "Well, there is no use talking about it here." The officer said: "I think you are a burglar. A few nights ago * * * I read a teletype where a camera store in Hollywood had been burglarized and approximately \$20,000 worth of camera equipment was taken." Johnson then arrested defendant on suspicion of burglary.

Shortly thereafter, Officer Atkisson returned to the scene and asked defendant where he had obtained the cameras and defendant replied that he had nothing to say and that he wanted to go to the police station. En route to the station in the patrol car Officer Johnson again asked defendant where he had obtained the cameras. Defendant said: "A fellow had given them to me" but when asked to identify this person he said: "Well, I would be a raving idiot to tell you who. I don't want to talk to you. I want to talk to some one higher up who could do something good." At the police station the gunny sacks were removed from defendant's car and a list made of their contents. The gunny sacks were found to contain the three cameras subsequently identified as being among those missing from the camera shop on August 11. The cameras were received in evidence.

Detective Northrup of the Los Angeles Police Department was the investigating officer in the case. He testified that he had a conversation with defendant on the morning of August 17 at the police station. He asked defendant about the cameras and told him that they had been taken in a burglary. Defendant replied that he could say nothing about the burglary except that he did not commit it. He said that he was merely delivering the equipment for some one else and that he was "going to get a

couple of bills" for his services. He also said: "I cannot tell you who I picked it up from or who I was going to deliver it to."

Joe Larios testified on behalf of defendant. He stated that on August 11th or 12th he received about 60 cameras and other photographic equipment in six burlap bags in his hotel room at the Missouri Hotel in Los Angeles. The cameras were delivered to him by one Tom McGowan. Several days later McGowan called Larios and told him that he had arranged to sell the cameras and to have them delivered to one Red Cole at a tavern near Pico and Robertson Boulevards. In the early evening of August 16th Larios telephoned defendant and asked him to make a delivery with his car in return for \$10. Defendant did not ask what he was to deliver and Larios did not tell him during the telephone conversation. Just before 8 p. m. defendant parked his car in the lot adjoining the Missouri Hotel and went to a drugstore to buy a pack of cigarettes while Larios loaded the gunny sacks into the car. Hyde returned as Larios was loading the last two sacks and asked what Larios was putting in the automobile—"What is it, melons?" Larios replied "No, cameras." Larios stated that he suspected that the gunny sacks contained stolen property but that he did not tell this to defendant. Larios told defendant to deliver the cameras to Cole at the tavern.

Defendant, testifying in his own behalf, stated that he had previously delivered merchandise for Larios in his car. He denied knowing that the cameras were stolen. After picking up the cameras he drove to the tavern, where he waited for several hours but did not find Cole. He left the tavern and was driving on Robertson Boulevard when he was stopped by the officers. He denied telling Officer Johnson that he was moving, that the gunny sacks contained his personal belongings, or that he was a camera salesman. He stated that he told the officers he was delivering the cameras for another man who sold cameras. He admitted mak-

ing a statement to the officers that if he told anything about this he would be a raving idiot, but he only used the phrase after being beaten at the police station. He first learned that the cameras were stolen property when he was shown a teletype at the station. He admitted telling Officer Northrup that he could not say anything about the burglary except that he did not do it, but he denied telling Northrup that he was to get two bills which "in the vernacular" would mean \$200.

Upon request for appointment of counsel on the present appeal the court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals for report to the court as to possible merit in the appeal. The matter was assigned to a member of the committee who has made written report to the court stating that the record had been examined and that in the opinion of the attorney it disclosed no meritorious ground of appeal. Defendant was duly so advised and his time to file a brief was substantially extended. He has filed a brief in propria persona. It is adequate as a presentation of all the points that could be urged in his behalf. We have made a thorough examination of the record and have discovered no insufficiency of the evidence and no error at the trial.

Defendant argues the following points in his brief: (1) The evidence was insufficient to support the verdict; (2) The court erred in permitting the officers to testify as to their conversations with him; (3) The court erred in admitting evidence obtained through an unlawful search and seizure; (4) He was denied due process of law.

[1] The first contention to be noticed is that there was insufficient evidence to show that defendant knew he was dealing with stolen property. The argument is without merit.

[2-4] Section 496 of the Penal Code provides in part: "1. Every person who buys or receives any property which has been stolen * * *, knowing the same to be * * * stolen * * *, is pun-

ishable by imprisonment * * *.” Whether defendant knew that the cameras were stolen property was a question of fact to be resolved from all the circumstances in evidence. *People v. Boyden*, 116 Cal.App.2d 278, 288, 253 P.2d 773. It was unnecessary for the People to prove actual and positive knowledge on his part, as the element of guilty knowledge may be shown by evidence from which such knowledge may be inferred. *People v. Juehling*, 10 Cal.App.2d 527, 531, 52 P.2d 520. It is well-settled that guilty knowledge may be inferred from the circumstance that when questioned about the ownership of the stolen property, the accused gave false and evasive answers. *People v. Boyden*, supra, 116 Cal.App.2d 278, 288, 253 P.2d 773, and cases cited. From the conflicting statements made by Hyde to Officers Johnson, Atkisson and Northrup in accounting for the presence of the cameras in his car, the jurors could reasonably conclude that he knew the cameras were stolen property. Although defendant denied having had guilty knowledge the effect to be given to his testimony was a matter for the determination of the jury. *People v. Toliver*, 90 Cal.App.2d 58, 61, 202 P.2d 301. The jurors were likewise not required, as a matter of law, to give credence to the testimony of Larios that he did not tell defendant that he thought the cameras had been stolen. *People v. Gould*, 111 Cal.App.2d 1, 6, 243 P.2d 809. In our opinion the verdict was amply supported by the evidence.

[5] Defendant’s second contention is that the court erred in permitting the officers to testify as to the statements made by him while being questioned about his possession of the stolen cameras. In this connection defendant argues that the officers’ testimony as to his replies was not corroborated by other evidence. The argument cannot be maintained. Corroboration is not a statutory requirement in a prosecution for receiving stolen property. Defendant quotes extensively from *People v. Reingold*, 87 Cal.App.2d 382, 197 P.2d 175, but that case is not in point. The *Reingold* case discusses the rule requiring the corrobora-

tion of accomplice testimony and it cannot be contended that the officers were accomplices of defendant in committing the offense for which he was on trial. Pen. Code, § 1111.

[6,7] A third contention is that the cameras taken by the officers from defendant’s car should have been excluded from evidence for the reason that they were obtained through an unlawful search and seizure. There are several reasons why the argument is without merit. Defendant was represented by counsel at the trial and his counsel did not object to the introduction of the cameras in evidence. It is established that the admissibility of evidence allegedly obtained by means of an unlawful search and seizure will not be reviewed on appeal in the absence of a proper objection in the trial court. *People v. Kitchens*, 46 Cal.2d 260, 262–263, 294 P.2d 17. Further, there can be no doubt of the lawfulness of the officers’ actions in the present case. They had the right to halt defendant’s car after they saw him commit a traffic violation. The car door was standing open and when Officer Johnson looked inside, the gunny sacks and at least one of the cameras were clearly visible. What the officer saw while looking through the open car door was admissible in evidence and was not obtained by an unreasonable search. The presence of the cameras in gunny sacks in the rear of defendant’s car, together with defendant’s evasive replies to Johnson’s questions, warranted the officer in a reasonable belief that the cameras were stolen property and that defendant was implicated in the theft. The officer was justified in arresting defendant and the cameras were lawfully seized as an incident to the arrest. *People v. Boyles*, 45 Cal.2d 652, 655, 290 P.2d 535; *People v. Coleman*, 134 Cal.App.2d 594, 286 P.2d 582.

[8] Defendant’s final contention is that he was denied due process of law in that he was beaten by the arresting officers. Defendant testified to that effect and C. T. Van Daley, a trusty at the county jail, testified that he saw a swelling on defendant’s head but that Hyde did not ask for medical

care. The officers denied striking defendant. On being asked on direct examination whether he had admitted his guilt as a result of physical violence, defendant stated that he never told the officers that he knew the cameras were stolen. No claim was made in the court below and none is advanced in defendant's brief that he was coerced into making a confession or any admission of guilt because of police brutality. There is, therefore, no merit to the argument that the alleged beatings deprived him of a fair trial.

The judgment and the order denying a new trial are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



155 Cal.App.2d 29

**Into WIRTA, Plaintiff and Respondent,
v.**

**John VERGONA et al., Defendants,
Irving V. Willat, Appellant.**

Civ. 9161.

District Court of Appeal, Third District,
California.

Nov. 6, 1957.

Action was brought to recover balance due under contract for sale of redwood logs. The Superior Court, Humboldt County, Carl L. Christensen, Jr., J., entered an order denying the motion of the defendant to change place of trial under statute authorizing trial court on motion to change places of trial when the convenience of witnesses and ends of justice will be promoted, and the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that Superior Court did not abuse its discretion in denying the motion.

Order affirmed.

1. Venue ⇐51, 52(1)

Under statute authorizing trial court on motion to change place of trial when convenience of witnesses and ends of justice will be promoted, it is not only necessary that convenience of witnesses be served, but it is equally essential that ends of justice be promoted. West's Ann.Code Civ.Proc. § 397, subd. 3.

2. Venue ⇐52(1)

Mere numerical majority of witnesses on one side or the other does not necessarily determine merits of motion to change places of trial under statute authorizing trial court on motion to change place of trial when convenience of witnesses and ends of justice will be promoted. West's Ann.Code Civ.Proc. § 397, subd. 3.

3. Appeal and Error ⇐965

Venue ⇐51, 52(1)

Granting or refusal of motion to change place of trial under statute authorizing trial court on motion to change place of trial when convenience of witnesses and ends of justice will be promoted, rests largely in discretion of court, to which motion is addressed, and in order to reverse such order, it must be clearly shown that trial judge abused his judicial discretion in denying change. West's Ann.Code Civ.Proc. § 397, subd. 3.

4. Venue ⇐51, 52(1)

Trial court did not abuse its discretion in denying motion to change place of trial under statute authorizing trial court on motion to change place of trial when convenience of witnesses and ends of justice will be promoted. West's Ann.Code Civ.Proc. § 397, subd. 3.

Alvin B. Baronov, Beverly Hills, for
appellant.

Hill & Hill, Eureka, for respondent.

VAN DYKE, Presiding Justice.

Irving V. Willat, the sole defendant served with process herein, having answered the complaint, moved the court that the place of trial be changed from the

County of Humboldt to the County of Los Angeles upon the grounds that thereby the convenience of witnesses and the ends of justice would be promoted. He appeals from an order denying his motion.

By the complaint herein plaintiff alleged as follows: That defendants John Vergona, Joseph Lombardi and Irving V. Willat were copartners doing business as the Redwood Lumber Company and that each of them so held himself out to be such partner; that plaintiff and Redwood Lumber Company entered into a contract whereunder plaintiff agreed to sell redwood logs to the partnership; that plaintiff delivered logs pursuant to the contract and that there was a balance unpaid thereon for which plaintiff brought suit; that in entering into the contract plaintiff had relied upon the representations of said three defendants that they were all copartners in said business.

By appellant Willat's answer he denied that he was a member of the partnership or had represented himself so to be, but he did not deny the existence of the partnership or that John Vergona and Joseph Lombardi were partners therein. For want of information and belief he denied the making of the contract, the performance thereof, and that any balance was due for logs delivered.

In support of his motion for a change of the place of trial, appellant filed an affidavit by himself and ten affidavits by others.

We think it unnecessary to relate in detail the contents of each affidavit. Most of them were by persons who had been employed at one time or another and in different capacities by the partnership and who averred that no statements had ever been made to them to the effect that appellant was a member of or interested in said partnership. Some said they had been either bookkeepers or accountants or tax consultants for the partnership and that the books and records of the partnership which had been in their custody or come under their observation did not reflect that Willat was a partner. Some of the affida-

vits showed that statements had been made to them by the two admitted partners to the effect that Willat was not a partner. One affidavit was by a manager of a branch bank in Los Angeles who testified that for years the partnership had maintained accounts with the bank and had obtained loans of money from the bank which had been negotiated through him and that he had never been informed that Willat was a member of the partnership; that the obligations of the partnership to the bank had not borne his signature; that his name had not appeared on any of the dealings between the bank and the partnership as shown by the bank's record. It was also shown that prior to the time this action was begun Vergona and Lombardi and the partnership had been adjudicated bankrupts; that plaintiff had filed his claim in said proceedings for the same debt herein sued upon; that all of the books and records of said partnership were in the custody of the trustee in bankruptcy and would be in such custody until the bankruptcy proceedings were ended.

Respondent, by his complaint, seeks to recover, first, upon allegations that Willat was a member of the partnership and as such liable to him for the debt he sues on; second, that if he was not such partner then he is still estopped to deny his status as such by reason of the representations made to respondent upon which respondent relied in contracting with and extending credit to the partnership. Appellant argues that it would be difficult to prove that the books and records of the partnership do not show any interest of appellant therein as a partner without the production of said books and records and that because they are in the possession of the trustee in bankruptcy he will be unable to present them in Humboldt County for that purpose. As related to respondent's reliance upon membership in fact, such argument is persuasive. However, it could not be said appellant cannot make his proof through deposition. With respect to the other affidavits on the same issue of membership in fact, many of the averments would be hearsay and inadmis-

sible. All of it would be quite inconclusive because, of course, it would be entirely possible that a great many people who, in one way or another, had dealt with the admitted partnership could truthfully assert they had never heard of appellant being a member thereof. With respect to the issue of liability through representation none of the matter averred by those who filed affidavits in support of appellant's motion would be material or admissible. On this subject, appellant asserts he never made such representations to respondent, but respondent's affidavits contain assertions that the representations were made and that they were made by appellant and that they were made solely within the County of Humboldt. Obviously, then, the most convenient place for the trial of the issue of representation would appear to be the County of Humboldt.

[1-3] Under Section 397, subdivision 3, of the Code of Civil Procedure, which authorizes a trial court on motion to change the place of trial when the convenience of witnesses and the ends of justice will be promoted, it is not only necessary that convenience of witnesses be served, but it is equally essential that the ends of justice be promoted. *Churchill v. White*, 119 Cal.App.2d 503, 259 P.2d 974. A mere numerical majority of witnesses on one side or the other does not necessarily determine the merits of the motion. *Figley v. California Arrow Airlines*, 111 Cal.App. 2d 285, 244 P.2d 472. The granting or refusal of a motion to change the place of trial under this section rests largely in the discretion of the court to which the motion is addressed and in order to reverse such order it must be clearly shown that the trial judge abused his judicial discretion in denying the change. *Churchill v. White*, supra; *Baird v. Smith*, 21 Cal.App. 2d 221, 68 P.2d 979; *Maselli v. E. H. Appleby and Co., Inc.*, 117 Cal.App.2d 634, 256 P.2d 618.

[4] We think this is peculiarly a case where the matter should be left to the discretion of the trial judge. The proof

falls far short of showing an abuse of discretion.

Accordingly, the order appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



155 Cal.App.2d 59

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Benjamin RUIZ, Defendant and Appellant.
Cr. 1327.

District Court of Appeal, Fourth District,
California.

Nov. 7, 1957.

Defendant was convicted of having possession of a narcotic, marijuana, in violation of Health and Safety Code. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Barnard, P. J., held that fact that part of contraband narcotic was found in defendant's pocket and part of it was found near him in his automobile was not sufficient to show separate and distinct offenses and did not require an election to prosecute on a separate charge or a separate trial for each alleged criminal act.

Judgment affirmed.

Criminal Law ⇐618, 678(1)

Fact that part of contraband narcotic was found in defendant's pocket and part of it was found near him in his automobile was not sufficient to show separate and distinct offenses and did not require an election to prosecute on a separate charge or a separate trial for each alleged criminal act. *West's Ann.Health and Safety Code*, § 11500.

J. Perry Langford, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant was charged with the possession of a narcotic, to wit, marijuana, in violation of section 11500 of the Health and Safety Code. He was also charged with a prior conviction of burglary. He pleaded not guilty but admitted the prior conviction. A jury found him guilty as charged in the information, and he has appealed from the judgment and from an order denying his motion for a new trial.

The appellant did not put on any evidence and the facts are undisputed. About 2 a. m. on March 18, 1957, two officers of the San Diego Police Department, while on patrol duty, observed a car parked on a lot. The driver was sitting in the car facing out the door with his feet out of the car, and he appeared to be ill. The officers turned around and as they were returning to the scene they saw the car being driven away slowly and weaving back and forth across the center line. They stopped the car which was being driven by the appellant. When asked to get out of the car the appellant staggered slightly and, in response to a question, said that he had had a couple of drinks. The officers gave the appellant some sobriety tests and found that he had difficulty in standing on one foot and that he weaved from side to side. When a flash light was passed across his eyes it was seen that there was very little contraction. The officers concluded that appellant was under the influence of alcohol or something else, and placed him in the back of the police car. One of the officers then proceeded to search the appellant's automobile. Under the front seat he found a portion of a cigarette wrapped in a brown paper. When asked if he knew anything about this the appellant replied that it was not his and that he "had been off the stuff for quite a while". He stated that the car was his, the car was im-

pounded, and the appellant was taken to the police station and booked.

The next morning one of the officers had a conversation with the appellant in which the appellant stated that he had not used any marijuana lately; that he knew nothing about this partial marijuana cigarette found in his car; that since he had owned the car no one had been in the car who used or smoked marijuana; that no one had driven the car since he owned it; and that the trousers he was wearing were his, and they were clean when he put them on the night of his arrest. The officers then searched the appellant's car and found a marijuana seed directly behind the driver's seat, and several particles of green vegetable matter on the floor of the car and under the rear seat. They also took debris from all of the pockets of the trousers that the appellant was wearing. The partial cigarette, the particles of green vegetable matter removed from appellant's car, and the debris removed from his trousers were all examined by a qualified expert and all found to contain marijuana.

The appellant's sole contention is that the court erred in denying his motion "to require the prosecution to elect the offense upon which they were relying to support the charge in the information." The record shows that during the prosecution's opening argument to the jury appellant's counsel interrupted and asked that the prosecution be required to elect "as to which narcotic he is referring to", whether he was relying on the partial cigarette found in the car or the other substances found in the car and in appellant's clothing. This motion was denied. It is argued that there was evidence of three separate acts of possession, referring to the cigarette, the marijuana found in his pockets and that found on the floor of his car; that it cannot be told which of these three offenses he was convicted of; and that since the prosecution offered evidence of more than one offense of the same kind while only one offense was charged it was required to elect the particular offense upon which it relied, citing *People v. Williams*, 133 Cal. 165, 65 P. 323; *People v.*

Hatch, 13 Cal.App. 521, 109 P. 1097; People v. Ruiz, 48 Cal.App. 693, 192 P. 327; and People v. Lawrence, 141 Cal.App.2d 630, 297 P.2d 144. In the first three of the cases thus cited the evidence showed separate offenses at different times. In People v. Ruiz, the offenses occurred only a few minutes apart but at a different place. In People v. Lawrence, it was pointed out that all of the acts occurred on the same day and within a short period of time, although an additional reason for affirming the case appeared in the fact that no demand for an election had been made. In another case, People v. Enright, 140 Cal.App. 649, 35 P.2d 1033, while there were separate acts the court stated that "The acts here complained of were perpetrated on the same occasion and within a few moments of each other, constituting one continuous felonious act."

In the instant case the only possession involved occurred at one place and at one time, and it did not involve separate acts in any real and practical sense. Only one act of possession was charged and the evidence showed but one act of possession at one time and place. The fact that part of the contraband was in the appellant's pockets and a part was near him in his automobile, is not sufficient to show such separate and distinct offenses as to require an election within the meaning and intent of the rule of law relied on by the appellant. The evidence disclosed that all of the marijuana involved was on the appellant's person or in a near-by place which was under his dominion and control, and it was all a part of one act of possession. The finding of marijuana in the car and in appellant's pockets was all a part of the same incident and cannot reasonably be held to constitute separate offenses, each complete in itself, and each of which would require a separate charge or a separate trial. People v. Jefferson, 123 Cal.App.2d 219, 266 P.2d 564; People v. Knight, 35 Cal.App.2d 472, 96 P.2d 173. The appellant admits that the possession of marijuana is a continuing offense and it logically follows that the possession of it in two or three places on or near his person at the same time does not

constitute two or three separate offenses within the meaning of this rule.

No prejudicial error appears and there is nothing which even tends to indicate that a miscarriage of justice has occurred.

The judgment and order are affirmed.

GRIFFIN, J., concurs.



155 Cal.App.2d 117

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Bruce Alexander MacEWING and Sam
Eugene Hewett, Defendants and
Appellants.**

Cr. 5754.

District Court of Appeal, Second District,
Division 3, California.

Nov. 8, 1957.

Hearing Denied Dec. 30, 1957.

Defendants were convicted of conspiracy to commit abortion and abortion, and from judgments of the Superior Court of Los Angeles County and orders denying motions for new trial, Beach Vasey, J., the defendants appealed. The District Court of Appeal, Shinn, P. J., held that there was sufficient corroboration of the corroboratee to support the conviction and that instructions were either not erroneous or if error not prejudicial.

Judgments affirmed.

Opinion, 314 P.2d 977, vacated.

I. Criminal Law §406(1)

In prosecution for conspiracy to commit abortion and abortion, admitting conversation between defendant and arresting officer, wherein defendant told the officer that he knew the codefendant and had asked someone in codefendant's office if an abor-

tion could be arranged, was admissible as admission. West's Ann.Code Civ.Proc. § 1870; West's Ann.Pen.Code, § 1102.

2. Criminal Law ⚖️511(2)

Corroborating evidence is sufficient if it tends to connect the accused with the commission of the crime in such a way as reasonably may satisfy the jury that the witness who must be corroborated is telling the truth, and it must be considered without aid of testimony which is to be corroborated, and is insufficient if it requires interpretation and direction of such testimony in order to give it value. West's Ann.Pen.Code, § 1108.

3. Criminal Law ⚖️511(1, 3)

Corroborating evidence need not be direct but may be circumstantial, and need not extend to all the elements of the offense, nor to every detail included in the testimony of a witness to be corroborated, and is sufficient if it tends, in some slight degree to implicate the accused. West's Ann.Pen.Code, § 1108.

4. Criminal Law ⚖️741(5)

Weight of corroborating evidence is a question of fact for the jury.

5. Abortion ⚖️11

Conspiracy ⚖️47

In prosecution for conspiracy to commit abortion and abortion, evidence established sufficient corroboration of the corroboratee to support the conviction of both defendants. West's Ann.Pen.Code, § 1108.

6. Criminal Law ⚖️511(1)

Evidence to establish corroboration must go beyond a mere showing of a connection of the accused with the commission of the offense and must be sufficient of itself to satisfy the jury that the corroboratee has told the truth. West's Ann.Pen.Code, § 1108.

7. Criminal Law ⚖️1172(7)

In prosecution for conspiracy to commit an abortion and abortion, instruction on corroboration which stated an incomplete and erroneous test to the advantage of the

accused was not ground for complaint by the accused. West's Ann.Pen.Code, § 1108.

8. Abortion ⚖️13

Conspiracy ⚖️48

In prosecution for conspiracy to commit an abortion and abortion, instruction that corroboration was sufficient if it tended to connect defendant with the commission of the crime in such a way as might reasonably satisfy the jury that the corroboratee was telling the truth was not error as permitting the jury to consider the testimony of the corroboratee in determining whether corroborative evidence tended to connect a defendant with the offense. West's Ann.Pen.Code, § 1108.

9. Abortion ⚖️13

Conspiracy ⚖️48

In prosecution for conspiracy to commit an abortion and abortion, instructions that "slight" evidence or evidence which tended in a "slight degree" to connect accused with the offense would be sufficient were improper because of vagueness in use of the quoted words.

10. Criminal Law ⚖️562

Slight evidence may be sufficient to support a verdict which depends upon the sufficiency of corroborative evidence, but it can furnish no guide to jurors in determining whether the evidence is convincing to them.

11. Criminal Law ⚖️1172(2)

In prosecution for conspiracy to commit an abortion and abortion, instructions on corroboration were not prejudicial on ground that they permitted the jury improperly to add the weight of the corroboratee's testimony to that of other witnesses. West's Ann.Pen.Code, § 1108.

12. Abortion ⚖️13

Conspiracy ⚖️48

In prosecution for conspiracy to commit abortion and abortion, refusing requested instructions that if corroborating evidence is susceptible of two constructions jury must adopt the interpretation admitting the defendant's innocence and rejecting his guilt was proper as not correctly

stating the law. West's Ann.Pen.Code, § 1108.

13. Criminal Law Ⓒ814(16)

In prosecution for conspiracy to commit abortion and abortion, instructions respecting accusatory statements should not have been given where there was no occasion therefor.

14. Abortion Ⓒ13

Conspiracy Ⓒ48

Criminal Law Ⓒ1172(2)

In prosecution for committing abortion and abortion, statement in instruction respecting reaction of defendant to an accusatory statement as furnishing corroboration was error, setting up no standard and as implying that there was evidence of some reaction of the defendant to an accusatory statement that might be deemed sufficient as corroboration, but was not prejudicial under the circumstances.

Ball, Hunt & Hart, Long Beach, for appellant Bruce Alexander MacEwing.

William T. Pillsbury, Long Beach, for appellant Sam Eugene Hewett.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Los Angeles, Thomas W. Cochran, Deputy Dist. Atty., Long Beach, for respondent.

SHINN, Presiding Justice.

Bruce A. MacEwing and Sam E. Hewett were accused by information in Count I of conspiracy to commit abortion and in Count II with abortion. Trial was to a jury, which found them guilty as charged. On an appeal taken by defendants the judgments were reversed. *People v. MacEwing*, 45 Cal.2d 218, 288 P.2d 257. At the retrial, which was also to a jury, MacEwing was convicted on both counts and Hewett was found guilty of conspiracy but not guilty of abortion. Defendants' motions for a new trial were denied; Hewett was placed on probation and MacEwing was sentenced to state prison. Defendants appeal from the judgments (Pen.Code,

§ 1237), and the denial of their motions for a new trial.

[1] Mrs. Frawley, the complaining witness, testified that in April 1953 she had had sexual intercourse with defendant Hewett, who was her co-worker at the Douglas Aircraft plant in Long Beach. She subsequently consulted a Dr. Johnson and was told that she was pregnant. She informed Hewett of her condition and asked if he could help her. Hewett told her that defendant MacEwing (a licensed physician and surgeon) had performed an abortion on his sister and that he would make the arrangements with him. The next day Hewett told Mrs. Frawley that he had talked with the doctor, and gave her a handprinted card containing MacEwing's name, address and telephone number. The card was received in evidence. On August 17th Mrs. Frawley visited the doctor's office, where she was examined and was told that the price would be \$400; she returned on August 20th and paid the \$400 to a nurse. MacEwing then performed the abortion. The next day Mrs. Frawley talked to the doctor on the telephone and he asked her if she had miscarried; on learning that she had not, he said that he would see her on the 24th. On that date she went to MacEwing's office and was given several hypodermic injections to bring on cramps. She left by taxi and late that evening she had a miscarriage. On August 30th she called Dr. Johnson, who sent her to a hospital where she remained for several days. She described in detail the offices occupied by MacEwing and the jury was taken to view the premises.

Dr. Bernard Johnson testified that on June 26th he told Mrs. Frawley she was pregnant. He saw her on the night of August 24th; she was in severe pain and told him that she had had an abortion and he examined the fetus she had expelled. A week later she had a fever and a pelvic infection which he believed was due to an abortion. He sent her to a hospital. He testified that he could find no indication that an abortion was necessary to save her life. Mrs. Frawley's mother testified that

on the night of August 24th her daughter was very sick and that she witnessed the miscarriage.

Matt Anderson, a cab driver, testified that on August 24th he received an order to go to MacEwing's office and pick up a passenger; he stated that Mrs. Frawley came out of the doctor's office looking very pale, disheveled and nervous and that he took her to an address she gave him.

On October 1, 1953, after the preliminary hearing, MacEwing was observed by George Franco, a security officer at the Douglas plant, getting out of a car on the parking lot. Dr. MacEwing was holding some handbills. When asked for identification he said his name was Case, that he worked for Rheems Manufacturing Company, that he had been at a union meeting and was trying to make a few dollars passing the handbills. One of the handbills was received in evidence. It read: "Union Civic & Morals Committee. Union Workers. This is where your funds go!! Douglas Worker, Gertrud Frawley * * * Admitted Abortion!! She figures to apply for insurance to pay. We protest! Signed—Painters dept. 559. Long Beach Douglas Plant. Swing Shift." Oval Pierce, president of the union local at the plant, testified that the handbills were not authorized by the union and that the union did not have a Civic and Morals Committee.

When Hewett was arrested he admitted to officers that he knew Mrs. Frawley and when asked by the officers whether he had made any arrangements for her regarding an abortion, he said that she had talked to him about her pregnancy and he had told her he would see if he could do something about it. He said that he knew MacEwing and that he and his brother had painted the doctor's offices several years previously. He said he had telephoned MacEwing's office but had not talked to the doctor; he told a woman at the office that he was trying to get help for a pregnant girl who wanted to get rid of her baby; the woman at the office told him that it couldn't be done. When MacEwing was

arrested he denied knowing Mrs. Frawley. Neither defendant testified.

The first assignment of error on behalf of Hewett is that the court erred in receiving in evidence the conversation between Hewett and the arresting officer. It is argued in this connection that Hewett's extra-judicial statements were not to be interpreted as an admission of wrongdoing, hence the officer's testimony was hearsay and should have been excluded. The argument is without merit. Evidence may be given of the acts, declarations and omissions of a party. Code Civ.Proc. § 1870; Pen.Code, § 1102. Hewett told the officer that he knew MacEwing and had asked someone in MacEwing's office if an abortion could be arranged. His statements were relevant. They were an admission that he was ready and willing to make an arrangement with MacEwing for an abortion and were logically related to the existence of a conspiracy. The officer's testimony was therefore properly received as an admission. 19 Cal.Jur.2d 133-36; *People v. Cavanaugh*, 44 Cal.2d 252, 266, 282 P.2d 53.

The next assignment of error to be considered is the contention of Hewett that the evidence tending to implicate him was legally insufficient as corroboration of the testimony of Mrs. Frawley. Pen.Code, § 1108.

[2] The rules governing the sufficiency of corroborating evidence were stated in the opinion of the Supreme Court on the prior appeal. Corroborating evidence is sufficient if it tends to connect the accused with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth; it must be considered without the aid of the testimony which is to be corroborated, and is insufficient if it requires the interpretation and direction of such testimony in order to give it value. *People v. MacEwing*, supra, 45 Cal.2d 218, 224-225, 288 P.2d 257, and cases cited.

[3,4] Corroborating evidence need not be direct but may be circumstantial. It need not extend to all the elements of the offense, nor to every detail included in the testimony of the witness to be corroborated, and it has been held that it is sufficient if it tends, in some slight degree, to implicate the accused. *People v. Griffin*, 98 Cal.App.2d 1, 24-25, 219 P.2d 519, and cases cited. The weight of the corroborating evidence is a question of fact for the jury to determine. *People v. Trujillo*, 32 Cal.2d 105, 112, 194 P.2d 681.

[5] The admissions of Hewett were sufficient as evidence that he was willing and endeavored to arrange with MacEwing for the performance of an abortion. It could have been inferred from evidence, other than the testimony of Mrs. Frawley, that she did not know Dr. MacEwing, or, at least, that Hewett believed them to be unacquainted, since he endeavored to contact the doctor for her. There was evidence other than that of Mrs. Frawley that she did go to the doctor's office; and it was a fair inference that she went to see him at the suggestion of Hewett. Although there was no direct evidence of any communication between Hewett and the doctor it was significant that instead of giving up the idea of enlisting the services of the doctor, after learning of Hewett's unsuccessful request by telephone (assuming the truth of his admissions), Mrs. Frawley visited the doctor. And it is scarcely conceivable that Mrs. Frawley would have failed to inform the doctor that she had come to him at the suggestion of Hewett. In the usual course of events the woman who had received the telephone call of Hewett would have made a report of it to the doctor. When it is considered that Hewett felt some responsibility to render assistance to Mrs. Frawley, and that but for his advice and efforts she would not have gone to the doctor, who was a stranger to her, it was not an unreasonable

inference that Hewett had contacted the doctor, disclosed to him the purpose he and Mrs. Frawley had in mind, and obtained his consent to perform the operation. We deem the corroborative evidence sufficient as to Hewett.

We are also of the opinion that there was sufficient corroboration of Mrs. Frawley's testimony with respect to the case against MacEwing. There are two phases of the problem where corroboration is required. The first is the question whether the evidence elicited from the corroborator, considered entirely apart from that of the corroboratee,¹ fairly, reasonably and logically tends to connect the defendant with the commission of the offense. This may be referred to as the initial test; if the evidence falls short of its objective it is to be disregarded, and the attempted corroboration fails. No question remains as to the credibility of the corroboratee or the truth of her testimony.

Counsel for MacEwing correctly say: "The law of the case required the lower court to instruct the jury that they were to assume that Frawley's evidence was removed from the case and that they were to then examine all other evidence in the case and determine if it clearly and logically permitted the jury to infer that the defendant was connected with the offense charged (*People v. MacEwing*, supra, 45 Cal.2d 218, 288 P.2d 257)."

At the request of MacEwing the court gave such an instruction as follows: "In determining whether or not the testimony of the witness Frawley has been corroborated as required by law, you must for the purpose only of deciding the special issue of corroboration as required by section 1108 of the Penal Code, assume to be removed from the case, all of the testimony of the witness Frawley and then examine all other evidence with the view of determining if that evidence tends to connect the defendant with an offense charged

1. For reasons we believe are obvious, instead of referring to Mrs. Frawley as "the person to be corroborated" or "the

witness whose testimony required corroboration" etc., we shall designate her as the "corroboratee."

in the information. If such other evidence does in and of itself and without the aid of Frawley's testimony tend to connect the defendant with the commission of an offense alleged in the information, then the testimony of the witness Frawley would be corroborated; if such other evidence does not in and of itself tend to connect the defendant with the commission of an offense alleged in the information, there is no corroboration although the witness Frawley may be corroborated in regard to any number of facts sworn to by her."

We shall first consider MacEwing's contention that as a matter of law the evidence failed to meet the above test in that it did not tend reasonably to prove his connection with the commission of the offense.

The testimony of Dr. Johnson and that of Mrs. Frawley's mother was sufficient to prove that Mrs. Frawley had suffered a miscarriage and that it was due to her having submitted to an abortion. The testimony of Matt Anderson, the cab driver, was sufficient to prove that Mrs. Frawley came out of MacEwing's office and entered his cab looking pale, disheveled, in a hurry and very nervous, which indicated that she had just gone through an ordeal of some sort. Suzanne Lee Perry, a witness for the People, testified that she went to work for Dr. MacEwing in May as an office assistant but gave injections to patients under his direction; Mrs. Walling, another nurse, was on vacation during the month of August and there were then in the clinic only Miss Hobson and Dr. MacEwing. Katherine Lee Hobson, a witness for the People, testified that she went to work for Dr. MacEwing in June as a bookkeeper and receptionist. She testified that another doctor, Wade Walker, has been "there" ever since she had been employed in Dr. MacEwing's office. She was not questioned whether he was present when Mrs. Frawley was seen leaving the office. At the time of Dr. MacEwing's arrest he was informed as to the identity of the complaining witness and he denied to the officer knowing Mrs. Frawley or ever having seen her. There was also testimony

as to an occurrence of minor significance, namely, that Dr. MacEwing was found on the premises of Douglas Aircraft in the possession of the handbills we have previously mentioned and that he gave the officer who questioned him a fictitious name and an untrue account of his activities.

It is earnestly insisted that this was insufficient evidence to prove MacEwing's connection with the offense charged. Each item of evidence is discussed as insufficient in itself to establish such a connection. The incidents were not to be considered one by one, but each with respect to its relation to the others. It is suggested that the fact that Mrs. Frawley emerged from the offices no more indicated that she was a patient of Dr. MacEwing than that she was Dr. Walker's patient; however, the fact that she was leaving the office in a distraught condition placed Dr. MacEwing under suspicion with relation to this precise point. We think the jury had a right to consider his failure to testify as a circumstance tending to prove that Mrs. Frawley was not Walker's patient, since if she had been a patient of Dr. Walker, MacEwing would have known it, and it would have been within his power to testify to the fact in order to free himself from responsibility for her presence in the office. We do not doubt that from the foregoing evidence the jury could reasonably have concluded that Mrs. Frawley was Dr. MacEwing's patient on August 24th, and that the operation was performed in his office; and we must assume that in reaching this conclusion the jury, in obedience to the instructions, gave no consideration to the testimony of Mrs. Frawley. It follows that the evidence was sufficient to prove MacEwing's connection with the offense. This, however, is not the ultimate test.

The second phase of the problem arises if and when the jury has concluded, in accordance with the foregoing formula, that the corroborative evidence reasonably tends to connect the defendant with the commission of the offense.

[6,7] Under well-settled rules, reaffirmed by the Supreme Court on the former appeal, the evidence necessary to establish corroboration must go beyond a mere showing of a connection of the accused with the commission of the offense. It must be sufficient of itself, to satisfy the jury that the corroboratee has told the truth. The instruction we have quoted ignored this requirement and stated an incomplete and erroneous test. It is, of course, a requirement that is of advantage to the accused, since it calls for a more rigorous test. In this inquiry it becomes necessary for the jury to compare the corroborative evidence with the testimony of the corroboratee, since it is by such comparison that the sufficiency of the independent evidence to prove the credibility and the truthfulness of the testimony of the latter is to be determined. If the corroborative evidence dovetails with and strengthens that of the corroboratee, in whole or in material part, with respect to one or more of the elements of the offense, so as to reasonably convince the jury that the corroboratee has testified to the truth, credibility is established, and the corroboration is sufficient to allow reliance upon the testimony of the corroboratee in its entirety. It then stands on the same footing as testimony that does not require corroboration.

[8] At the request of the People the court instructed as follows: "You are instructed that the corroborating evidence legally necessary to sustain a conviction of either the crime of conspiracy to commit abortion as charged in Count I of the information or the crime of abortion as charged in Count II, is sufficient if it tends to connect a defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated—Gertraud Frawley—is telling the truth."

It is contended that it was error to give the instruction, although it states the test approved by the Supreme Court on the prior appeal. According to the argument the instruction permitted the jury to consider

the testimony of Frawley in determining whether the corroborative evidence tended to connect a defendant with the commission of the offense in such a manner as to convince the jury that she was telling the truth. If this had been the only instruction with respect to the corroborative evidence it might have been understood by the jury as counsel for MacEwing understand it. It does not state that in comparing the corroborative testimony with that of the corroboratee the former must be accorded no weight derived from the latter. No doubt a specific instruction to that effect would have been given if it had been requested by the defendants, but such a request was not made.

Counsel for MacEwing do not question that the corroboration must be sufficient to convince the jury that the corroboratee has told the truth. They contend that the statement respecting the truthfulness of the testimony of the corroboratee ignores the quantum of proof that is required and reduces the inquiry to the sole question of the credibility of the corroboratee. It is an unavailing and untenable objection. Of course, credibility must be established. By corroboration the witness gains credibility and the testimony affected gains weight. Credibility is of the very essence of corroboration.

If the instruction had permitted the jury to consider the testimony of the corroboratee with that of the corroborator in determining whether the testimony of the latter was sufficient to prove a defendant's connection with the offense it would have been in direct conflict with the first instruction, which stated the correct rule. Such is not the case. The first instruction stated that in determining whether the evidence tended to connect a defendant with the offense, the testimony of Frawley should be deemed removed from the case, and since under the second instruction the jury was required to ascertain whether the corroborative evidence was sufficient "to connect a defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness—Gertraud

Frawley—is telling the truth,” there was no misdirection of the jury. If the jury obeyed the instruction to lay aside Mrs. Frawley’s testimony in weighing the testimony of other witnesses, the second instruction did not mislead them. The two instructions were conflicting in the delineation of the sufficiency of the corroborative evidence and the first one was erroneous as well, but of this MacEwing does not and could not complain. They were not conflicting as to the manner in which the corroborative evidence was to be weighed. As previously stated, it was to the advantage of the defendants that the jury be instructed as to the test stated in the second instruction.

[9,10] We are not by any means expressing approval of the manner in which the jury was instructed in the rules pertaining to corroboration. Certainly a single instruction could have been framed that would have stated the entire rule simply and adequately. The court gave 15 instructions on that subject. Among them were instructions that “slight” evidence, or evidence which tended in a “slight degree” to connect the accused with the commission of the offense, would be sufficient. These are words of vague meaning. They could mean many things to many people. The Supreme Court stated a test on the former appeal that is complete and easily understood. It should take the place of other tests. It is absurd to state that test and also to instruct that slight evidence may be sufficient. Slight evidence could be a very minimum of evidence, and not at all convincing. It is a rule of law that slight evidence may be sufficient to support a verdict which depended upon the sufficiency of the corroborative evidence, but it can furnish no guide to jurors in their endeavors to determine whether the evidence is satisfying or convincing to them. There was no error in giving the second instruction.

[11] We are impressed by the fact that the matter of instructions on corroboration is in need of re-examination and revision. Although we are of the opinion that the

jury was not as well instructed as it should have been, and in some respects erroneously instructed, we would be at a loss to discover any prejudice to the defendant. MacEwing’s complaint of the second instruction to the effect that it permitted the jury to improperly add the weight of Mrs. Frawley’s testimony to that of the other witnesses falls short of any showing of prejudice. The other witnesses were Dr. Johnson, Mrs. Frawley’s mother and Anderson, the cab driver. There could have been no good reason for doubting the truth of their testimony or for believing it only because it coincided with the testimony of Mrs. Frawley.

MacEwing does not contend that the testimony of Mrs. Frawley, if legally corroborated, was insufficient to justify the verdict.

[12] The next point raised by MacEwing is that the court committed prejudicial error in refusing to give his requested instruction reading: “If the corroborating evidence, if any, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the defendant and the other to his innocence, you are required under the law to adopt that interpretation which will admit to the defendant’s innocence and reject that which points to his guilt.”

The instruction was properly refused. As we have stated, the first inquiry is whether the corroborative evidence tends logically to prove the defendant’s connection with the offense. If it does, the inquiry goes further. There is no requirement that, considered by itself, it must be inconsistent with innocence. It might be sufficient as tending to show a connection with the commission of the offense and yet be consistent with innocence. It is by no means the determining factor as between guilt and innocence. It is to be weighed for a single purpose and when it accomplishes that purpose, it is to be considered with other evidence on the issue of guilt or innocence.

The rule as to equally reasonable theories is applicable to the entire direct evidence, not to each part separately. Under the rule contended for by MacEwing the judgment could not stand if the testimony of the independent witnesses was as consistent with innocence as with guilt, even though it logically tended to prove his connection with the offense and when considered with the other evidence was sufficient to establish guilt. Such a rule would be an innovation in the law of corroboration.

The court instructed as follows: "If the evidence in this case (as to any particular count) is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of a defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt. You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt." This was a correct and sufficient statement of the rule applicable to opposing reasonable interpretations of the evidence.

[13] On behalf of MacEwing it is contended that the court committed error in giving two instructions each of which related to accusatory statements. One of them stated in part "The reaction of a defendant to an accusatory statement may in itself, furnish corroboration." The other stated that the failure to reply to an accusatory statement or the making of false, evasive or contradictory statements may be considered as indicating an admission that the accusation was true, and that while

such statements would not be sufficient to prove guilt they were to be considered as a circumstance tending to prove a consciousness of guilt. There were no accusatory statements made to MacEwing and there was no occasion for instructions on the subject. They should not have been given. The officer who arrested MacEwing testified that he told MacEwing what he was being arrested for, told him that Mrs. Frawley was making the accusations, and that MacEwing replied that he had never seen her nor heard her name mentioned.

[14] The statement "The reaction of a defendant to an accusatory statement may in itself, furnish corroboration" was clearly erroneous. The question of the legal sufficiency of the corroborative evidence is one of law. The statement has no place in an instruction. It is vague and meaningless. It sets up no standard and supplies no test, but suggests that there is a test of some sort and leaves it to the jury to determine what it is. The statement also carried an implication that there was evidence of some reaction of MacEwing to an accusatory statement that might be deemed sufficient as corroboration. It was for the jury to determine, if that was possible, what reaction the court had in mind, for a so-called "reaction" might be anything from a confession to a positive denial of guilt. The implication was not removed by the additional admonition that the "reaction mentioned should be disregarded unless the accused made some statement that indicated an admission that the accusatory statement was true." The court was still speaking of a "reaction" that did not exist. It is contended that inasmuch as there was no evidence of MacEwing's conduct or statements other than his voluntary statement that he did not know Mrs. Frawley, the instruction erroneously suggested that if the jury believed he did know her, his denial that he knew her could be regarded as an indication of a consciousness of guilt. We doubt that the instruction would have been so understood. Notwithstanding the possible implication of the erroneous instructions, we do not believe the jury

could have regarded MacEwing's denial that he knew Mrs. Frawley as indicating a consciousness of guilt, or an admission of an incriminating fact. The error was not prejudicial.

The judgments as to both defendants and the orders denying their motions for a new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



154 Cal.App.2d 813

Helen Hayes OVERBY, Plaintiff and Respondent,

v.

Howard N. OVERBY, also known as Howard Newell Overby, Defendant and Appellant.

No. 17363.

District Court of Appeal, First District,
Division 1, California.

Oct. 31, 1957.

Divorce proceeding. The Superior Court, County of San Mateo, Louis B. DeMatteis, J., granted interlocutory decree and husband appealed. The District Court of Appeal, Bray, J., held that where wife had obtained interlocutory decree of divorce from her former husband on September 10, 1948 and a final decree on September 13, 1949, two days after her marriage to defendant, the full year from date of entry of interlocutory decree expired on September 10, 1949, nunc pro tunc order entering final decree of divorce as of September 10 was valid, subsequent order entering decree as of September 11, was nullity, and defendant was not entitled to an annulment of the marriage.

Affirmed.

1. Marriage ⚡58(1)

It is the duty of courts to validate a marriage rather than to find ways of destroying it.

2. Divorce ⚡162

Marriage ⚡58(5)

Time ⚡4

Where wife had obtained interlocutory decree of divorce from her former husband on September 10, 1948 and a final decree on September 13, 1949, two days after her marriage to defendant, the full year from date of entry of interlocutory decree expired on September 10, 1949, nunc pro tunc order entering final decree of divorce as of September 10 was valid, subsequent order entering decree as of September 11 was a nullity, and defendant was not entitled to annulment of marriage. West's Ann.Civ.Code, §§ 10, 132, 133; West's Ann.Code Civ.Proc. § 12; West's Ann.Gov.Code, §§ 6800, 6803, 6806.

Norman S. Menifee, Redwood City, for appellant.

Carr, McClellan, Ingersoll & Thompson, Burlingame, for respondent.

BRAY, Justice.

This appeal by defendant husband from an interlocutory decree of divorce granted plaintiff wife raises the question of how the year required to expire between the interlocutory and final decrees shall be computed.

Record.

Plaintiff sued for divorce upon the grounds of extreme cruelty. Defendant cross-complained for an annulment on the ground that plaintiff's previous marriage had not been annulled at the time of her marriage to defendant on September 11, 1949. At the trial it appeared that plaintiff had obtained an interlocutory decree of divorce from her former husband on September 10, 1948, and a final decree on September 13, 1949 (two days after her marriage to defendant). However, the day before the trial herein commenced (De-

ember 12, 1955) a final decree of divorce was ordered entered nunc pro tunc as of September 10, 1949. Defendant contended that this decree was void because a full year from the date of entry of the interlocutory decree (September 10, 1948) had not expired on September 10, 1949. The trial court herein agreed with that contention but on January 6, 1956, vacated that decree and entered a final decree of divorce as of September 11, 1949. That date was a Sunday and defendant contends that therefore the order entering the final decree as of that date is void. The court denied defendant's plea for an annulment and granted plaintiff a divorce.

If the year required by section 132, Civil Code, had expired by September 10, 1949, then this decree was valid and the court had no power to set it aside. In that event, plaintiff was fully divorced when on September 11, 1949, she married defendant. Section 132, Civil Code, provides that the final decree of divorce may be entered "When one year *has expired* after the entry of such interlocutory judgment * * *" (Emphasis added.) Government Code section 6803 provides that a year is a period of 365 days. Section 6806 provides that a day is a period of time between one midnight and the following midnight. Government Code section 6800, Code of Civil Procedure section 12, and Civil Code section 10, all provide that the time in which an act is to be done is computed by excluding the first day and including the last day. The question of the method of computing the time required between the entry of the two decrees in a divorce action heretofore has not been passed upon in this state. We see no reason why the method provided by section 12, Code of Civil Procedure, and section 10, Civil Code, should not apply. *Willson v. Superior Court*, 1948, 84 Cal. App.2d 185, 190 P.2d 333 did not discuss the method of computing but did state in a proceeding to mandamus the superior court to enter an interlocutory decree of divorce nunc pro tunc, that if the interlocutory decree were entered nunc pro tunc as of August 18, 1942, a final decree en-

tered as of August 19, 1943, would validate the petitioner's marriage on August 21, 1943. In *Ringel v. Superior Court*, 1942, 54 Cal.App.2d 34, 128 P.2d 558, a writ of mandate was issued compelling the superior court to enter a final decree nunc pro tunc as of April 2, 1932, where the interlocutory decree had been entered April 2, 1931. In *re Estate of Hughes*, 1947, 80 Cal. App.2d 550, 182 P.2d 253, held that the second marriage of the decedent was validated by a nunc pro tunc final decree as of March 4, 1927, where the interlocutory decree was entered March 4, 1926. In neither the *Ringel* nor the *Hughes* case was the method of computing the year discussed, although the ruling was such as to justify holding that the decree in the instant case was valid. Another case which would sustain that decree is *In re Halamuda*, 1948, 85 Cal.App.2d 219, 192 P.2d 781, which dealt with subdivision (b), section 701, Welfare and Institutions Code, which provides that a ward of the juvenile court may be freed from the custody of his parents if he has been such ward "for the period of one year continuously immediately prior to the filing of a petition * * *". The child had been made a ward on February 26, 1946. The petition was filed February 26, 1947. The court held that the petition was not prematurely filed. In *Kelly v. State Personnel Board*, 1939, 31 Cal. App.2d 443, 445, 88 P.2d 264, it was held that an eight months' probationary period beginning on December 20, 1934, would expire at midnight on August 19, 1935. *Cosgriff v. Board of Election Commissioners*, 1907, 151 Cal. 407, 91 P. 98, cited with approval in *In re Halamuda*, supra, 85 Cal. App.2d 219, 192 P.2d 781, dealt with the then section 1192, Political Code, requiring certain certificates of party nominations to be filed not less than twenty days before the day of election. The certificate in question was filed October 17; the election was held November 6. The court then excluded November 6 as the first day of the period and then found October 17 to be the last day of the period and included it. It then held that the certificate was filed not less

than twenty days before the day of election. By that method of computation the election was held on the 20th day which the court held was not less than twenty days after the filing of the certificate. By so doing, however, the court said that it was applying the proper rule, namely, excluding the first day and including the last day.

Section 133, Civil Code, provides: "Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed and entered, if no appeal has been taken from the interlocutory judgment or motion made for a new trial to annul or set aside the judgment or for relief under Chapter 8, Title 6 of Part 2 of the Code of Civil Procedure, the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. The court may cause such final judgment to be signed, dated, filed and entered *nunc pro tunc* as aforesaid, even though a final judgment may have been previously entered where by mistake, negligence or inadvertence the same has not been signed, filed or entered as soon as it could have been entered under the law if applied for."

In *Macedo v. Macedo*, 1938, 29 Cal.App.2d 387, 84 P.2d 552, a *nunc pro tunc* final decree was applied retroactively to a date prior to the enactment of Civil Code section 133 in validating a second marriage. The court there said (29 Cal.App.2d at page 391, 84 P.2d at page 554): "The act is both curative and remedial, and the retroactive operation of such statute should be given effect unless it disturbs some vested right or impairs the obligation of some contract. [Citations.]

"Here, however, we can perceive no vested rights in appellant. He had no vested right to dissolve his marriage status in any particular manner. In fact it would be the tendency of the law to validate the marriage

rather than to find ways of destroying it. It confirms rather than impairs the contract. Acts validating invalid contracts have been sustained where the act goes no further than to bind a party to a contract which he has attempted to enter into but which was invalid by reason of some personal inability or through neglect of a legal formality."

In *re Estate of Hughes*, supra, 80 Cal. App.2d 550, at page 553, 182 P.2d 253, at page 256, states that the purpose of Civil Code section 133 was "* * * to validate otherwise void marriages and thus relieve the parties to such marriages from the stigma and other consequences of bigamous relationships into which they might innocently fall by reason of oversight or neglect to have a final decree entered. Mere entry of the *nunc pro tunc* judgment acts retroactively to restore them to the status of single persons * * *. It is all strictly artificial, but so is the semi-divorced status occupied by the holders of an interlocutory decree."

[1] If we adopt the method used in the *Cosgriff* case, namely, start with September 10, 1949, the day as of which the final decree was ordered entered, and count 365 days back, the 365th day would be September 10, 1948, and no question could arise. Counting the other way the 365th day is September 10, 1949. We see no reason why, as assumed in the *Ringel* and *Hughes* cases, supra, the requirement that a year expire between the two decrees is not satisfied. As pointed out in the cases herein cited, it is the duty of the courts to validate the marriage rather than to find ways of destroying it. Such an interpretation would be in keeping with the ideas of the average layman. As to birthdays, it is the universal custom to consider that a year has expired from one birthday to another, that is, a year would have expired between the two September 10ths.

[2] As we hold that the order entering a final decree of divorce as of September 10, 1949, is a valid one, the order entering the decree as of September 11th was a null-

ity. The trial court properly denied the annulment.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



154 Cal.App.2d 862

Benjamin F. GUNTER, Plaintiff and Appellant,
v.

Henry COOPER et al., Defendants,
Distillery, Rectifying and Wine Workers'
International Union of America, and Win-
ery and Distillery Workers' Union Local
51, Respondents.

Civ. 5532.

District Court of Appeal, Fourth District,
California.

Nov. 4, 1957.

Action for damages for purported libel, slander and interference with contractual relations and conspiracy. Verdict for plaintiff, and the Superior Court, San Bernardino County, Martin J. Coughlin, J., granted a new trial and from the judgment and order granting a new trial and an order denying new trial, the plaintiff appealed. The District Court of Appeal, Griffin, J., held that the evidence failed to establish that individual writing the letter was duly authorized to act for and on behalf of the international union; that the trial court properly granted a new trial as to the local union; and that the plaintiff failed to sustain the claim that the letter constituted an interference with the contractual relations between the plaintiffs and his employer.

Judgment on the directed verdict and order granting a new trial affirmed. Attempted appeal from order denying new trial dismissed.

1. Labor Relations Ⓒ766

In action for libel and slander resulting in the discharge of the plaintiff from his employment, evidence was insufficient to justify imposing liability on an international union on the ground that the individual defendant purportedly instigating the charges against plaintiff was authorized to act for and on behalf of the international as its agent, where the defendant was a business representative of the local union only and international paid no officers of the local union.

2. Labor Relations Ⓒ764

In action for libel and slander resulting in alleged wrongful discharge of plaintiff from his employment, where amended complaint seeking to attach liability to the international union alleged that individual defendant allegedly procuring the discharge, was an agent of the international and acting within the scope of his employment, and to attach liability to a local union, the complaint alleged that the individual was an agent of the local and acting within the scope of his employment, pleadings were not sufficient to attach liability to the international, by reason of any claim of delegated agency to the local union.

3. New Trial Ⓒ68

In action for libel and slander allegedly resulting in the wrongful discharge of the plaintiff from his employment based on a letter written by an individual defendant, the trial court under the evidence properly granted a new trial as to the local union on the ground that there was no showing of malice in the communications. West's Ann. Civ.Code, § 47.

4. Libel and Slander Ⓒ101(4)

Under the statute, malice is not inferred from privileged communications. West's Ann.Civ.Code, § 47.

5. Appeal and Error Ⓒ979(2)

New Trial Ⓒ71

A motion for new trial is to a large extent addressed to the sound legal discretion of the court to which the application is made, and its action in granting a new trial is conclusive and will not be disturbed,

especially where the ground of the motion is insufficiency of evidence to justify the decision, and there is substantial conflict therein, in the absence of a clear and affirmative showing of manifest abuse of discretion.

6. Torts ⇨27

In action for interference with contractual relations by allegedly writing a letter which resulted in the discharge of the plaintiff from his employment, evidence showing justification for writing the letter failed to sustain a verdict for plaintiff.

John T. Tomlinson, Jr., Chino, for appellant.

Bodle & Fogel, George E. Bodle, and George M. Dell, Los Angeles, for respondents.

GRIFFIN, Justice.

This is an action for damages for purported libel, slander, interference with contractual relations, and conspiracy. From October, 1945, to November, 1949, plaintiff and appellant was a night watchman for his employer, Fruit Industries, Ltd., in Guasti, California. He alleged a letter, dated November 25, 1949, signed by defendant Henry Cooper, who died shortly after the letter was written, was sent to a Mr. Biane, superintendent of Fruit Industries, Ltd., and resulted in his discharge. The letter read in part as follows:

"A situation detrimental to the welfare and reputation of your plant has been brought to my attention. After careful investigation I find the fault lies with one of your watchmen, namely, Ben Gunter.

"Due to his character and reputation the women on the bottling line are nervous in his presence and feel they can not do their best work. To safeguard their jobs, their health and the reputation of your plant I recommend that you discharge Mr. Gunter at once.

"If this is not done immediately, for the welfare of the women, I will

stop the operation of this bottling line at once."

The complaint alleges that these statements were false and untrue; and that he suffered personal embarrassment and loss of employment. He further alleged that this communication shows, by innuendo, that Cooper meant that plaintiff was of such a character and reputation that women were nervous in his presence, feared he was likely to harm them, that he had molested women, and those reading said letter understood said words to mean this. He further alleged that Cooper was the business representative and agent of defendant and respondent Distillery, Rectifying and Wine Workers' International Union of America, an association (hereinafter referred to as International), an agent of defendant and respondent Winery and Distillery Workers' Union Local 51, an association (hereinafter referred to as Local 51), and that he was acting within the scope of his employment. He then alleged that Local 51 was affiliated with International. These latter two defendants, by answer, denied generally these allegations and particularly denied that any agency relationship existed. They did allege, however, that defendant unions were the collective bargaining agents of the employees of said employer and that the facts set out in said alleged communication were true, directed to an interested party, and they were privileged.

A jury trial was had. At the close of plaintiff's case a nonsuit was granted as to the conspiracy count pertaining to defendant Worrell, who was plant security man for plaintiff's employer. It was denied as to Union defendants except on the conspiracy counts. At the close of the case a motion for a directed verdict as to defendant International on the grounds that no evidence was produced by plaintiff to show agency between Cooper and International or to show malice or breach of contract by it was granted. A similar motion by Local 51 was denied, resulting in a jury verdict against it for \$20,000. The court granted its motion for a new trial on the ground of insufficiency of the evidence.

Plaintiff appeals (1) From the judgment in favor of defendant International; (2) From the order granting Local 51 a new trial, and setting aside the verdict of the jury; and (3) From the order denying plaintiff's motion for a new trial as to International.

The proof of malice on the part of International and that it was acting by and through its claimed business agent Cooper, or through Local 51, as its agent, is lacking in evidentiary support. The only evidence produced by plaintiff was the introduction of the constitution and by-laws of International. Its headquarters were in Washington, D. C. They show that International is affiliated with the American Federation of Labor; that its purpose is to encourage the formation of other unions; to grant charters to local unions; that any local union accepting a charter and becoming affiliated with it must accept its constitution and by-laws; that the government of all local unions and members shall be vested in the International as supreme head; that each local union shall have the right to adopt by-laws governing matters of local usage, subject to approval of International; that each local union shall have the authority to handle all grievances for and on behalf of the membership without specific authorization from any member and shall have the power to adjust and dispose of such grievances in accordance with the best interests of the local union and its membership, subject to the right of appeal to International; that the officers of each local union shall be elected by ballot; and it designates such officers.

The constitution and by-laws of Local Nos. 51 and 56 provide as their object to assist and protect members of the local unions against unjust demands and unjust conditions, and to settle differences which may arise. They also provide as a part of the duties of their members, to faithfully observe the terms of contracts between the unions and the employers, and they are authorized to employ a business representative of the local union and empowered to seek adjustment of all contro-

versies between the union and the employers.

It therefore affirmatively appears that defendant Cooper was not himself an authorized agent or representative of International, duly authorized by it, to send the communication in evidence, unless it could fairly be said from the evidence produced that the local union was International's agent and by virtue of Local 51's agency Cooper was authorized to write the letter in its behalf. In support of this claim plaintiff cites *Le Baron v. Kern County Farm Labor Union*, D.C., 80 F.Supp. 151. There was some additional evidence offered to the effect that International maintained a desk in Cooper's office located at 815 South Hill Street, Los Angeles. Later the witness corrected her testimony indicating it was Local 51 that maintained its office desk there, and that International had its office in Fresno. The letter here involved was written on a letterhead containing the printed name of International and its printed seal. Thereunder is designated the writer's address, "611 Hillstreet Building, 815 So. Hill Street." Then follows further printing: "Local Union No. 51 City of Los Angeles State Calif." It is signed "Henry O. Cooper, Representative".

There was testimony that after Cooper's death one Ethridge, a paid representative of International stationed in Fresno, temporarily took over Cooper's duties with Local 51, due to lack of funds of that particular local. He testified, however, that the local unions are strictly autonomous; that they elect their own officers and appoint their own agents; and that the International does not interfere with their local business and does not pay any of the officers or agents of the local union; that Cooper had no authority to act for International; that plaintiff contacted him (Ethridge) after Cooper's death and asked him to intercede in his behalf in having him restored to his former position as watchman; that he told him since he was a night watchman and not eligible to be a member of this local union, as he had been before, he had no jurisdiction but he would

ask his employer to reinstate him; that he did so and was unsuccessful; that for this purpose he investigated the charges contained in the letter and interviewed one of the women bottlers, a member of the local union, at the plant, and she told him plaintiff made her nervous because he "leered" at her. Mr. Biane testified that prior to the receipt of the letter he had reports come to his office about this watchman; that when the letter came he called Gunter to his office, showed him the letter in confidence, which he had taken from the safe, and that plaintiff was discharged; that the reason was this as well as a series of troubles the company had with him over a period of six months or a year and that this was the culmination of those troubles.

Defendant Worrell testified he was plant security man and not a member of Local 51; that he talked to Gunter on one occasion when the teletype wires had been shot in two causing considerable damage in the plant and plaintiff admitted shooting a bird off the wire; that on another occasion he shot at a tree and the bullet went through the print shop; that he had complaints from certain specified women employees waiting in their cars; that when they would see plaintiff coming toward them they said they were nervous and would roll up the windows and lock the doors; that plaintiff wanted to date one of the married women and she told him she was going to knock him in the head with a bottle if plaintiff said anything more to her, and he told her there was nothing he could do about it.

Plaintiff testified that the day after Thanksgiving Biane showed him the letter, gave him his final check, and said since a girl was killed in Los Angeles lately, "molesting women is hot as a firecracker"; and that the letter would stay in his safe unless plaintiff made him pull it out. (Apparently plaintiff later appeared with his attorney and the letter was examined by them.) Plaintiff then said he was not on good terms with defendant Worrell because he was always "bawling him out about something"; that about three weeks before he was discharged he felt the com-

pany was going to fire him anyway so he saw defendant Cooper about getting back into the union so it could fight the company in his behalf if he was discharged. He claims Cooper told him the company was misusing Federal stamps and asked plaintiff to "catch them at it" if he could; that he did not see Cooper after that and he did not believe Cooper had any ill will or malice toward him but that Worrell did because he, plaintiff, had reported him on one occasion for not making the rounds on one watch; that as far as the union was concerned, outside of the letter, he had nothing against it. He then denied all the accusations made in the letter and said he had been a nervous wreck for the past six years over the affair; and that his wife could not even talk to him about it. He related an occasion when he was wiping the dust off of one of the girls' desks at the plant at the request of Worrell, and one of the girls winked at him, nodded her head, and he then laid down his rag and left. He also admitted he had previously reported to the federal authorities that the company for which he was then working was using an unlawful bleach coloring in the wine and that Biane and others in the company decided he was a "trouble maker". Some verification of this attitude is contained in subsequent letters and cards written by plaintiff to Biane. One of these cards read:

"Nov. 23

"2 years to Day you and your Bunch Framed me it was Henry O Coopers I'Dea to turn the use of Carmel Coloring in Wine and the un-lawful Bleache to Federal authortier. He allso said to catch you on misuse of Federal Stamps He helped Frame some of the lies thats Been told on me You Broke up my Home."

When plaintiff discovered the name of one of the women employed by the company who had reported the conduct of plaintiff, he wrote to her ex-husband and told him the company had framed him and had bribed her to try and make their charges

(that he molested women) stand up. He told the ex-husband he wanted him to write to plaintiff and tell him "she can be bribed", and said that the winery had too many paid liars. In another letter he asked the addressee's help to induce Biane to be strapped in an electric chair and let plaintiff question him. He further accused his former attorney of being "bought off", as well as one of the Superior Court judges in another case, and concluded that there was no justice in this county or in the state either.

It appears that plaintiff applied for unemployment benefits, giving as his reason for discontinuance of his services as "Falsely accused and fired". In reply the company wrote that the reason given by plaintiff was "violation of company rules". The company rules, received in evidence, provided that "Employees shall at all times so conduct themselves toward their fellow-workmen as to make for peaceful and hearty cooperation which will aid in building up general efficiency of every department in the plant".

Plaintiff, in his testimony, admitted the woman bottler, referred to in his letter to her ex-husband, did state in the club room before the other employees that plaintiff "should be single and you can go and come as you damned please". When questioned about the letter in evidence set forth in the amended complaint, plaintiff testified there was nothing in that letter that would cause him to be nervous or upset, and he wanted to apologize to the court for signing the amended complaint which would so indicate, but it was his memory that it said something about molesting women.

On rebuttal a steward for the women employees of the winery, designated by Local 51, testified plaintiff never bothered her in any way, that his conduct toward the women was that of a gentleman, and no complaints were ever made to her about him. Several other women employees so testified. One, however, said she was seated in her car one night and defendant came up to her; that she closed and locked the doors and windows because she was nerv-

ous and did not know who he was. A Mrs. Seely, about whom plaintiff wrote to her husband, testified plaintiff never molested her but it made her nervous after plaintiff found out her name and told her who she was and she told Cooper about the incident but did not remember saying plaintiff "leered" at her, but she could have said it, she "just didn't recall".

[1] The claim that defendant Cooper was directly and duly authorized to act for and on behalf of International as its agent, in sending the letter involved, is lacking in evidentiary support. Cooper was business representative of Local 51 only. The only paid representative of International in California was Ethridge. International paid no officers of the local union. It elected and paid its own representatives. Cooper had no authority to sign a contract for International nor to act for it as its agent. The only evidence is the possible assumed authority of Cooper to so act in using International's letterhead in directing the letter to plaintiff's employer. The constitution and by-laws of International gave no direct authority to Cooper to act for it in this regard. The only possible claim would be that Local 51 was an agent of International and as such agent International would be liable as principal for acts of the agent of the local.

[2] The amended complaint, to attach liability to International, merely alleges that Cooper was the agent of International, and as such was acting within the scope of his employment. To attach liability to Local 51 it alleges he was agent of Local 51 and as such was acting within the scope of his employment. It does not allege that Local 51 was the agent of International and acting within the scope of its authority. It appears to us that the pleadings and proof are not sufficient to attach liability on International by reason of any claimed delegated agency to Local 51. This holding is supported by *Di Giorgio Fruit Corporation v. National Labor Relations Board*, 1951, 89 U.S.App.D.C. 155, 191 F.2d 642, 28 A.L.R.2d 377, certiorari denied, 1951, 342 U.

S. 869, 72 S.Ct. 110, 96 L.Ed. 653. It was there held that as a matter of law the local union was not acting as agent for its parent organization and said, after setting forth similar provisions of the Constitution of the National Union, 191 F.2d at page 648:

"All those provisions spell out a basic responsibility on the part of the local rather than a subordinate position of agency delegated by National. The presence of the two National representatives assisting the local Farm Union in the course of the strike was not sufficient to constitute the local an agent of the National. If, on the evidence here presented, it were to be held that this local was the agent of the National, it would be difficult to imagine a local member of the National which would not be such an agent."

See also *Keller v. Markley*, 50 Cal.App.2d 155, 156, 122 P.2d 614. The order denying plaintiff a new trial as to this defendant was authorized.

[3,4] The next question is whether the trial court was, under the evidence, permitted to grant a new trial as to defendant Local 51. Defendant Local 51 makes several claims why the court's decision in this respect can be supported. (1) That plaintiff did not sufficiently establish a cause of action for libel. (2) That the trial court had the right to believe that the claimed letter written by Cooper, which plaintiff said he saw, contained language to the effect that he "molested women" was not sufficiently established. There appears to be no justification to believe that any letter, other than the one produced, was written. Its language is rather definite as to its meaning. Cooper was not alive so could not inform the court as to the factual basis for writing the letter. There is some testimony that complaint was made about plaintiff which may well have induced Cooper to write the letter. Even assuming that the charges there made were shown to be untrue, as the testimony of the several witnesses might indicate, the plaintiff's testi-

mony clearly shows he did not believe Cooper or the Unions entertained any malice toward this plaintiff when the letter was sent by Cooper. The record is also clear that the only persons against whom plaintiff made the charge of malice were Worrell and Biane. Apparently the court believed it was a privileged communication under section 47 of the Civil Code. Under subdivision 3 of that section malice is not inferred from the communication. The trial court was justified in this belief. See also *Emde v. San Joaquin County Central Labor Council*, 23 Cal.2d 146, 154, 143 P.2d 20, 150 A.L.R. 916; *Freeman v. Mills*, 97 Cal.App.2d 161, 166, 217 P.2d 687; *Smith v. Los Angeles Bookbinders Union*, 133 Cal. App.2d 486, 284 P.2d 194.

[5] Although there may have been a conflict in the evidence on this question, the trial court, in the exercise of its discretion, was authorized to grant a new trial. It is well settled that a motion for new trial is, to a large extent, addressed to the sound legal discretion of the court to which the application is made, and that its action in granting a new trial is conclusive and will not be disturbed especially where the ground of the motion is insufficiency of the evidence to justify the verdict or decision and there is a substantial conflict in the evidence, in the absence of a clear and affirmative showing of manifest abuse of discretion (20 Cal.Jur. p. 27, sec. 13, and cases cited).

[6] The other claim is that the letter constituted an interference with the contractual relations between plaintiff and his employer. The evidence on this question is in conflict and the same rule here applies in reference to granting motions for new trial. There is testimony that plaintiff was a "trouble maker", that he had reported his employer to the government authorities, and a six-weeks investigation followed without proof of any violation; that plaintiff reported his superior watchman to the insurance company for failure to make a nightly inspection of the plant, without results; that he shot at birds on the electric wires while on duty causing plant diffi-

culties, etc.; that he felt he was going to be discharged before this letter was received; and the letter culminated in that discharge. There was also some evidence, though conflicting, that there was justification for writing the letter to plaintiff's employer in the interest of the health, safety, good morals, and wellbeing of women workers there employed, who belong to the local union. Under certain circumstances, reporting such conditions have been considered as justified and privileged. *Los Angeles Pie Bakers Ass'n v. Bakery Drivers*, 122 Cal.App.2d 237, 243, 264 P.2d 615; *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 35, 112 P.2d 631. The trial court was justified in believing that plaintiff had not sustained the burden resting upon him in respect to this claim.

Judgment on directed verdict and order granting a new trial affirmed. Attempted appeal from order denying new trial dismissed.

BARNARD, P. J., concurs.



155 Cal.App.2d 36

George B. RYALL, Plaintiff and Respondent,
v.

Myrtle E. SEARS, also known as Myrtle
Sears Swartz, Defendant and
Appellant.
Civ. 22362.

District Court of Appeal, Second District,
Division 1, California.
Nov. 7, 1957.

Hearing Denied Dec. 30, 1957.

Action against vendor for broker's commission. The Superior Court of Los Angeles County, William B. McKesson, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Drapeau, J. pro tem., held that evi-

dence sustained finding that plaintiff had not also acted as agent for purchaser.

Affirmed.

1. Brokers ⇨86(7)

In action against vendor for broker's commission, evidence sustained finding that plaintiff had not also acted as agent for purchaser.

2. Trial ⇨397(1)

Specific findings are not necessary when findings taken as a whole clearly show that they include trial judge's conclusions upon material issues.

3. Appeal and Error ⇨1071(6)

In action against vendor for broker's commission, findings taken as a whole clearly reflected trial judge's conclusions that plaintiff had not at any time acted as agent for purchaser and that, as a matter of law, there had been no condition attached to defendant's liability under her written agreement; and, therefore, it was not prejudicial error for trial judge to fail to make specific findings as to plaintiff's asserted dual agency and as to whether there had been a condition as to defendant's liability to pay commission.

4. Trial ⇨29(4)

Serious and groundless charges that trial judge had been guilty of prejudicial misconduct, that he had been biased and prejudiced, and that he had prejudged case, should not have been made.

5. Evidence ⇨397(1)

Where parties had put their agreement into writing, agreement would have to be determined as a matter of law by contents of writing itself, and extrinsic evidence was properly excluded.

6. Continuance ⇨14(1)

In action against vendor for broker's commission, it was not an abuse of discretion to deny motion for continuance made by defendant, who failed to avail herself of judge's offer to continue trial one day if she wanted to find out whether plaintiff's license was valid, after plaintiff had

been permitted to amend complaint by interlineation to include allegation that he was a duly licensed broker.

Chas. L. Nichols, Beverly Hills, Christopher Hall, Los Angeles, Robert R. Malli-coat, and Richard E. Hodge, Beverly Hills, for appellant.

Gerald Bridges, Claude W. Bridges, and William H. Simon, Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff, George D. Ryall, and defendant, Myrtle E. Sears, are real estate brokers.

Mrs. Sears owned business property in El Cajon, in San Diego County. She agreed in writing with Mr. Ryall that he was her exclusive agent to sell this property.

First he sold the north half of the property to Mayfair Development Company, and Mrs. Sears paid him his commission on that sale.

After his exclusive agency expired, he sold the south half of the property to the same buyer.

To complete the last sale, an escrow agreement was made between Mayfair and Mrs. Sears. In an instruction signed by Mrs. Sears and by Mr. Ryall the escrow holder was directed to pay Mr. Ryall a commission of \$7,750 for his services in that sale. This writing is as follows:

"Instructions to Pay Commission

"Escrow No. 803

"Date March 14, 1955

"The First National Trust and Savings Bank of San Diego

"National City Branch

"National City, California

"Upon close of escrow, you are instructed to pay George D. Ryall, a licensed real estate broker, the sum of \$7,750.00 from funds received or held by you on my behalf. *I acknowledge that said broker was heretofore em-*

ployed by me to effect a sale of the property described under the above escrow number, that I have agreed to pay said sum to said broker as his commission for said services, and that pursuant to said employment he has produced the purchaser named therein.

"(Sgnd) Myrtle E. Sears

Approved:

"Please mail payment to address below unless payment is called for on the day the above escrow is closed. I hereby waive any interest in such deposits as Mayfair Development Co. shall make in accordance with the terms of the escrow instructions referred to herein.

"It is understood that no commission is owing if this transaction is not consummated.

"(Sgnd) George D. Ryall

"Licensed Real Estate Broker

"License No. 18149

"Address: 417 So. Hill Street
Los Angeles 13, California"

"(Sgd) George D. Ryall

(Emphasis added.)

After the escrow was completed and Mrs. Sears got her money she instructed the escrow holder not to pay Mr. Ryall. Whereupon he brought this action.

Mrs. Sears appeals from a judgment against her.

Her contentions on appeal will be disposed of as they are stated.

[1] 1. She contends that Mr. Ryall acted as agent for both her and Mayfair. This is based upon the use of the words "client" and "represented" by Mr. Ryall in his testimony at the trial, with reference to Mayfair.

The use of these words by Mr. Ryall did not necessarily imply that he was agent for Mayfair too. The trial judge resolved any conflict as to the meaning of these words in favor of Mr. Ryall and against Mrs. Sears.

The judge said, "You can interpret that any way you want to, but I interpret it as

any broker does; he goes to a prospective buyer and says I've got Mrs. Sears' property for sale. Do you want to buy it for \$165,000? To him, that's representing them as a client. Nothing wrong about it at all."

It is interesting to compare counsel's position now with his position during the trial of the case. Then he objected to every attempt of counsel for plaintiff to clarify this testimony.

"Q. (By Mr. Bridges, attorney for plaintiff.) Mr. Ryall, will you explain to the Court what you meant when you stated in answer to counsel's questions, that Mayfair Development Company was a client of yours?"

"Mr. Hodge (Attorney for defendant): I object to that question, your Honor. The statements speak for themselves. We have his testimony under oath. The questions were not objected to.

"The Court: I don't know what that objection is. What is the ground of your objection?"

"Mr. Hodge: Incompetent, irrelevant, and immaterial. It is incompetent because the testimony is on the record under oath. There was no objection to it at the time. It is not relevant to prove anything. Also, for that reason it should not be allowed.

"The Court: Read me the question. (Question read.)

"The Court: Are you objecting on the grounds it is incompetent, irrelevant, and immaterial?"

"Mr. Hodge: Yes, your Honor.

"The Court: Sustained."

Moreover, counsel for defendant states in his brief four times (pages 2, 5, 6, and 7) that the evidence was *uncontradicted* that Mr. Ryall acted as agent for Mayfair, when at page 132 of the reporter's transcript the following testimony is to be found:

"Q. Mr. Ryall, did you receive any compensation of any kind or character from Mayfair Development Company in connection with the sale of Mrs. Sears' property to them?"

"Mr. Hodge: I object to that question, your Honor, as incompetent, irrelevant, and immaterial.

"The Court: Overruled.

"A. No.

"Q. Do you have any agreement either written or oral with them for the receipt of any compensation of any kind for the sale of the property of Mrs. Sears to them?"

"Mr. Hodge: I object to that question as calling for the conclusion of the witness; also, it is incompetent, irrelevant, and immaterial.

"The Court: Overruled. You may answer the question.

"A. No."

[2,3] 2. Passing now to defendant's next contention, that it was prejudicial error for the trial judge to fail to make specific findings as to Mr. Ryall's asserted dual agency; and also as to whether there was a condition as to defendant's liability to pay the commission she agreed in writing to pay:

It is well settled that specific findings are not necessary when the findings taken as a whole clearly show that they include the trial judge's conclusion upon material issues. *Bowers v. Union Trust Co.*, 117 Cal. App. 259, 264-265, 3 P.2d 614.

The findings here in question include the fact that Mr. Ryall did not at any time act as agent for Mayfair; also that, as a matter of law, there was no condition attached to defendant's liability under her written agreement.

[4] 3. Next we come to defendant's assertion of prejudicial misconduct by the trial judge; that he was biased and prejudiced; and that he prejudged the case:

This assertion is entirely without merit; it is unkind and uncalled for; and it has no place in the briefing of this case.

Counsel for defendant does not point out a single instance from the record of bias, or of prejudice, or of misconduct of the judge who tried this case, or that he prejudged it. In his brief counsel says he

does not impugn the courtesy or manliness exhibited by the judge, but he argues that the judge's conduct throughout the trial indicates the truth of his charges.

Read as a whole, the record fails to support any of these unfounded charges.

The judge made a conscientious effort to ascertain the truth as to the issues involved. He treated counsel fairly and courteously throughout the trial, and these serious and groundless charges should never have been made.

[5] 4. There is no error in rulings upon admissibility of evidence.

As we have been able to determine from defendant's brief, these rulings may be summarized as follows:

(a) Sustaining objections to proffered testimony of an officer of Mayfair that defendant's attorney first proposed the purchase of the property to him; also that she too proposed it to him.

(b) That the judge's rulings would not permit defendant to prove that her promise to pay Mr. Ryall was conditional on his efforts to consummate the closing of the escrow.

(c) That when defendant put her order into the escrow to pay Mr. Ryall, there was no purchaser ready, able, and willing to purchase the property, for the reason that the escrow agreement was in the nature of an option, continuing as long as Mayfair made partial payments upon the purchase price or until it was paid in full. And that it was error to exclude testimony to this effect.

The answer to all of these contentions is readily apparent. The parties put their agreement into writing. Therefore, extrinsic evidence is excluded, because the agreement must be determined as a matter of law by the contents of the writing itself. *Peterson v. Montgomery Holding Co.*, 89 Cal.App.2d 890, 892, 202 P.2d 365; *Nourse*

v. Kovacevich, 42 Cal.App.2d 769, 771, 109 P.2d 999.

[6] 5. Referring to Mrs. Sears' final contention that the judge erred in denying her motion for a continuance when the case was called for trial:

Her counsel objected to the introduction of evidence because the complaint failed to allege that plaintiff was a duly licensed real estate broker. The trial judge held that the objection was well taken; but permitted the complaint to be amended by interlineation to include this essential allegation.

Counsel for defendant would not stipulate that this amendment be deemed denied. The judge said he would continue the trial one day if counsel for defendant wanted to find out whether plaintiff's license was valid or not. Counsel for defendant did not avail himself of this offer. He said he was "taken by surprise" by the judge's indication that he was going to go on with the trial. Finally the judge denied defendant's motion for a continuance, and went on with the case.

This court can see no possible detriment to defendant by this ruling.

The case was ready for trial. No demurrer had been interposed to the complaint. The parties and their witnesses were all there. Counsel for defendant should have known whether or not plaintiff was a licensed real estate broker. Counsel's conduct savored of dilatory tactics that are not countenanced by our courts.

It was the duty of the judge to bring the case to trial, and it was not an abuse of discretion for him to do so.

6. Additional findings proposed by defendant are not necessary to a decision of this case.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

155 Cal.App.2d 1

The PEOPLE of the State of California, acting by and through the Department of Public Works, Plaintiff and Respondent,
v.

Joe Thomas LUCAS, also known as J. T. Lucas, Mary Lucas, First Western Bank & Trust Company, successor in interest to Central Bank, a corporation, and Corporation of America, a corporation, as trustee, et al., Defendants and Appellants.

Civ. 17178.

District Court of Appeal, First District,
Division 1, California.
Nov. 5, 1957.

Condemnation proceeding. The Superior Court, Contra Costa County, Homer W. Patterson, J., entered a judgment unsatisfactory to defendants and they appealed. The District Court of Appeal, Bray, J., held that where verdict, findings of fact judgment in condemnation, and final order of condemnation, all used the phrase the property "and all improvements thereon pertaining to the realty," even though complaint and an instruction made no specific reference to fixtures as a portion of the property to be taken, judgment would not be reversed on any theory that such judgment did not include damages for fixtures.

Judgment affirmed.

1. Eminent Domain ☞262(5)

In condemnation proceeding, where verdict, findings of fact, judgment in condemnation and final order of condemnation, all used the phrase the property "and all improvements thereon pertaining to the realty," even though complaint and an instruction made no specific reference to fixtures as a portion of the property to be taken, judgment would not be reversed on any theory that such judgment did not include damages for fixtures.

2. Appeal and Error ☞971(3)

The test on appellate review, of whether a trial court abused its discretion in restricting scope of cross-examination, is

not whether a certain question should have been allowed, but whether a sufficiently wide range was allowed to test credibility and weight of testimony.

3. Evidence ☞558(8)

In condemnation proceeding, trial court did not, under the circumstances, abuse its discretion in sustaining an objection to question asked plaintiff's expert witness on cross-examination as to whether the possibility of a certain route requiring defendants' land being selected by highway commission prior to filing of its complaint would affect development of defendants' property, in view of fact such question merely referred to affect of uncertainty of commission's plans on development of defendants' property rather than effect on market price, and in view of wide latitude given defendants in cross-examination.

Gregory S. Stout, San Francisco, for appellants.

Robert E. Reed, Holloway Jones, Jack M. Howard, Thomas F. Vizzard, San Francisco, for respondent.

BRAY, Justice.

Defendants appeal from a condemnation action judgment in their favor in the sum of \$226,000.

Questions Presented.

1. Was the value of "trade fixtures" included in the judgment?
2. Alleged restriction of cross-examination.

The property condemned is $\frac{1}{8}$ acres at Walnut Creek. The main improvements consist of two buildings, serving as automobile agency salesrooms and repair shops and a gasoline station. The balance of the property served as a used car lot and storage space. Affixed in and out of the buildings were certain special in place improvements used in connection with the businesses on the property. These consisted of a suction fan, underground oil tank, specialized air piping, hoists, underground gas-

oline tanks, wash rack, special electric wiring, lubrication rack.¹ Also located on the property in conjunction with its use were site improvements consisting of paving, sidewalks, curbs, wire fences, sign poles, bulkhead and flood lights.² Defendants contend that the most of the items contained in these two groups were "trade fixtures" and personal property and were not included in the judgment. Defendants ask that the judgment be reversed and the case returned to the trial court upon the issue of damages alone and "for clarification of the instant judgment."

1. The Fixtures

[1] We deem it unnecessary to determine whether or not the fixtures were personal property nor to discuss the cases cited by defendants in support of their contention on this subject, for the reason that it clearly appears from the record that the value of these fixtures was an issue in the case, submitted to the jury and included in the verdict and judgment. It is true that the complaint and instructions made no specific reference to fixtures as the property to be taken. However, the verdict, the findings of fact, the judgment in condemnation, and the final order of condemnation, all use the phrase "[the property] and all improvements thereon pertaining to the realty." This is the same language used in section 1248, Code of Civil Procedure, which says the duty of the jury is to ascertain and assess: "The value of the property sought to be condemned, and all improvements thereon pertaining to the realty * * *." Moreover, the parties at the trial used the word "improvements" as including these fixtures. Plaintiff's counsel in examining its own experts asked many times for a breakdown of the valuation of the various fixtures and site improvements. The direct and cross-examination of the defendants' witnesses also demonstrates that the fixtures and site improvements were valued as part of the real property. Thus

defendants' expert witnesses Hamlin and Schreiber put a value on fixtures No. 1 of \$5,085 and \$6,771.25 respectively. Fixtures No. 2 Hamlin valued at \$7,546.75. They valued each item separately, even to the wood fencing. Defendants' third witness Wallace did not value the fixtures separately but was asked by defendants the value of the "land, buildings, fixed improvements or fixed fixtures and land improvements." Plaintiff's expert witness Gabriel was asked by plaintiff: " * * * have you had occasion to estimate the value of the so-called site improvements, that is, the paving, I mean by that all of the factors that go into that and have you lastly had occasion to estimate the replacement costs of the various fixtures in place, fixtures which constitute a part of the realty here such as the lubrication racks and that type of equipment." On cross-examination of Gabriel defendants asked him "What, Mr. Gabriel, in your opinion, is the replacement costs prior to taking depreciation of the—all of the improvements, fixtures and site improvements on the Lucas property?" Further defendants asked him if in the fixtures which he included in his valuation there were any items that Hamlin included in his "testimony on the fixture items" that Gabriel had not included in his valuation or any that Gabriel included that Hamlin had not.

Plaintiff was examining Simmons, plaintiff's second expert, and asked him as to whether he had made a breakdown between the value of land and improvements. Defendants' counsel interrupted saying "Just the improvements as you usually include the fixtures and all those items?" Then plaintiff's counsel stated "May it be understood when I say 'improvements', I include the physical structures that are the operating buildings on the property, the site improvements in the nature of paving, lighting and so forth, walls, bulkheads, gravel, fencing, lighting, wire fencing, and that in-place equipment would include

1. These will be referred to for convenience and without characterizing their legal title, as fixtures No. 1.

2. These will be referred to likewise for convenience and without determining their legal title, as fixtures No. 2.

the hoists and other fixtures particularly adapted and annexed to the realty. Do you have that in mind, Mr. Simmons? The Witness: Yes, I have. Q. (By Mr. Vizzard [plaintiff's counsel]): Now, with that in mind, and your figure incorporating and including those items, would you state the value that you assigned to the various improvements? A. \$137,500.00." A little later defendants' counsel stated: "Counsel, I am going to raise one point which may simplify this. I am not going to quarrel with the value of the improvements, fixtures, and so forth, I mean not as a stipulation, but I will not cross examine on it. I think the witness has been very fair on that item. That may simplify your direct examination."

Thus, it is unimportant whether the fixtures were personalty or realty. The case was tried and determined upon the theory that their value was included in the valuation given to the jury. Particularly is this so when no evidence was offered from which the jury could have determined which of the items were permanently attached to the ground and therefore might be realty and which were not and might be personalty. Nor was any ruling nor instructions requested of the court upon the subject. Applicable here is the statement in *Howard v. Howard*, 128 Cal.App.2d 180, 184, 275 P.2d 88, 91: "Hence, the rule is applicable which Mr. Justice Spence aptly states in *Miller v. Peters*, 37 Cal.2d 89, 93, 230 P.2d 803, 806, thus: '(2) It is settled law that where the parties and the court proceed throughout the trial upon a theory that a certain issue is presented for adjudication, both parties are thereafter estopped from claiming that no such issue was in controversy even though it was not actually raised by the pleadings. [Citations.] * * *'"

While the court did not expressly instruct the jury that it was to consider the value of the fixtures and did instruct on the method of determining the land values, there was nothing in the instructions which intimated to the jury that it was not to consider the evidence on the value of

the fixtures nor to value them, and as the parties included "fixtures" in the word "improvements" the jury could only have concluded that the use of that word by the court in its instructions likewise included them.

2. Restriction of Cross-Examination.

All experts testified that defendants' land was in a geographical area known as a "strip development" meaning a commercial development that runs along both sides of a major traffic artery. Plaintiff's witnesses placed a lower per square foot value on defendants' land than did defendants' witnesses, and also than defendants' witnesses placed on strip development areas in other places which defendants claimed were comparable to their area, and which plaintiff's witnesses said were not comparable. They also gave other reasons for the lower value they placed on defendants' land. On cross-examination of plaintiff's witness Gabriel defendants asked him if he knew that the State Highway Commission prior to the filing of the complaint had considered two alternate routes of the freeway, one of which would require the taking of defendants' property. The witness said he had read about it. Defendants then asked the witness whether the possibility that the route selected might be the one requiring defendants' property would affect the development of land on both sides of the street upon which defendants' property is located. The court sustained an objection to the question principally upon the ground that the answer would be a matter of speculation. Defendants' position concerning this question is: "Appellants' position is that by earmarking a general geographical area as the subject of future freeway or highway development, the owners of the land in question as well as prospective purchasers or developers are placed on notice by the State that their individual and particular holdings may be seized. Until the State finally determines the exact site of its route and either acquires by suit or private negotiation the desired and needed land,

all owners or users, present or prospective, necessarily should be concerned with the prospective availability of their land to them. In all probability, this situation may tend to depreciate the price to be paid for their property should they elect to sell prior to the finalization of the State's program."

One of the objections to the question was that it assumed facts not in evidence. The court pointed out in sustaining the objection that it did not think the proper foundation had been laid. No offer was made to prove the truth of the facts assumed in the question.

In *Atchison, T. & S. F. R. Co. v. Southern Pac. Co.*, 13 Cal.App.2d 505, 517, 57 P.2d 575, the court held in determining the market value of land at the time of filing the complaint in December, 1933, it would be speculative to allow evidence that the area was "stigmatized" and the market value of land therein affected by the fact that a Railroad Commission order made in 1927, requiring the construction of a depot which would require the condemnation of the defendant's land. The court said that permitting the examination of witnesses using that order as a basis in order to determine whether there was a market slump in the area during the period between the making of the order and filing suit, and what it was due to, would be indulging in "unfathomable speculation."

In *United States v. Certain Lands in Town of Highlands, D.C.*, 47 F.Supp. 934, 937, where land was acquired for the expansion of the United States Military Academy at West Point the court said: "It is possible that the long lapse between the time when Congress first publicly evinced an interest in this tract for the uses of the U. S. Military Academy and the commencement of these proceedings thwarted the efforts of the claimant fully to subdivide the tract and dispose of home sites and recreational facilities. I know, however, of no method of compensating

an owner for such consequences of Congressional action. Legislative debates or even unfounded rumors may affect market values favorably or adversely. The owner is entitled to no more than the market value of the property taken regardless of the myriad influences which combine to annex that value to the property."

[2,3] The scope of cross-examination for the purpose of testing credibility and weight of testimony is extensive so the trial court is given wide discretion in order to keep such examination within reasonable bounds and not have overlong trials. The test on appellate review is not whether a certain question should have been allowed but whether a sufficiently wide range has been allowed to test such credibility and weight of testimony. *People v. La Macchia*, 1953, 41 Cal.2d 738, 743, 264 P.2d 15. In the instant case defendants were given a very wide range of examination on the credibility and weight of the experts' testimony. Defendants were permitted to cross-examine on the disparity between the land values of the experts on each side as well as to show that the state's experts restricted the area upon which they based their valuation. Also the land values of other adjacent "strip developments" and the prices paid for land in those areas were testified to by all the witnesses.

It should be noticed that the question merely referred to the effect of the uncertainty of the commission's plans on the "development" of property on defendants' street. No question was asked as to the effect on "market price," the subject with which the jury was concerned.

In view of the wide latitude given in cross-examination and the circumstances of the case, we find no error in the sustaining of the objection to this one question.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

155 Cal.App.2d 149

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Billie JONES, Defendant and Appellant.
Cr. 1165.

District Court of Appeal, Fourth District,
 California.

Nov. 8, 1957.

Rehearing Denied Nov. 26, 1957.

Hearing Denied Dec. 30, 1957.

Proceeding in the nature of a writ of error coram nobis. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered order denying the petition and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that matters which could have been raised on a timely appeal from the judgment of conviction or in connection with motion for new trial were not matters coming within limited scope of writ of error coram nobis.

Order affirmed.

1. Criminal Law ☞997(2)

Matters which could have been raised on timely appeal from judgment of conviction or in connection with motion for new trial were not matters coming within limited scope of writ of error coram nobis.

2. Criminal Law ☞998, 1069(1)

A motion to vacate judgment in criminal case is in nature of application for writ of error coram nobis and a proceeding of that nature is properly regarded as a part of the proceedings in the case to which it refers rather than as a new adversary suit, and the time within which an appeal must be taken from an order denying such a motion is the 10 days prescribed by the rule. West's Ann. Rules on Appeal, rule 31; West's Ann.Pen.Code, § 1237.

3. Criminal Law ☞1069(1)

Rule 3(b) relating to extension of time for filing of appeal where there is ruling on motion to vacate judgment is applicable only in civil cases and is not made applicable to criminal cases by Rule 30 since express provision for a different time for appeal in criminal cases is made in Rule

31, and also because the application of Rule 3(b) in criminal cases would be inappropriate if not impracticable. West's Ann.Rules on Appeal, rules 3(b), 30, 31.

4. Criminal Law ☞1069(1)

Under the rules, appeal from January 18, 1957, order denying a petition for a writ of error coram nobis could not be considered an appeal from original judgment of conviction entered on November 21, 1956. West's Ann.Rules on Appeal, rule 31; West's Ann. Pen.Code § 1237.

Billie Jones, in pro. per. for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant and one Richard R. Cardwell were jointly charged with violations of the Health and Safety Code. Jones was charged in two separate counts with selling a narcotic, and with a prior conviction of possession of narcotics. He pleaded not guilty and admitted the prior conviction. A jury found him guilty as charged, his motion for a new trial was denied, and judgment was pronounced sentencing him to prison on November 21, 1956. No appeal was taken from the judgment or from the order denying his motion for a new trial.

On January 15, 1957, Jones filed in the Superior Court a document in which he stated that he moved the court to vacate and set aside "that certain Judgment, and grant motion for the issuance of the writ of coram nobis, error coram bogus." In this document he asserted that he was denied his constitutional rights in that he was not represented by an attorney of his own choosing; that the failure of the court to dismiss his last court-appointed attorney at the trial of the action was a violation of his rights; that his "legal right of having my witnesses according to law, was denied me by my lawyer"; and that he was denied the right to make a motion for a new trial. At the time set for the hearing of this application the court denied the petition

and the defendant has appealed from that order.

[1] The appellant and the said Cardwell were tried at the same time, although judgment as to each of them was rendered on a different date. Cardwell also applied for a writ of error coram nobis in the Superior Court and he appealed from the order denying the same. *People v. Cardwell*, 153 Cal.App.2d 377, 314 P.2d 484. Most of the points raised in the application here involved, and on this appeal, were raised on that appeal and for obvious reasons were not sustained. Those matters could have been raised on a timely appeal from the judgment, or in connection with the motion for new trial, and are not matters coming within the limited scope of the writ of error coram nobis. The further contention that the appellant was denied the right to make a motion for a new trial is not sustained by the record which shows that such a motion was made and denied.

It also appears in this case that the appellant had three separate attorneys at different times in the trial court, two of them being appointed by the court, and that the appellant later moved the court for leave to dismiss the third attorney saying he thought he could present a better defense for himself, which motion was denied. At appellant's request this court appointed an attorney for him on this appeal. Because of appellant's dissatisfaction with the attorneys who had represented him at the trial a different attorney was appointed. This attorney had previously represented Cardwell at the trial of the action and was familiar with the facts. Subsequently that attorney asked permission to file a report in lieu of a brief and the request was granted. Thereafter, the appellant notified this attorney that he did not want him to file a brief, (indicating that no attorney in San Bernardino County was satisfactory to him) and informed this court that he did not want such a report filed. The appellant then filed a brief in propria persona, a brief for the respondent was filed, and the appellant then filed a closing brief.

In his briefs the appellant makes the further contention that his application to the Superior Court was mistakenly treated as a petition for writ of error coram nobis; that it was actually a motion to vacate the judgment; that this is an appeal from the order denying that motion; that under Rule 3(b) of the Rules on Appeal he had at least 60 days to appeal from the original judgment; that Rule 3(b) is made applicable to criminal cases by Rule 30; that Rule 31 allows him ten days after the order denying the motion to vacate in which to take an appeal; and that it follows that he is entitled to have this considered an appeal from the original judgment, and to have a full transcript and record of the original trial presented to and considered by this court.

[2-4] While the appellant stated in his application that he moved the court to vacate the judgment the expressed purpose was to have the court grant his application for the issuance of a writ of error coram nobis and he has appealed from the order denying that application. His right to appeal from the order denying his motion to vacate the judgment is expressly provided for in section 1237 of the Penal Code and that right arises from the provisions of that section. A motion to vacate a judgment in a criminal case is in this state in the nature of an application for a writ of error coram nobis and a proceeding of that nature is properly regarded "as a part of the proceedings in the case to which it refers" rather than as "a new adversary suit". In *re Paiva*, 31 Cal.2d 503, 190 P.2d 604, 608. As was said in that case: "* * * a motion to vacate a judgment in a criminal case upon grounds which make such motion the equivalent of a proceeding in the nature of a writ of error coram nobis, must be regarded as a part of the proceedings in the criminal case." The time within which an appeal must be taken from an order denying such a motion is the ten days prescribed by Rule 31 of the Rules on Appeal. Rule 3(b) of those rules was clearly intended to be applicable only in civil cases and is not made applicable to criminal cases by Rule

30 since express provision for a different time for appeal in criminal cases is made in Rule 31, and also because the application of Rule 3(b) in criminal cases would be inappropriate if not impracticable. It follows that this appeal from the order entered on January 18, 1957, cannot be considered an appeal from the original judgment of conviction entered on November 21, 1956.

The order appealed from is affirmed.

GRIFFIN, J., concurs.



Claude ALARID, Plaintiff and Appellant,
v.

**Alexander J. VANIER, Defendant and
Respondent.***
Civ. 5554.

District Court of Appeal, Fourth District,
California.

Nov. 6, 1957.

Hearing Granted Dec. 30, 1957.

Action arising out of head-and-tail motor vehicle collision resulting from failure of defendant's foot brake to work. From a judgment of the Superior Court of Orange County, Robert Gardner, J., in favor of defendant, plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the evidence would support the jury's implied finding that defendant's brake failure had resulted from a cause or thing beyond his control.

Affirmed.

1. Automobiles ⇐242(1)

In action arising out of head-and-tail motor vehicle collision resulting from failure of defendant's foot brake to work, defendant did not have burden of proving exact cause of brake failure.

2. Negligence ⇐116, 134(1, 11)

Defense of unavoidable accident is not an affirmative defense, and even though such defense is interposed, burden is still on plaintiff to prove negligence and proximate cause by preponderance of evidence.

3. Automobiles ⇐245(15)

In action arising out of head-and-tail motor vehicle collision resulting from failure of defendant's foot brake to work, jury question was presented as to whether defendant had, or should have had, knowledge which should have lead him to take steps to prevent brake failure. West's Ann. Vehicle Code, § 670.

4. Negligence ⇐121(1)

Negligence presumption arising from violation of statute was rebuttable by evidence showing excuse or justification for such violation. West's Ann. Vehicle Code, §§ 670, 679.

5. Automobiles ⇐242(2)

In action arising out of head-and-tail motor vehicle collision resulting from failure of defendant's foot brake to work, doctrine of res ipsa loquitur was not applicable as a matter of law.

6. Trial ⇐243

Where no request for instruction on doctrine of res ipsa loquitur was made, in action arising out of head-and-tail motor vehicle collision resulting from failure of defendant's foot brake to work, and doctrine was not applicable as a matter of law, it was not error to instruct that no inference of negligence arose from mere happening of accident and that the law recognized that an inevitable accident could occur without having been proximately caused by negligence, notwithstanding plaintiff's contention that such instructions conflicted with instruction as to presumption of negligence arising from violation of statute. West's Ann. Vehicle Code, §§ 670, 679.

7. Automobiles ⇐245(15)

In action arising out of head-and-tail motor vehicle collision resulting from failure of defendant's foot brake to work, evidence raised question for jury as to whether

* Opinion vacated 327 P.2d 897.

defendant's violation of Vehicle Code sections had been excusable and justifiable under circumstances. West's Ann.Vehicle Code, §§ 670, 679.

8. Trial ⇐201

In action arising out of head-and-tail motor vehicle collision resulting from failure of defendant's foot brake to work, it was not error to instruct that the jurors were not permitted to speculate as to cause of accident, notwithstanding defendant's contention that such instruction suggested that jurors were not to guess as to cause of brake failure.

9. Trial ⇐203(1)

In action arising out of head-and-tail motor vehicle collision resulting from failure of defendant's foot brake to work, each of parties was entitled to instructions appropriate to his theory of case, insofar as consistent with pleadings and evidence.

Simon & McKinsey, T. W. McKinsey, Long Beach, for appellant.

Powell & Banyard, Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising out of an automobile accident. The complaint alleged that the accident occurred as a result of the plaintiff's car being struck from the rear by an automobile negligently operated by the defendant. The answer denied the charge of negligence and affirmatively pleaded unavoidable accident. A jury returned a unanimous verdict in favor of the defendant, and a motion for a new trial was denied. The plaintiff's appeal from the judgment is presented on a clerk's transcript and an engrossed statement.

On June 15, 1955, the plaintiff was driving south in the outer south-bound lane of a 4-lane highway in Orange County. He stopped his car behind five cars which were also stopped for an intersection stop sign. The defendant was also driving his 1949 Plymouth car south in the same lane of this highway. He observed the plaintiff's

car and applied his foot brake, which failed to work, and his car struck the rear of the plaintiff's car.

The defendant's car was equipped with a hydraulic brake system and a mechanical hand brake. From the settled statement it appears that the defendant was 65 years old, that he purchased his car about January 15, 1955, and that he then tested the car and the brakes were good. Between that time and the day of the accident he drove his car about 20 miles per day to and from work, and during that period there was nothing wrong with the brakes and they worked perfectly. From two to four weeks before the accident he had some work on the clutch done at a garage. At that time none of the garage employees made any report or suggestion to him concerning the brakes as there was then nothing wrong with them. About April 15, 1955, he had the car lubricated at a Shell station and was given a report showing that the brake cables and master cylinder had been inspected and lubricated, and indicating that no service or replacements were recommended in connection therewith.

The defendant testified that on the day of the accident he drove about ten miles from his home to his place of employment, which was about 2½ blocks north of the place where the accident occurred. En route he stopped at numerous stop signs and stop signals and the brake worked perfectly. Upon arrival at his place of employment he drove onto the tract, across gravel and dirt between unfinished houses, and parked the car at 7:45 A.M. Neither he nor anyone else drove the car until quitting time at 4:30 P.M. He then drove off the tract and turned south on this highway but did not find it necessary to apply the brake as he entered the highway. As he proceeded south he saw the plaintiff's car coming to a stop behind five or six cars which had stopped for the stop sign. He was traveling about 20 miles an hour, and when he was about 200 feet or slightly less from the place where the plaintiff had stopped he put his foot on the brake pedal, the brake did not take hold, and there

was no pressure at all on the brake pedal. He pushed hard, and the pedal went all the way to the floor. He realized there was danger and "his hair went up in the air. He was scared." Traffic was heavy, a car was passing him on the left-hand south-bound lane, and there was a sloping shoulder and a ditch eighteen inches deep on his right. He could not turn to his left and was afraid to turn to his right for fear he might tip over. He was so excited he did not think to use the hand brake. When asked if he used his hand brake he stated "It come so sudden, I didn't make any effort. I didn't think of it". He had no information or warning of any kind that there was anything wrong with the car's brakes prior to the time he tried to stop behind the plaintiff's automobile. The front of his car struck the rear of the plaintiff's car. His car slowed down a little before the impact but not much. Two other witnesses testified that there was no pressure on the brake pedal of defendant's car, and that it went all the way to the floor when they tried it following the accident.

[1-3] The appellant first contends that the respondent was negligent as a matter of law, and that the court should have granted appellant's motion for a directed verdict on the issue of liability. It is argued that respondent's car was admittedly not equipped with brakes maintained in such condition that they complied with the requirement of section 670 of the Vehicle Code, as then in effect; that this constituted negligence as a matter of law unless excuse or justification was shown; that this presumption of respondent's negligence could only be rebutted by a showing that the statutory violation resulted from causes beyond his control; that the fact that the brake on respondent's car failed is not a sufficient excuse or justification for this violation of the code section; that it was also essential that he produce some evidence of what caused the brake to fail, in order to show that that failure resulted from a cause beyond his control; that no such evidence was produced; and that the court should have found the respondent negligent as a

matter of law. This argument erroneously assumes that in defending the charge of negligence the respondent had the burden of affirmatively proving the exact cause of the brake failure. *Parker v. Womack*, 37 Cal.2d 116, 230 P.2d 823. The defense of unavoidable accident is not an affirmative defense and the burden was still on the plaintiff to prove negligence and proximate cause by a preponderance of the evidence. *Polk v. City of Los Angeles*, 26 Cal.2d 519, 159 P.2d 931. In the absence of evidence indicating that respondent was chargeable with knowledge that the brake was not or might not be in good condition, the brake failure might well be accepted by the jury as a sufficient excuse or justification for the violation. In the driving of automobiles such brake failures are not unknown and they frequently come suddenly, without any warning. The average driver is not a mechanical expert, and is not necessarily in a position to anticipate such a mechanical failure. The essential question in such a case is not as to exactly what caused the mechanical failure but is as to whether he had or should have had some prior knowledge of facts which should have led him to take proper steps in advance which might have prevented the brake failure. Unforeseen brake failure is a circumstance beyond the control of the driver in the ordinary case, and the evidence here supports the implied finding of the jury that this brake failure resulted from a cause or thing beyond the control of the respondent. *Parker v. Womack*, 37 Cal.2d 116, 230 P.2d 823; *Merry v. Knudsen Creamery Co.*, 94 Cal.App.2d 715, 211 P.2d 905; *Alward v. Paola*, 79 Cal.App.2d 1, 179 P.2d 5. Whether sufficient excuse or justification for the statutory violation was here shown was a question of fact for the jury.

The appellant next contends that since a presumption of respondent's negligence was applicable in this case the court committed prejudicial error by giving three instructions which created conflict and confusion as to the standard by which the jury was to judge the respondent's negligence. As ap-

pellant admits, the court correctly instructed the jury as to the provisions of sections 670 and 679 of the Vehicle Code; that if a party to the action violated these sections a presumption arises that he was negligent; that this presumption is not a conclusive one; that it may be overcome by other evidence showing that under the circumstances his conduct was excusable and such as might reasonably have been expected from a person of ordinary prudence; and that to overcome the presumption of negligence the evidence must support a finding that the violation resulted from a cause or thing beyond the control of the person charged with the violation. Complaint is made, however, of three other instructions. The first was that "The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent." In the second the jury was told "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it." In the third the jury was told "The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he has failed to fulfill his burden of proof."

It is argued that the first of these instructions was prejudicial because it conflicted with the instruction that defendant's negligence was presumed, and further that it was prejudicial because such an instruction should not be given where a *res ipsa loquitur* factual situation applies, citing *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7. With respect to the second of these instructions it is contended that it aggravated

ed the error and prejudice resulting from the first one, and that the two together could only have had the effect of completely eliminating the presumption of defendant's negligence. While it is conceded that the third of these instructions was a correct statement of law, it is argued that this instruction suggested that the jury was not to guess as to the cause of the brake failure.

[4-9] The first of these instructions did not conflict with the instruction that negligence was presumed from a violation of the statute. That presumption was rebuttable and could be rebutted by evidence showing an excuse or justification for such violation. The instruction was limited by the phrase "considered alone", and did not tend to eliminate a consideration of the presumption of negligence. All phases of the matter were submitted to the jury, and the evidence might well justify an inference that no negligence in fact existed. No request for an instruction on the doctrine of *res ipsa loquitur* was here made and it does not appear, as a matter of law, that that doctrine was applicable. In considering an instruction in the same language as the first one here in question the court said, in *Barrera v. De La Torre*, 48 Cal.2d 166, 308 P.2d 724, 727: "Since such an instruction would be proper when accompanied by an instruction on the *res ipsa loquitur* doctrine, the same reasoning would likewise indicate its propriety when not so accompanied, if given in a case in which it cannot be said as a matter of law that the *res ipsa loquitur* doctrine was applicable and in which no instruction with respect to that doctrine was requested." Neither the first nor second of these instructions eliminated the presumption of negligence from the consideration of the jury, and the question as to whether that presumption had been overcome by evidence showing that the violation of the statute was excusable and justifiable under the circumstances, and that the violation resulted from causes or things beyond the control of the respondent, was one of fact for the jury. In *Merry v. Knudsen Creamery Co.*, 94 Cal.App.2d

715, 211 P.2d 905, under somewhat similar facts, it was held not to be error to give instructions which were practically the same as the first and second instructions here complained of. The case of *Talbert v. Ostergaard*, 129 Cal.App.2d 222, 276 P.2d 880, relied on by the appellant, is factually distinguishable. In that case, there was a failure to reveal the facts concerning an inspection of the instrumentality which proved faulty which was made three days before the accident. The third of these instructions related to the cause of the accident itself, and not to the cause of the brake failure. We find no prejudicial error in any of these instructions. Each of the parties was entitled to instructions appropriate to his theory of the case, insofar as consistent with the pleadings and the evidence, and the instructions given sufficiently presented all of the issues of fact to the jury.

The judgment is affirmed.

GRIFFIN, J., concurs.



155 Cal.App.2d 55

William T. GRAY, Plaintiff and Appellant,
v.

MONTGOMERY WARD, Inc., a corporation,
et al., Defendants and Respondents.

Civ. 5509.

District Court of Appeal, Fourth District,
California.

Nov. 7, 1957.

Rehearing Denied Dec. 4, 1957.

Hearing Denied Dec. 30, 1957.

Action for breach of warranty wherein plaintiff made service on foreign corporation by service of summons and complaint on secretary of state of California, and the foreign corporation moved to set aside service. The Superior Court, Orange County, Franklin G. West, J., granted motion, and

plaintiff appealed. The District Court of Appeal, Stone, J. pro tem., held that where dealers were appointed upon recommendation of foreign corporation's sales representative, after appointment representative called on dealers regularly urging them to stock with and promote sales of manufacturer's products, commissions on sale of corporation's products to dealers by representative constituted sole consideration paid to representative by corporation, representative took care of serious complaints, and total volume of sales was substantial, manufacturer was doing business in California in so far as jurisdiction of California court and amenability to process were concerned.

Reversed.

Corporations ⇐642(4½)

Where dealers were appointed upon recommendation of foreign manufacturer's sales representative, and after appointment representative called on dealers regularly urging them to stock with and promote sale of manufacturer's products, commissions on sale of products to dealer by representative constituted sole consideration to representative by manufacturer, representative took care of serious complaints, and total volume of sales in state was substantial, manufacturer was "doing business" in state in so far as jurisdiction of state court and amenability to process were concerned. West's Ann.Corp.Code, §§ 6501, 6502.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business".

James E. Kelly and Elber H. Tilson, Los Angeles, for appellant.

Head, Jacobs & Jacobs, Santa Ana, for respondent Duro-Metal Products Co.

STONE, Justice pro tem.

Plaintiff William T. Gray filed an action for damages for breach of warranty and negligence on September 3, 1953, against Montgomery Ward Inc., a corporation, and several fictitiously named de-

fendants. Plaintiff alleged the sale to him in October, 1952, of a bench power saw and sanding disc attachment by Montgomery Ward, Inc., and further alleged that said sanding disc attachment was defective and was negligently manufactured by defendants, including Doe Company, a corporation, resulting in the said sanding disc exploding and disintegrating and causing injury to plaintiff's face and eye on or about December 3, 1952.

Defendant Montgomery Ward, Inc. answered and denied breach of warranty or negligence. Plaintiff was unable to personally serve an agent of Duro-Metal Products Company, an Illinois corporation, so pursuant to Corporations Code sections 6501 and 6502 service of summons and complaint was made on Duro-Metal Products Company, sued as the fictitiously named defendant Doe Company, a corporation, by delivery of the same to the Secretary of State of the State of California. Defendant Duro-Metal Products Company filed a special appearance and notice of motion to set aside service of summons and complaint on the ground that said defendant was not "doing business" in the state of California either at the time of the accident complained of or at the time of the service of process. The trial court granted the motion to quash and set aside the service of summons and complaint on Duro-Metal Products Company, an Illinois corporation, and the plaintiff appeals from that order.

The matter was heard upon the affidavits of counsel for plaintiff and for Duro-Metal Products Company and the affidavit of the assistant secretary and treasurer of Duro-Metal Products Company, and the affidavit and deposition of E. Bellezzo, the manufacturer's agent handling Duro-Metal Products in California. The company denied doing business in California or having any agent, servant or employee or other representative in the state of California at all times pertinent to this action. Mr. Bellezzo, in his deposition, testified that from January 1, 1955, until the taking of the deposition June 27, 1955, he was a sales

representative for Duro-Metal Products Company. He described himself as a manufacturer's agent with a territory covering the states of California, Oregon, Washington and Arizona. He stated that he called upon dealers and prospective dealers in the state of California. New dealers were appointed upon his recommendation. Defendant's head office was in Illinois and before making a recommendation, Bellezzo first checked the proposed retail dealer's credit, his type of distribution, the type of salesman employed, and the general manner in which the applicant conducted his business. Bellezzo testified that once a dealer for Duro was appointed, he called on that dealer regularly urging him to stock with and promote the sales of Duro-Metal Products. He occasionally delivered catalogues and brochures furnished by Duro-Metal Products Company to the dealers. Mr. Bellezzo was under the supervision of a Mr. Brady, sales manager for Duro-Metal Products Company, who maintained an office in the state of Illinois, where he remained but who forwarded information regarding sales and promotion of defendant's products to Bellezzo in California. Orders for merchandise were sometimes given to him personally and others were mailed directly to the company but in either event he received a commission. Such commissions constituted the sole consideration paid to Bellezzo by Duro-Metal Products Company. It should be noted that in case of a serious complaint about any Duro-Metal Product sold by a dealer the company in Illinois would refer the complaint to Bellezzo for disposition. During the years 1952, 1953, and 1954, Bellezzo sold Duro-Metal Products and serviced the dealer accounts in California in exactly the same manner as in 1955, but he was then employed by a California company, Hedwick and Company, which acted as manufacturer's agent for Duro-Metal Products in California. In his deposition Bellezzo enumerated several dealers in California and indicated sales to them were continuous during the years 1952, 1953, 1954, and 1955, and that the total volume of sales was substantial.

From the foregoing résumé it is apparent defendant Duro-Metal Products Company was "doing business" in California in some sense of the term as their products were being sold, their dealer accounts were being serviced, and new dealers were being appointed after their credit and type of business had been investigated. The question is whether these facts constituted doing business in a manner which gives the California courts jurisdiction over the defendant consistent with due process. The distinction between the meaning of "doing business" in regard to a regulatory or tax statute as contrasted with notice to a corporation of a pending action is fully treated in *Fielding v. Superior Court*, 111 Cal.App. 2d 490, 494, 244 P.2d 968, 970. The court therein points out that:

"The essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state. *Milbank v. Standard Motor Const. Co.*, 132 Cal. App. 67, 22 P.2d 271; *Boote's Hatcheries, & Packing Co. v. Superior Court*, 91 Cal.App.2d 526, 528, 205 P.2d 31. * * * The essential thing is merely whether the corporations are present within the state, whether they operate through an independent contract, agent, employee or in any other manner."

Whether Bellezzo was employed by Hedwick or self-employed, when he located new dealers, checked and appraised credit ratings, serviced dealer accounts and handled complaints of ultimate consumers in California, he was performing services for Duro-Metal Products Company, and that

company was "doing business" through him within the meaning of the term as defined in the *Fielding* case.

The facts of *Jeter v. Austin Trailer Equipment Company*, 122 Cal.App.2d 376, 265 P.2d 130, are similar to the case before us. The *Jeter* case presents a lengthy and detailed discussion of the development of the California theory and rule concerning the question of when a foreign corporation is "doing business" in the state in so far as jurisdiction is concerned. Rather than repeat the various aspects of the principle involved and its ramifications set forth in the *Jeter* case, we simply quote the court's conclusion, 122 Cal.App.2d at page 388, 265 P.2d 130, at page 137, that:

"By way of recapitulation of the current state of the law under the evolving concept of the 'doing business' requirement, it is deducible from the cases that the essentials of due process are fully met, at least for the purposes of amenability to local process and jurisdiction, if a foreign corporation maintains substantial contacts with a state through a course of regularly-established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions."

The defendant Duro-Metal Products Company was doing business in this state in so far as jurisdiction and amenability to process are concerned.

The order is reversed.

BARNARD, P. J., and GRIFFIN, J.,
concur.

154 Cal.App.2d 846

**May Palmer FURNIVAL, Plaintiff and
Appellant,**

v.

**Nancye C. GROVES et al., Defendants and
Respondents.**

Civ. 17598.

District Court of Appeal, First District,
Division 2, California.

Nov. 4, 1957.

Rehearing Denied Dec. 4, 1957.

Hearing Denied Dec. 30, 1957.

Quiet title action. Defendants filed a cross-complaint for the same relief. The Superior Court, Santa Clara County, John D. Foley, J., denied a motion to set aside default judgment against plaintiff, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that since defendants had pleaded same matter as both answer and cross-complaint, and allegations were deemed denied, in their function as answer, without further pleading, plaintiff could not be put in default for failure to plead to cross-complaint.

Reversed with directions.

Kaufman, P. J., dissented.

1. Judgment ⇨485

Judgment void on face of record may properly be attacked at any time.

2. Quieting Title ⇨37(1)

In quiet title action, defendant, claiming title in himself, may plead his own title in answer and, without filing a counterclaim or cross-complaint, ask for affirmative relief quieting his own title against plaintiff.

3. Judgment ⇨106(1)

Quieting Title ⇨43

Where defendants in quiet title action pleaded same matter as both answer and cross-complaint, allegations were deemed denied, in their function as answer, without further pleading, and plaintiff could not be put in default for failure to plead to cross-complaint. West's Ann.Code Civ. Proc. §§ 462, 473.

McDougall & Fairfax, Aubrey B. Fairfax, Frank B. Cliff, Palo Alto, for appellant.

Atkinson, Farasyn & London, Mountain View, for respondents.

DOOLING, Justice.

Appellant filed a complaint to quiet her title to described real property. Respondent on August 18, 1953 filed an answer in three counts: Count 1 denied the material allegations of the complaint and Count 2 pleaded the judgment in a prior action as res judicata. The third count was headed in the pleading: "Further answering said complaint and by way of cross-complaint against the said plaintiff, defendant Nancy C. Groves alleges:"

The allegations following this heading affirmatively pleaded that defendant is the owner of the same property described in the complaint and prayed that defendant's title be quieted thereto.

No answer was filed to this pleading by plaintiff and on September 10, 1953, on the ex parte application of defendant, the trial court ordered the default of plaintiff entered for failure to answer defendant's cross-complaint and after taking evidence thereon, entered judgment on defendant's cross-complaint quieting defendant's title to the described property.

On June 15, 1956 plaintiff noticed a motion to set aside the default and default judgment to be heard on July 6, 1956 on the grounds, among others, that the default was entered without authority of law and that the default judgment is void. An affidavit filed in support of this motion explained the delay beyond the six-month period fixed in Code of Civil Procedure, section 473 by the statement that the fact of the entry of the default and default judgment was not discovered until "more than six (6) months had elapsed from the date of said default to the date affiant discovered same."

The court denied the motion to set aside the default and judgment and plaintiff appeals from that order.

[1] Since the motion was not made within six months it may not be considered as one authorized by any part of Code of Civil Procedure, section 473 except the last paragraph thereof. However if the judgment is void on the face of the record, as appellant claims, it may properly be attacked on that ground at any time. 29 Cal.Jur.2d, Judgments, § 187, pp. 143-144.

Appellant points out that on the face of the record the issues tendered by the complaint have never been adjudicated. The judgment in terms only adjudicates the issues tendered by the cross-complaint and, since there can only be one final judgment in which all issues are adjudicated between the parties, the judgment here attacked appears to be a partial or piecemeal judgment, and not a final one. *Nicholson v. Henderson*, 25 Cal.2d 375, 153 P.2d 945. Respondent counters that the adjudication of title in her disposes completely of the claim of title in appellant asserted in the complaint. The situation is rather anomalous, but we do not find it necessary to resolve the anomaly.

[2] Quiet title actions are somewhat peculiar in that a defendant, claiming title in himself to the property described in the complaint, may plead his own title in the answer and without filing a counterclaim or cross-complaint ask for affirmative relief quieting his own title against the plaintiff. *District Bond Co. v. Pollack*, 19 Cal.2d 304, 307, 121 P.2d 7; *Islais & Salinas Water Co. v. Allen*, 132 Cal. 432, 64 P. 713; *Hough v. Wright*, 127 Cal.App. 689, 16 P.2d 301. As the court stated the rule in the *Hough* case, 127 Cal.App. at page 691, 16 P.2d at page 301: "It is well settled, however, that in actions to quiet title affirmative relief may be granted to a defendant where, as here, by his answer, he * * * alleges ownership in himself and prays for a judgment establishing and quieting title in him * *."

In view of this rule the pleading of the same title and prayer for affirmative relief by counterclaim or cross-complaint which may be pleaded and prayed for in the answer itself would seem to be superfluous and

unnecessary. Nonetheless the courts, while recognizing this, have held that the same relief may be asked by way of counterclaim (*Brooks v. White*, 22 Cal.App. 719, 721, 136 P. 500) or cross-complaint (*Larkin v. Superior Court*, 171 Cal. 719, 725-726, 154 P. 841; *Sormano v. Wood*, 179 Cal. 102, 104, 175 P. 451).

However when it comes to determining the effect of a cross-complaint which sets out the same matters which might as readily be pleaded affirmatively in the answer there are cases which in the interest of justice have treated such cross-complaints as answers pleading affirmative matter. *Phillips v. Hagart*, 113 Cal. 552, 554, 45 P. 843; *Pauly v. Rogers*, 121 Cal. 294, 297, 53 P. 808; *Booth v. Stow*, 38 Cal.App. 191, 192, 175 P. 705.

More in point on the question here presented are the cases of *Crofton v. Young*, 48 Cal.App.2d 452, 119 P.2d 1003, and *Brooks v. White*, supra, 22 Cal.App. 719, 136 P. 500. The rationale of these two cases is clearly disclosed by the following quotation from *Crofton v. Young*, supra, 48 Cal.App.2d at pages 458-459, 119 P.2d at page 1007: "Where a cross-complaint is unnecessary in view of the allegations of the answer the clerk has no authority to enter a default. *Brooks v. White*, 22 Cal. App. 719, 136 P. 500. It was pointed out in that case that in quiet title actions a cross-complaint is usually unnecessary since full relief may be granted the defendant pursuant to his answer. While certain exceptions were noted, it was held that where the issues are fully presented by the complaint and answer further pleading on the part of a plaintiff is not required, and the omission to answer an unnecessary pleading will confer no authority on the clerk to enter a plaintiff's default.

"In the instant case, a single pleading was filed which was denominated 'Answer and Cross-Complaint'. In the first part of the instrument, under the heading 'Answer', it is alleged that the judgment obtained from the bank is a first lien upon the property, that the judgment has been assigned to Neal, that the judgment-debtor, Thomas N.

Crofton, is the owner of the real property, and that the plaintiff and respondent is not and never has been the owner thereof. Following that, under the heading 'Cross-Complaint', the same facts are alleged more in detail, and it is specifically alleged that the property was transferred by the judgment-debtor to the plaintiff and respondent without consideration and for the purpose of defrauding the judgment-creditor. The allegations of the answer are then adopted by reference as a part of the cross-complaint. There is but one prayer in which 'this answering defendant' prays that the plaintiff take nothing and that 'the defendant' Neal be adjudged to have a first lien upon the property. The answer alleges the ultimate facts while the portion called a cross-complaint goes more into detail in alleging probative facts, and the prayer asks for nothing which could not be given under the answer if it stood alone. Under these circumstances the cross-complaint was unnecessary and the setting aside of the respondent's default for not answering the cross-complaint was proper since its entry by the clerk was unauthorized."

Respondent attempts to distinguish these two cases by asserting that here the affirmative matter was pleaded only by way of cross-complaint and was not, as in those cases, pleaded once in the answer and a second time in the cross-complaint. The argument savors of hair-splitting, but conceding its force, the heading of the third subdivision of respondent's pleading, quoted in full above, demonstrates that he pleaded the same matter both as an answer (quoting again: "Further answering said complaint * * *") and "by way of cross-complaint."

[3] Under the authority of *Crofton v. Young*, supra, 48 Cal.App.2d 452, 119 P.2d 1003, and *Brooks v. White*, supra, 22 Cal. App. 719, 136 P. 500, if respondent had set out the same allegations twice in his pleading, once as an answer and repeated a second time as a cross-complaint, the plaintiff could not be held in default for failing to plead thereto. Here respondent pleaded the

same matter once as both answer and cross-complaint. In its function as answer the allegations were deemed denied without further pleading. Code Civ.Proc. § 462. It would be a ridiculous refinement to hold that what is deemed denied in its function as answer would be admitted by failure to answer it in its function as cross-complaint. We deem this case controlled by the reasoning of the courts in the *Crofton* and *Brooks* cases.

The order is reversed with directions to the trial court to set aside the default and default judgment.

DRAPER, J., concurs.

KAUFMAN, Presiding Justice.

I dissent.

This is an appeal from an order denying appellant's motion under Code of Civil Procedure, section 473, to set aside a default judgment.

Appellant commenced this action to quiet title on May 11, 1953. On August 18, 1953, respondent answered, denying the allegations of the complaint and as a defense alleged that a certain action was *res judicata* of appellant's rights. In addition, respondent filed a cross-complaint, alleging that the respondent was the owner of the property and praying that respondent's title be quieted. The answer and cross-complaint were served on appellant's attorney on August 17, 1953. On September 10, 1953, 24 days after the service of the answer and cross-complaint on appellant's attorney, after hearing respondent's proof, the trial court entered the default of the appellant for failure to answer the cross-complaint, and granted respondent a decree quieting title. Appellant's motion to set aside the default was not filed until June 15, 1956. This motion was denied on July 23, 1956.

Appellant asserts that there was an abuse of discretion in denying the motion because she had no notice of the answer and cross-complaint and was not required to answer thereto, and that the judgment was therefore void.

The applicable portion of Code of Civil Procedure, section 473, is: "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or preceeding was taken.

" * * * The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

The granting or denying of a motion to vacate a default rests in the sound discretion of the trial court. *Baratti v. Baratti*, 109 Cal.App.2d 917, 242 P.2d 22; *Shearman v. Jorgensen*, 106 Cal. 483, 39 P. 863. Although appellate courts are reluctant to disturb the order of the trial court, denials of relief must be more carefully scrutinized than orders granting relief. *Brill v. Fox*, 211 Cal. 739, 297 P. 25. The burden of showing that there are grounds for setting the default aside is on the moving party.

Appellant's brief and the augmented record indicate that the answer and cross-complaint were served on appellant's counsel by mail, a form of service which is proper and authorized by Code of Civil Procedure, section 465, and gave appellant notice thereof under Code of Civil Procedure, sections 442, 1012, 1013. The record also contains letters exchanged between appellant's and respondent's counsel which clearly indicate that appellant had notice of respondent's intention to bring the matter to trial, thus vitiating appellant's contention that the default should be set aside on grounds of fraud.

Appellant's motion here was made more than two years after the entry of the default, after the expiration of the six-month period allowed in the statute set forth above. Such a motion is governed by the rules applicable to collateral attack and, in the absence of extrinsic fraud or mistake, the judgment cannot be set aside unless it is void on its face. *Borenstein v. Borenstein*, 20 Cal.2d 379, 125 P.2d 465; *City of Salinas v. Luke Kow Lee*, 217 Cal. 252, 18 P.2d 335. Appellant relies chiefly on *Brooks v. White*, 22 Cal.App. 719, 136 P. 500. In that case, however, the answer denied plaintiff's ownership of the property and affirmatively alleged that the defendant was the owner of the property in question, and the cross-complaint alleged that the defendant owned the property and requested that her title be quieted. In this case, the answer consisted of a denial of the allegations of the complaint and the pleas of *res judicata*. The issue of respondent's title was raised only by the cross-complaint, and is therefore not a repetitious and unnecessary pleading. In an action to quiet title where the defendant does not set up ownership and title, by answer and counterclaim, a cross-complaint is proper. *Myers v. Superior Court*, 75 Cal. App.2d 925, 172 P.2d 84; *Crofton v. Young*, 48 Cal.App.2d 452, 119 P.2d 1003. The negligence or carelessness of a party or his attorney is not ground for collateral attack on a final judgment. *Greenwood v. Greenwood*, 112 Cal.App. 691, 297 P. 589.

I am here in agreement with the following statement from the memorandum opinion of the trial court: "It is well established that a cross-complaint commences an independent cross-action and must be answered (or demurred to) just as a complaint. Hence, although the default statutes refer only to a complaint, they are applied to the failure to answer or demur to a cross-complaint. (Witkin Calif. Procedure, Vol. 2, p. 1694; *Ross v. San Diego Glazed Cement Pipe Co.*, 50 Cal.App. 170, 194 P. 1059.)" Appellant's motion properly denied.

Appellant contends that there is not a final judgment in this action. The appeal

here is from the order denying motion to set the judgment aside, *not* from the judgment.

The judgment disposes of every issue in the case, including any and all rights appellant may have had in the property. That sufficiently satisfies the rule that there may be only one final judgment in an action.

"Under California procedure there is ordinarily only one final judgment in an action. A cross-complaint is not considered sufficiently independent to allow a separate final judgment to be entered upon it, unless the judgment or order on the cross-complaint may be considered final as to some of the parties." *Sjoberg v. Hastorf*, 33 Cal.2d 116, 199 P.2d 668.

In this case the judgment finally settles the rights of all the parties in the action to the property involved. It is, therefore, a final judgment.

In view of the foregoing the order of the trial court finds ample support in the record.

I would affirm the order.

fault judgment rendered against him for amount owed a private investigator he had hired, failed to set forth sufficient facts for equitable relief on ground of extrinsic mistake or excusable neglect based on illness and pressure of legal business.

Judgment affirmed.

1. Judgment ⇨460(3)

Complaint by attorney to vacate a default judgment rendered against him for amount owed a private investigator he had hired, failed to set forth sufficient facts for equitable relief on ground of extrinsic mistake or excusable neglect based on illness and pressure of legal business. *West's Ann.Code Civ.Proc.* § 473.

2. Judgment ⇨143(14)

Pressure of legal business is not a sufficient ground to invoke section of Code of Civil Procedure providing for relief from a default judgment. *West's Ann.Code Civ.Proc.* § 473.

3. Attorney and Client ⇨29

An agreement of attorney to pay a private investigator five per cent of gross recovery, if any, obtained by attorney in a personal injury action, was not illegal as fee splitting. *Rules of Professional Conduct*, rule 3, *West's Ann.Bus. & Prof.Code*, following § 6076.



154 Cal.App.2d 598

Richard P. LYONS, Plaintiff and Appellant,
v.

Walter SWOPE, Defendant and Respondent.
Civ. 17405.

District Court of Appeal, First District,
Division 2, California.

Oct. 22, 1957.

Rehearing Denied Nov. 21, 1957.

Hearing Denied Dec. 17, 1957.

Action to vacate a default judgment. The Superior Court, San Mateo County, A. R. Cotton, J., sustained defendant's demurrer to the complaint without leave to amend and plaintiff appealed. The District Court of Appeal, Kaufman, P. J., held that complaint by attorney to vacate a de-

Peter J. Coniglio, South San Francisco, for appellant.

Ernest E. Emmons, Jr., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

The appellant filed a complaint in the Superior Court of San Mateo County invoking the equity powers of the court to set aside and vacate a default judgment made and entered against him by the Municipal Court of the Southern Judicial District of San Mateo County. This appeal is taken from the trial court's action in

sustaining respondent's demurrer to the complaint without leave to amend.

Appellant is an attorney at law licensed to practice in California and, in connection with a personal injury action, employed the respondent, a licensed California private investigator, pursuant to a contingent investigation agreement which provided that respondent would receive 5% of the gross recovery obtained. The personal injury action was settled for \$29,000, but respondent was not paid. Thereafter, respondent sued appellant in the Municipal Court for \$1,450. Appellant was served in that action on December 10, 1954, but failed to appear. His default was entered on May 24, 1955, and a default judgment rendered against him on June 17, 1955, over six months after service has been made. Appellant then filed a motion to set aside the default judgment. This motion was denied on November 19, 1955. On March 1, 1956, the order of the Municipal Court denying the motion was affirmed by the Appellate Department of the Superior Court and on March 29, 1956, appellant's petition for a rehearing was denied. On March 29, 1956, appellant filed the complaint for equitable relief to which the respondent interposed a general and special demurrer. On April 19, 1956, the court heard arguments and sustained the respondent's general demurrer to appellant's complaint without leave to amend.

The contentions on appeal are as follows:

1. The trial court erred in sustaining the demurrer to the complaint without leave to amend as the complaint stated a cause of action for equitable relief on the ground of extrinsic mistake or excusable neglect.

2. The contingent investigation agreement was illegal and in violation of Rule 3 of Professional Conduct of the State Bar of California.

Appellant's grounds for equitable relief as set forth in Paragraph VIII of the Complaint are the following:

- 1) At the time of service appellant was engaged in an eight-day trial.

- 2) Appellant was City Attorney of South San Francisco and had to give priority to city work over his other legal work.

- 3) Shortly after he was served, appellant developed a virus influenza which prevented him from working evenings in his office and, because of the duties of his office, he was unable to prepare and file an answer to the respondent's complaint.

- 4) Other extenuating circumstances, such as vacations of secretarial help and the demands of the city council, which prevented him from filing an answer.

[1,2] We do not think the above recite sufficient grounds for equitable relief. It only appears that appellant was busy with other legal work. Pressure of legal business is not sufficient to invoke Code of Civil Procedure, section 473. *Dow v. Ross*, 90 Cal. 562, 27 P. 409. His illness was not a disabling one as he was able to continue with his other legal work. In *Jeffords v. Young*, 98 Cal.App. 400, 277 P. 163, relied upon by the appellant, the illness of counsel resulted in his death. In *Smith v. Busniewski*, 115 Cal.App.2d 124, at page 127, 251 P.2d 697, at page 699, the court pointed out, "It is well settled that equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake or excusable neglect which was not the result of negligence or laches on the part of the complainant."

- (a) In *Hallett v. Slaughter*, 22 Cal.2d 552, at page 557, 140 P.2d 3, at page 6, relied upon by the appellant for the proposition that he is entitled to equitable relief if his negligence in no way prejudiced the opposite party, the court said: "'* * * At most, it was a question of fact for the court below to determine whether or not the lack of vigilance on the part of the plaintiff was such as would not have occurred with a man of ordinary care and prudence, under the same circumstances

That court has decided the question in favor of the plaintiff, and we are satisfied with its conclusion.'” Here we are satisfied with the lower court’s conclusion that the complaint on its face demonstrates that the default judgment was not obtained by extrinsic fraud, mistake and accident. The other cases cited by appellant are not relevant here. See *Levinson v. Bank of America*, 126 Cal.App.2d 122, 271 P.2d 632, as being here in point.

[3] (b) There is also no merit in appellant’s second contention as no fee splitting was involved, and in *Cain v. Burns*, 131 Cal.App.2d 439, 280 P.2d 888, it was held that the prohibition of Rule 3 applied to the attorney and not the investigator.

In view of the foregoing the judgment of the trial court finds support in the record before us.

Judgment affirmed.

DOOLING, J., concur.



154 Cal.App.2d 853

James L. TREADWELL, Plaintiff and Appellant,

v.

PACIFIC INDEMNITY COMPANY,
Defendant and Respondent.

Civ. 17741.

District Court of Appeal, First District,
Division 2, California.

Nov. 4, 1957.

Action to recover value of certain tools of the insured and his employees stolen from insured’s building. From a judgment entered after sustaining demurrer to the plaintiff’s second amended complaint in the Superior Courts, City and County of San Francisco, John B. Molinari, J., the

plaintiff appealed. The District Court of Appeal, Draper, J., held that the policy did not cover the losses sustained by the insured.

Judgment affirmed.

1. Insurance ⇨146(1)

A court is compelled as far as possible to give effect to all language of a policy.

2. Insurance ⇨165

Under a property floater policy providing that the limits of liability did not exceed \$60,000 outside the building, but was “nil” in the building, policy was construable as meaning that no insurance was extended to property within the building.

See publication Words and Phrases, for other judicial constructions and definitions of “Nil”.

3. Pleading ⇨36(2)

Plaintiff was bound by the allegations of his amended complaint.

4. Insurance ⇨163(3)

Where stolen property consisted of hand tools used for servicing and repair of mobile equipment, such property could not be deemed to be “accessories” of any of machines serviced or repaired so as to be included within the coverage of a property floater policy.

See publication Words and Phrases, for other judicial constructions and definitions of “Accessories”.

5. Insurance ⇨146(1)

A court must read an insurance policy as a whole without deletion or interpolation, and a forced construction is not to be adopted so as to cast upon insurer a liability which it has not assumed.

6. Insurance ⇨163, 164(1)

Where property floater policy covered mobile agricultural and construction equipment, including “accessories” therefor, language covered the mobile equipment and accessories therefor, whether owned by the insured or merely in his custody for the purposes stated, but did not cover all property in the custody of the assured for the

purpose of performing work upon mobile agricultural and construction equipment.

Athearn, Chandler & Hoffman, Theodore P. Lambros, San Francisco, for appellant.

Derby, Cook, Quinby & Tweedt, San Francisco, for respondent.

DRAPER, Justice.

Plaintiff appeals from judgment entered after sustaining of demurrer to his second amended complaint without leave to amend.

This pleading sought recovery of the value of certain tools of appellant and his employees stolen from within plaintiff's building. Respondent had issued a "property floater policy" insuring appellant against "all risks of direct physical loss of * * * the insured property." Photostatic copy of the policy is made a part of the second amended complaint.

The principal issue arises under paragraph 6 of the policy, which follows paragraphs defining property covered and excluded, and perils insured and excluded. Paragraph 6 reads:

"6. Limits of Liability: The liability of this Company shall not exceed \$60,000.00 in any one loss, casualty, or disaster, including salvage charges or other expenses or all combined subject to the following limits:

"(a) While in Transit: \$25,000.00

"(b) 1. While at the following location(s) owned, rented, under control of or used, in whole or in part, by the Assured:

	In Building	Outside Building
1755 - 3rd Street,	<u>\$ NIL</u>	<u>\$60,000.00</u>
<u>San Francisco, California</u>	<u>\$ _____</u>	<u>\$ _____</u>
	<u>\$ _____</u>	<u>\$ _____</u>

"(b) 2. In the event, after attachment of this policy, the Assured shall acquire an additional location(s) within the territorial limits of this policy by ownership, rental, control, or use, in whole or in part, coverage is afforded under this policy for a period of 30 days after date of acquisition, or until this policy is endorsed to cover property at such acquired locations, whichever first occurs.

"The Company's limit of liability shall not exceed, in any one loss, casualty or disaster, \$60,000.00 at each such location.

"(c) \$20,000.00 while located elsewhere within the territorial limits of the policy except as described in (a) and (b)."

(The portions of the above quotation which are underlined are typewritten in the policy. All the remainder is printed.)

On its face, this language appears to exclude coverage of property within the building at appellant's place of business. The complaint alleges that the property was stolen from the building. Thus the policy, so construed, would not extend to the loss sued upon.

[1, 2] Appellant argues, however, that the typewritten word "nil" should apply to limits of liability, rather than to coverage. Thus, he argues, the policy liability is limited to \$60,000 on property outside the building, but is without any limit what-

ever on property within the building. On its face, this argument seems untenable. In more technical approach, the word "nil," a contraction of nihil, means "nothing" (Webster's New International Dictionary, 2d ed.). To state that "The liability of this Company shall not exceed nothing" is by no means to say that the liability is unlimited. We are aware that it is hardly realistic to apply standards of good English usage to the language of an insurance policy. Policy jargon is at least as painful to the purist as the language of judicial opinions. Nonetheless, we are convinced that the word "nil" in its context here cannot be given the meaning urged by appellant. The rules of construction compel us to give

effect, so far as possible, to all language of the contract. We conclude that the word means that no insurance is extended to property within the building. Our view is supported by the only decision we find dealing with a comparable problem (*Alamo Casualty Co. v. Richardson*, Tex.Civ.App., 235 S.W.2d 726).

The foregoing also disposes of appellant's argument that the \$20,000 limit fixed by subdivision (c) applies here. As demonstrated, use of the word "nil" in paragraph 6(b)1 excludes coverage of property within the building at 1755 Third Street. Thus subdivision (c), which applies only to property not described in subdivisions (a) and (b), can have no effect here.

The property here in question also is excluded from the application of the policy by the language describing the property insured. The policy covers "mobile agricultural and construction equipment * * *, including accessories therefor, attached or otherwise, the property of the Assured and the property of others in the custody or control of the Assured, for sale, display, demonstration, storage, service, repairs, or for the purpose of performing work thereon."

[3-6] In his first amended complaint, appellant described the stolen property as hand tools used for servicing and repair of mobile equipment, but which "were not attached to nor kept in or on any item of such equipment, and did not accompany any such item which left plaintiff's premises under sale or lease." As appellant concedes, he is bound by these allegations of the earlier complaint (*Owens v. Traverso*, 125 Cal.App.2d 803, 271 P.2d 164). By no reasonable definition can the tools used by shop workmen, in the business of repairing and servicing mobile equipment generally, be deemed to be "accessories" of any one or all of the machines which have been or may hereafter be serviced or repaired (*Webster's New International Dictionary*, 2d ed.; *Black's Law Dictionary*, 4th ed.). Appellant argues, however, that the quoted language covers

all property in the custody of the assured for the purpose of performing work upon mobile agricultural and construction equipment. This strained construction, as well as others urged, requires rearrangement of the policy language or omission of portions of it. We must read the contract as a whole, without deletion or interpolation (*Cummins v. Bank of America*, 17 Cal.2d 846, 849, 112 P.2d 593). Clearly the language used here means that insurance is extended to mobile equipment and accessories therefor, whether owned by the assured or merely in his custody for the purposes stated. The rule is that a forced construction is not to be adopted to cast upon the insurer a liability which it has not assumed (*New York Life Ins. Co. v. Hollender*, 38 Cal.2d 73, 81, 237 P.2d 510; *Baine v. Continental Assur. Co.*, 21 Cal.2d 1, 5, 129 P.2d 396, 142 A.L.R. 1253).

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



Elsie E. COWEE, Ruth Evans and Pearl L. McNulty, Plaintiffs and Respondents,

v.

Matthew MARSH, Defendant and Appellant.*
Civ. 9355.

District Court of Appeal,
Third District, California.
Oct. 22, 1957.

Hearing Granted Dec. 17, 1957.

The Superior Court, Butte County, Arthur Coats, J., rendered judgment for plaintiffs who did not serve written notice of entry of judgment but notice was given by clerk of court to parties and 32 days after receipt, defendant filed notice of intention to move for new trial and served notice on plaintiffs. Defendant's motion for new

* Opinion vacated 324 P.2d 553.

trial was denied and defendant filed notice of appeal 84 days after entry of judgment and 27 days after denial of motion for new trial. Plaintiffs moved to dismiss appeal. The District Court of Appeal, Warne, J. pro tem., held that notice of entry of judgment must be given by prevailing party and notice of entry of judgment prepared and served by clerk of court did not start running of 10 day period for filing of notice of intention to move for new trial.

Motion to dismiss appeal denied.

1. Appeal and Error ⇨348(1)

New Trial ⇨155

Valid service of notice of entry of judgment is necessary to start time running within which trial court may pass upon motion for new trial, but it is not necessary to start the time running within which an appeal may be taken. West's Ann.Code Civ. Proc. §§ 659, 660.

2. Appeal and Error ⇨345(1)

Time limit within which an appeal may be taken may be extended if new trial proceedings are validly begun. West's Ann. Code Civ.Proc. §§ 659, 660.

3. Judgment ⇨217

Any party desiring to achieve finality of judgment may do so by giving written notice of entry of judgment. West's Ann. Code Civ.Proc. § 659.

4. Judgment ⇨276

Clerk of court has no authority to give written notice of entry of judgment. West's Ann.Code Civ.Proc. § 659.

5. New Trial ⇨138

Mere possession of knowledge of entry of judgment is immaterial in so far as it could fix any limitation upon the time within which notice of intention to move for new trial might be given by party desiring to do so. West's Ann.Code Civ.Proc. §§ 659, 660.

6. New Trial ⇨138

Notice of entry of judgment prepared and served upon interested parties by clerk of court does not start running of 10 day

period for filing of notice of intention to move for new trial. West's Ann.Code Civ. Proc. §§ 659, 660.

7. New Trial ⇨138

Where plaintiffs, prevailing parties, had not served written notice of entry of judgment, but notice had been given by clerk of court to parties and 32 days after receipt defendant had filed notice of intention to move for new trial and had served notice on plaintiffs but defendant's motion for new trial was denied and notice of appeal was filed 84 days after entry of judgment and 27 days after denial of motion, notice of intention to move for new trial had been filed and served timely. West's Ann.Code Civ.Proc. § 659.

8. Judgment ⇨276

It is essential to valid notice of entry of judgment that notice be given by a party to the action, but notice of entry of judgment may be waived. West's Ann.Code Civ.Proc. § 659.

Peters & Peters, Chico, and Coyle E. Bybee, Chico, for appellant.

J. Adrian Palmquist, Oakland, Manwell & Manwell, Marysville, and James G. Changaris, Yuba City, for respondents.

WARNE, Justice pro tem.

This is a motion to dismiss an appeal from the judgment. The sole question is whether the receipt of a notice of entry of judgment prepared and filed by the clerk of the court started the running of the ten-day period of time for the filing and serving of intention to move for a new trial allowed by the provisions of Section 659 of the Code of Civil Procedure.

Judgment was entered on May 2, 1957. No notice of entry of judgment was served by the prevailing party. However, the record shows that notice in writing of entry of judgment was given on the 9th day of May, 1957, by the Clerk of the Superior Court of Butte County, by depositing copies of said written notice in the United States mail addressed to counsel for the respective par-

ties at their respective addresses. Counsel for appellant have their offices in Chico, Butte County, California, approximately 25 miles from the county seat of Butte County. Notice of entry of judgment was received by them on May 10, 1957.

On June 11, 1957, thirty-two days after receipt by counsel for appellant of the clerk's notice of entry of judgment, appellant filed notice of intention to move for a new trial. Notice of the motion was served on counsel for respondents the following day.

Appellant's motion for a new trial was heard over the objections of respondents and was denied on June 28, 1957. Notice of appeal was filed on July 25, 1957, the eighty-fourth day after the entry of judgment and the twenty-seventh day after denial of appellant's motion for a new trial.

It is appellant's position that, in order to have any legal effect, the notice of entry of judgment must be given by the attorney for the prevailing party, and that a notice of entry of judgment prepared and served upon all interested parties by the clerk of the superior court does not start the running of the ten-day period for the filing of the notice of intention to move for a new trial as provided for in Section 659 of the Code of Civil Procedure.

[1] Valid service of notice of entry of judgment is necessary to start the time running within which a trial court may pass upon a motion for a new trial (*Gross v. Hazeltine*, 206 Cal. 130, 273 P. 550; *Code of Civ.Proc.* sec. 660), but it is not necessary to start the time running within which an appeal may be taken. *Lawson v. Guild*, 215 Cal. 378, 10 P.2d 459.

[2-5] The rules on appeal automatically limit the time within which an appeal may be taken, although this limitation may be extended if new trial proceedings be validly begun, but the legislature has placed no absolute limit upon the time within which the new trial proceedings may be started, except it has provided the time within which a new trial proceeding may be begun can be limited by the giving of a written notice

that judgment has been entered. If that notice be not given, then the new trial proceedings may be initiated long after the right of appeal from the judgment may have expired. The statute has not said expressly who may give the notice that fixes a limitation upon the time within which new trial proceedings may be begun. Any party desiring to achieve finality of the judgment may do so by giving the statutory notice. In this case neither party has given such notice but it is claimed that the clerk of the court has effectively placed a limitation upon the time within which the parties may exercise their right to begin new trial proceedings by himself giving a notice of the entry of judgment. The statute does not make this his duty and hence it follows that, as a ministerial officer, he has no authority to give the notice. His act in giving the notice which he gave in this case, was purely voluntary and ought to be given no more significance than if the same information had been conveyed by any disinterested person not a party to the action. It ought not to be held that the time within which a motion for a new trial could be made has been shortened by the action of the clerk. While the notice did convey information the result of that ought not to be declared to be any more than to bring home to both parties the knowledge that judgment had been entered of record. Mere possession of knowledge of the entry of judgment is immaterial in so far as it could fix any limitation upon the time within which a notice of intention to move for a new trial might be given by any party desiring to do so.

McCordic v. Crawford, 23 Cal.2d 1, 5, 142 P.2d 7, 9 impliedly at least places the burden of serving notice of entry of judgment on the prevailing party. The court stated:

"It is thus left to the prevailing party to take the initiative in insuring the finality of the judgment by serving upon the opposing party written notice of entry of judgment. When he does so, the time within which a motion for new trial may be made (*Labarthe v. McRae*, 35 Cal.App.2d 734, 97 P.2d 251)

and granted (*Gross v. Hazeltine*, 206 Cal. 130, 273 P. 550) begins to run. A notice of intention to move for new trial must be filed 'within ten (10) days after receiving written notice of the entry of judgment.' Code Civ.Proc. section 659. Until the date of service there is no restriction on the right to move for a new trial. Thus the date of service of notice of entry of the judgment marks the starting point in this regard as well as for the sixty-day period in which the court retains power to grant a motion for new trial."

It has long been the custom and practice of California attorneys representing prevailing clients to serve the statutory notice of entry of judgment on the opposing counsel. This custom and practice was recognized in the case of *Jansson v. National Steamship Company*, 34 Cal.App. 483, 168 P. 151, 152. There the court held that where the prevailing plaintiff assigned a portion of the judgment to his attorney and served the defendant with notice of such assignment, signed by plaintiffs and not by his attorney, such notice was not sufficient notice of entry of judgment as required by Section 659 of the Code of Civil Procedure to start the time running in which a motion for a new trial must be made. While it was held that such document was only intended to give notice of the assignment of judgment and, therefore, did not constitute a notice of entry of judgment, the court went on to quote without disapproval a statement made by the trial judge: "Where an attorney is retained in an action to represent a party litigant, all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record alone."

Again, in the case of *Harris v. Minnesota Investment Co.*, 89 Cal.App. 396, 400, 265 P. 306, 309:

"* * * Where an attorney is retained in an action to represent a party litigant, all statutory notices and legal proceedings therein must be signed or inaugurated by the attorney of record

alone. * * *" (Citing *Jansson v. National Steamship Co.*, supra.)

[6-8] We conclude that under the statutory and case law it is essential to a valid notice of entry of judgment that the notice be given by a party to the action. Of course notice may be waived, as has been held. Knowledge of entry of judgment in and of itself is not sufficient. To hold contrary to the long-accepted practice would unjustly deny appellant his right of appeal.

The respondents' motion for an order dismissing said appeal is denied.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



155 Cal.App.2d 131

D. Jack METZGER, Plaintiff and Appellant,
v.

**Dale BOSE and Ruth N. Bose, sued herein
as Jane Doe Bose, Defendants and
Respondents.**
Civ. 9186.

District Court of Appeal, Third District,
California.
Nov. 8, 1957.

Action to enjoin the obstruction of a roadway. From a judgment sustaining demurrers to the complaint in the Superior Court, Shasta County, Albert F. Ross, J., the plaintiff appeals. The District Court of Appeal, Schottky, J., held that the complaint stated a cause of action.

Judgment reversed with directions to overrule the demurrer.

I. Easements ¶61(8)

Where plaintiff alleged that he was an owner of easement and right of way for road purposes over adjacent lands and that defendants interfered with the plain-

tiff's uses of such easement and sought an injunction, the complaint stated a cause of action.

2. Pleading ¶

The policy of the law is that legal controversies be disposed of on their merits and not upon technical grounds of pleading.

William H. Phelps, Fall River Mills, for appellant.

Newton & Lopez, Redding, David W. Packard, Redding, of counsel, for respondents.

SCHOTTKY, Justice.

This is an appeal from a judgment rendered after the court sustained a general and special demurrer to plaintiff's amended complaint and plaintiff failed to further amend his complaint.

The amended complaint alleges in substance:

That plaintiff has owned a certain described parcel of real property for several years; that in 1950 plaintiff conveyed to defendants a parcel of real property contiguous and to the west of the property first described, the description of the said property conveyed to defendants referring to a map depicting a county road running across the easterly portion of the property conveyed by plaintiff to defendants. The complaint then alleges:

"That by virtue of an appurtenance to the parcel of real property set forth in paragraph II of this complaint, hereinafter referred to as plaintiff's property, plaintiff is the owner of an easement and right of way for road purposes over the lands adjacent and contiguous to his said parcel of real property to the west of same, the exact location of said easement and right of way for road purposes being the

former County Road which was abandoned by the County of Shasta in the year 1955, the same being that set forth in paragraph III of this complaint."

The complaint alleges further that prior to the abandonment of the road by the county, plaintiff had erected a resort, motel and fishing facilities on his property, and that he and his patrons had traveled over said road; and that on March 15, 1956, defendants barricaded the said road in such a manner as to prevent plaintiff and his patrons from traveling over said road. Plaintiff prayed for an injunction and for nominal damages.

Defendants' demurrer was both general and special but the only ground of demurrer which appears to have been relied upon by defendants and considered by the trial court was the ground that the complaint did not state a cause of action. Furthermore, the grounds of special demurrer are without merit and we shall therefore confine ourselves to the question of whether or not the amended complaint states a cause of action.

[1] We have concluded that the amended complaint does state a cause of action and that the court erred in sustaining defendants' demurrer thereto. Paragraph II, hereinbefore quoted, alleges that "plaintiff is the owner of an easement and right of way for road purposes over the lands adjacent and contiguous to his said parcel of real property to the west of same," etc. This allegation of ultimate fact, together with the further allegation that defendants interfered with plaintiff's uses of said easement, is in our opinion sufficient to state a cause of action.

Defendants point out that immediately preceding the allegation hereinbefore quoted the complaint states that by virtue of an appurtenance to plaintiff's real property plaintiff is the owner of the easement, and argue that plaintiff cannot properly assert any interest in real property which he con-

veyed to defendants without any reservation of an easement. From this they argue that it appears on the face of the complaint that plaintiff's only source of title rests in a claim that, having owned both parcels as contiguous parts of a whole, plaintiff conveyed one part without reserving a private easement to use the area occupied by the public with the result that when the public abandoned the road plaintiff had no right to pass over what had been the public way. But it does not appear on the face of the pleading that this is the source of the plaintiff's alleged title. Rather it appears that plaintiff's reference to the public road and its abandonment is by way of describing accurately the boundaries of the easement claimed—it is the strip formerly used as a public way.

[2] We are convinced that the allegation in the complaint that plaintiff was the owner of an easement for road purposes was sufficient to state a cause of action and that there is nothing in the complaint to negative said allegation. The arguments advanced by respondents merely point out evidentiary matters of defenses which may be presented at the trial of the action. Just what the origin, nature and extent of plaintiff's alleged easement are are matters which may be developed at the trial, but they cannot be summarily disposed of upon demurrer. It is, of course, the policy of the law that legal controversies be disposed of on their merits and not upon technical grounds of pleading. All that we are deciding upon this appeal is that the complaint by which plaintiff seeks to establish an easement and to restrain interference by defendants therewith does state a cause of action and that the demurrer should have been overruled.

The judgment is reversed with directions to the trial court to overrule the demurrer to the amended complaint.

VAN DYKE, P. J., and PEEK, J., concur.

155 Cal.App.2d 134

Robert WALKER, Petitioner,

v.

The SUPERIOR COURT OF The State of California, IN AND FOR The COUNTY OF MENDOCINO, Respondent.

Civ. 9376

District Court of Appeal, Third District, California.

Nov. 8, 1957.

Rehearing Denied Dec. 5, 1957.

Hearing Denied Dec. 30, 1957.

Petition for writ of mandate to compel the respondent court to order a pretrial inspection of certain reports in the possession of the district attorney and coroner and to furnish the petitioner's counsel with copies of certain documents. The District Court of Appeal, Van Dyke, P. J., held that the petitioner was entitled to inspect the autopsy report; that the trial court did not abuse its discretion in not permitting a pretrial inspection of a statement of the witness' in the sheriff's possession; and that the petitioner was entitled to a copy of the report of the bureau of criminal investigation respecting the condition of the petitioner's shoes taken from him and which it was contended were used in committing the homicide.

Writ issued.

1. Criminal Law ☞627½

Where petitioner moved for writ of mandate to compel the court to order a pretrial inspection of reports in the possession of the district attorney and coroner, and a hearing was had on the motion at which time affidavits were filed by petitioner and no counteraffidavits were filed by the prosecution, factually the matters averred were admitted.

2. Criminal Law ☞627½

Petitioner indicted for murder and attempted rape was entitled to a pretrial inspection of the autopsy report in the possession of the district attorney on ground that such report is a "public document". West's

Ann.Gov.Code, §§ 1227, 27491; West's Ann.Code Civ.Proc. §§ 1888, 1892.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Document".

3. Criminal Law Ⓒ627½

Defense counsel in a criminal prosecution has no absolute right to inspect or compel the production of evidence in the possession of the prosecution.

4. Criminal Law Ⓒ627½

The defendant has no inherent right to invoke discovery as a means of examining the state's evidence merely in hope that something may turn up which would aid his defense, but in the interest of justice the trial court may grant pretrial discovery for good cause shown.

5. Criminal Law Ⓒ627½

Mandamus Ⓒ61

When an application for discovery of evidence in the possession of the prosecution is made, the trial court has a broad judicial discretion to grant or refuse and it is only when such discretion has been abused, that error can be predicated thereon so that mandate will lie.

6. Mandamus Ⓒ154(4)

In mandamus proceeding to compel the pretrial inspection of reports in the possession of the district attorney, allegation that neither the petitioner nor his attorney had been able to determine the occurrences observed by witness at the time the victim was assaulted was not alone a sufficient reason for holding that the trial court abused its discretion in not permitting pretrial inspection of any statement of the witness' in the sheriff's possession. West's Ann.Pen.Code, § 187.

7. Criminal Law Ⓒ666½

Where petitioner was charged with murder and attempted rape the petitioner was entitled to interview a witness of the crime and neither the prosecution nor the sheriff were entitled to order the witness not to talk to the defendant or his counsel.

8. Mandamus Ⓒ61

Court has no authority to enter an order at the request of an accused to compel a

witness to talk or submit to an interview when he objects thereto.

9. Mandamus Ⓒ61

Where it was contended that petitioner had kicked victim of the homicide in the head and one of the material issues at trial would be whether the petitioner did so and when arrested he was wearing the same shoes he was wearing at the time of the altercation and the shoes were taken from him and submitted to a laboratory analysis and petitioner contended it would be impossible to ascertain the condition of his shoes prior to the analysis except from a criminal investigation report, trial court in mandamus proceeding should have ordered a copy of the report to be given to the petitioner.

Broadus & Golden, Ukiah, for petitioner.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., and Merle P. Orchard, Mendocino County Dist. Atty., Ukiah, for respondents.

VAN DYKE, Presiding Justice.

This is a petition for a writ of mandate to compel the respondent court to order the pretrial inspection of certain reports in the possession of the district attorney and coroner and to furnish the petitioner's counsel with copies of certain documents in the possession of the sheriff and the district attorney.

Petitioner Robert Walker has been indicted for the murder of one Marion Harrist and for the attempted rape of one Nellie V. Acard. On September 13, 1957, petitioner sought an order from the respondent court directing the district attorney and the sheriff to deliver to petitioner's counsel the following documents:

1. A copy of any written statements signed by the petitioner and a copy of any transcripts of any recorded statement given by the petitioner.

2. A copy of any written statement signed by Raul Diaz and a copy of any tran-

script of any recorded statement given by Raul Diaz.

3. A copy of any report of Carl Aagaard, M. D., concerning the autopsy performed by him on the body of Marion Harrist.

4. A copy of any report received by the district attorney or the sheriff from the Bureau of Criminal Identification and Investigation concerning materials observed on or removed from the petitioner's shoes.

In the alternative to the above requests, petitioner sought an order permitting petitioner's counsel to inspect and copy each of the statements, transcripts, and reports.

The motion was made on the ground that the petitioner was entitled to receive, inspect, and copy the statements, transcripts and reports in preparation for trial and that to deny petitioner such rights would be to deprive him of procedural due process of law.

[1] A hearing was had on the motion, at which time affidavits were introduced by petitioner and his counsel. No counter-affidavits were filed by the prosecution. Factually, therefore, the matters averred were admitted. Petitioner alleged in his affidavit that he made certain statements to members of the sheriff's office; that he was unable to recall what he said; that it may be necessary for him to refresh his memory of the events to which they relate; and that the statements made are material to the issue of petitioner's guilt or innocence.

The affidavit of petitioner's attorney alleged that he went to the home of Raul Diaz, who was an eyewitness to the events and occurrences leading to the charges against petitioner, to interview Diaz concerning the facts giving rise to those charges; that Diaz told the attorney that he would be willing to discuss the events and occurrences observed by him relating to the death of Marion Harrist and the alleged attempted rape of Nellie V. Acard, except that he had been told by the sheriff not to discuss anything about those matters with anyone; that the sheriff had given Diaz a

writing for him to show to anyone attempting to talk to him about the case reading as follows:

"I, Raul Diaz, have been Instructed by Sheriff Reno H. Bartolomie of Mendocino County, not to converse, discuss, or mention anything pertaining to the case of The People of the State of California, -vs.- Robert Walker, who is now being held in the Mendocino County Jail and charged with 187 P.C., to-wit: murder, 161 [261] P.C., to-wit: attempt rape. This notice also includes the defense attorneys or attorney for Robert Walker."

Continuing, the affidavit stated that Diaz said he was afraid that he would get in trouble if he violated the sheriff's order; that the sheriff has in his possession or under his control written statements signed by Diaz; that the sheriff has refused to provide the attorney with a copy of Diaz's statement; that Diaz is the only witness to the events and occurrences at the time Marion Harrist met his death except for defendant and Nellie V. Acard, and that his statements are necessary for defendant and his attorney to determine what Diaz observed.

The affidavit further stated that the attorney had asked Dr. Aagaard, the physician who performed the autopsy on the body of the decedent, for a copy of the autopsy report; that Dr. Aagaard refused to furnish a copy of the report or to discuss the matter because he also had been instructed by the sheriff not to do so; that the attorney had asked the sheriff, who is also the county coroner, for a copy of the report, but the request was refused.

The affidavit of petitioner's attorney also states that the prosecution contends the decedent met his death as a result of being kicked in the head by petitioner; that at the time of petitioner's arrest he was wearing the same pair of shoes he was wearing at time decedent met his death; that several days after he was incarcerated in the county jail the sheriff took the shoes; that the sheriff transmitted them to the State Bureau

of Criminal Identification and Investigation, where the shoes were submitted to a laboratory analysis in which any materials deposited on the shoes which might have some evidentiary value in the case were removed; that it is now impossible to obtain any more material from the shoes having any evidentiary value on the issue of whether or not petitioner kicked the decedent on the head; that the sheriff has a written report containing statements identifying and describing the material removed from the shoes; that the sheriff has refused to furnish petitioner's attorney with a copy thereof and that without the report it is impossible for the defendant to receive a fair trial.

At the hearing on the matter, petitioner's attorney testified that he went to the coroner's office and asked the deputy if the files contained a copy of Dr. Aagaard's autopsy report; that he was informed that a copy was in the files; that a copy was refused him and that his request for inspection was also refused.

After the hearing the court entered its order granting the petitioner the pretrial inspection of any written statements signed by petitioner and a copy of any recorded statements given by petitioner relating to the charges as set forth in the indictment. Otherwise the court denied the motion.

Petitioner then asked this court to compel the trial court to order pretrial inspection of the documents in the possession of the prosecution and the coroner, which the trial court had refused. Petitioner claims that if he is required to proceed to trial without the materials sought in his motion addressed to the trial court he will be deprived of procedural due process of law. In his brief filed in support of the petition, petitioner claims that he is entitled to the autopsy report as a matter of right, and that the trial court abused its discretion in refusing to grant inspection of Diaz's statements and the report on the shoes made by the State Bureau.

We shall discuss each of these contentions separately.

The Autopsy Report

[2] Petitioner contends that the autopsy report is a public document and he therefore is entitled to a copy of it as a matter of right. By Section 27491 of the Government Code the coroner has the duty to investigate the cause of death of any person reported to him as having been killed by violence or who has suddenly died under circumstances that afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means. The section provides that the information secured by the coroner is to be reduced to writing and *forthwith* filed by him in his records of the death of the individual. (Emphasis ours.) Government Code, Section 1227 provides that the public records and other matters in the office of any officer, except as otherwise provided by law, are at all times during office hours open to the inspection of any citizen of the state. Section 1888 of the Code of Civil Procedure provides that all written acts or records of public officers are public records. Section 1892 of the Code of Civil Procedure provides that every citizen has the right to inspect and take a copy of any public writing except as otherwise provided by statute. An autopsy report is a record that the coroner is required to keep and is therefore a public record which a citizen may inspect. None of the statutory exceptions is present here. In the instant case an indictment has been filed. Petitioner is therein charged with murder and attempted rape. There is no reason why the report should be withheld from the public.

The Statements of the Witness Raul Diaz

[3-8] Defense counsel in a criminal prosecution have no absolute right to inspect or compel the production of evidence in the possession of the prosecution. The defendant has no inherent right to invoke discovery as a means of examining the state's evidence merely in the hope that something may turn up which would aid his defense. But in the interest of justice the

trial court may grant pretrial discovery for good cause shown. When an application for such discovery is made the trial court has a broad judicial discretion to grant or refuse and it is only when such discretion has been abused that error can be predicated thereon so that mandate will lie. *Cramer v. State*, 145 Neb. 88, 15 N.W.2d 323, 327; *State v. Payne*, 25 Wash.2d 407, 171 P.2d 227. Petitioner's allegation that neither he nor his attorney has been able to determine the things, events, or occurrences observed by Raul Diaz at the time Marion Harrist was assaulted is not alone a sufficient reason for this court to hold that the trial court abused its discretion in not permitting pretrial inspection of any statements of Diaz's in the sheriff's possession. Petitioner has the right to interview Diaz and through an interview he could learn what Diaz observed. Presumably he has received a copy of the indictment with the names of the witnesses who testified before the grand jury, as did Diaz. Presumably, also, he has received a transcript of the testimony given by Diaz. Nevertheless he has the right to interview Diaz.

" * * * Witnesses are not parties, and should not be partisans. They do not belong to either side of the controversy. They may be summoned by one or the other or both, but they are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous. Such a proceeding in a criminal case would violate the provisions of the Constitution of this state * * * which provides that, 'In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining them [witnesses] in his favor * * *.' The defendant, therefore has the constitutional right to have compulsory process for obtaining witnesses to testify in his behalf. He has also the right, either personally or

by attorney, to ascertain what their testimony will be." *State v. Papa*, 32 R.I. 453, 459, 80 A. 12, 15.

While the right may in certain instances be subject to proper exercise of judicial supervision (*Baker v. State*, Fla., 47 So.2d 728), we do not think that the prosecution or the sheriff may order a witness not to talk to the defendant or his counsel. Diaz has refused to talk only because the sheriff ordered him not to and we are of the opinion that it would be proper for the court to entertain a motion to compel the sheriff to annul his order to Diaz. Of course, Diaz did not have to obey the order of the sheriff but as a practical matter such an order can be, and was here shown to be, an effective way of keeping a witness's mouth closed. Since the order came from a person connected with the state, we are of the opinion that a court can and should order that person to cease interfering with defense counsel's right to interview a witness. Petitioner has shown no sufficient reason why he should have pretrial inspection of the statements Diaz made to the sheriff. It may be, as was held in *People v. Riser*, 47 Cal.2d 566, 305 P.2d 1, that at the trial conditions may arise giving petitioner a right to compel production and inspection of such statements. But we are here concerned only with pretrial discovery. What we have said "does not involve the question of the right of an accused to obtain an order from the court to compel a witness to talk or submit to an interview who objects to same. That the court has no authority to enter such an order is well settled." *Leahy v. State*, 111 Tex.Cr.R. 214, 13 S.W.2d 874, 881.

The Report of the Bureau of Criminal Identification and Investigation

[9] Petitioner alleges that the prosecution will contend that Marion Harrist met his death as a result of being kicked in the head by the petitioner and, accordingly, one of the material issues at the trial will be whether petitioner did so. As noted, these allegations have not been denied. When petitioner was arrested he was wearing the

same shoes he was wearing when the altercation with the deceased occurred. The shoes were taken from the petitioner by the sheriff and transmitted to the State Bureau of Criminal Identification and Investigation, where they were submitted to a laboratory analysis in which any material which may have been deposited on the shoes was removed. Petitioner alleges that it would now be impossible for the defense to ascertain the condition of the shoes prior to the analysis except from the report. Petitioner alleges that if it were shown that the shoes did not contain any hair or flesh it would tend to prove that petitioner did not kick the decedent. The report is not evidence and would not ordinarily be admissible at the trial. However, the report is now the only source of information from which the defense can discover what evidence the shoes afforded. Unless the defense is allowed to see the report it may be most difficult for the petitioner to properly prepare for trial. We think that in the interest of justice the trial court should have ordered a copy of the report given to the petitioner.

“* * * That it was desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.” *Powell v. Superior Court*, 48 Cal.2d 704, 312 P.2d 698, 701.

We conclude that a peremptory writ of mandate should issue, requiring the respondent court to set aside its order denying the petitioner the right to inspect and take a copy of the autopsy report and to inspect and take a copy of the report of the State Bureau of Criminal Identification and Investigation.

Let the writ issue.

PEEK and SCHOTTKY, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Linden Morgan DECKER, Defendant and
Appellant.

Cr. 5991.

District Court of Appeal, Second District,
Division 1, California.

Nov. 12, 1957.

Defendant was convicted of violating the bookmaking statutes and from a judgment of the Superior Court of Los Angeles County, Clement D. Nye, J., the defendant appealed. The District Court of Appeal, Fourt, J., held that admitting evidence to show probable cause for the arrest was not improper though defendant raised no issues thereon; that alleged hearsay evidence was admissible; and that the evidence sustained the conviction.

Judgment affirmed.

1. Criminal Law §419(3)

In prosecution for bookmaking, testimony of the arresting officer concerning probable cause for the arrest was admissible notwithstanding the defendant failed to contend that there was no probable cause for his arrest. West's Ann.Pen.Code, §§ 337a, subds. 1, 6, 995.

2. Criminal Law §260(11)

In prosecution tried to the court, the trial court presumably considered only matter that is relevant and competent and considers that only for purposes for which it was legally admissible.

3. Criminal Law §1137(5)

Where defendant must have known that alleged inadmissible evidence was in the transcript of the preliminary hearing when he stipulated that the cause should be submitted thereon to the trial judge and there was no motion to strike such testimony, defendant invited claimed error that the trial court considered inadmissible testimony and was estopped to complain thereof.

4. Criminal Law Ⓒ419(2)

Where the very fact in controversy is whether certain things were said or done and not as to whether those things were true or false, the words or acts are admissible not as hearsay but as original evidence.

5. Criminal Law Ⓒ419(2)

In prosecution for bookmaking, where prosecution attempted to show that the defendant was assisted by unknown accomplices and was illegally accepting wagers and purported wagers over the telephone and the fact that the words of the wager were spoken in an offer and were accepted by either defendant or his accomplice was the very fact in issue, evidence thereof was not subject to exclusion as hearsay. West's Ann.Pen.Code, § 337a, subds. 1, 6.

6. Gaming Ⓒ98(3)

Evidence sustained conviction for violation of the book making statute. West's Ann.Pen.Code, § 337a, subds. 1, 6.

G. Vernon Brumbaugh, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction on two counts under the bookmaking statutes.

In an information in Los Angeles county, appellant was charged in count I with a violation of subdivision 1, section 337a, Penal Code (engaging in bookmaking upon the result of a horse race), and in another count with a violation of subdivision 6 of the same section (lay, make, offer and accept bets upon the result of a horse race). He was also charged with two prior felony convictions in New York with service of prison terms therefor. Appellant pleaded not guilty and denied the prior convictions. At the trial a jury was waived and the cause was submitted on the transcript of the preliminary hearing and the testimony of a police officer for the plaintiff. Appellant did not testify.

Appellant was found guilty of the charges. No evidence was introduced with reference to the prior convictions and the court struck the same. Proceedings were suspended and appellant was placed on probation for two years upon condition that he spend sixty days in jail and refrain from like activities in the future. Appellant was admitted to bail pending the appeal.

A substantial résumé of the pertinent facts is as follows: On January 24, 1957, Officer Deiro of the Los Angeles police department dialed a telephone call to the telephone numbered Capital 52639 from the telephone numbered Madison 92098. The officer had previously received information from an informant that the Capital 52639 number was being used for bookmaking purposes. The informant had given the officer information in the past which had resulted in arrests of suspects. The officer ascertained from the telephone company that the telephone with the number Capitol 52639 was located at 3608 Griffin Avenue, Los Angeles.

The person answering the officer's call had a male voice. Deiro stated over the telephone, "This is Eddy for Vac, Madison 92098." The male voice repeated the telephone number. Deiro inquired, "Do you have the results of the Fifth?" The male voice stated, "No, I don't have the results. I will have them call you." The officer then hung up. Until the telephone talk the officer had never heard the answering male voice, but he did hear the appellant's voice after the arrest and recognized appellant's voice as being the voice he had heard in the telephone conversation. About three minutes after the officer hung up, the telephone numbered Madison 92098 rang and Deiro answered. An unknown male voice said, "Hello," and Deiro said, "This is Eddy for Vac." The male voice said, "Is this Vac?", and the officer replied, "No, this is Eddy; I am calling for Vac." The male voice then said, "Did he give you the number?", and the officer replied, "Yes." The male voice then stated, "O.K., what do you have?" Officer Deiro replied, "In the 6th

Nearly, 2 to win." The male voice said, "That is scratched." The officer then stated, "O.K., then in the 7th give me Spike; in the 8th Wireline; make that a \$2 win parley." The voice repeated the officer's statement and then said, "Thank you," and hung up. The officer had learned that there was a horse named "Nearly" which was to have run in the sixth race at Santa Anita but was scratched, a horse named "Spike" running in the seventh race, and a horse named "Wireline" running in the eighth race.

Deiro dialed the telephone numbered Capitol 52639 a second time. The same male voice as before answered the telephone. Deiro said, "This is Eddy for Vac again. My horse in the 6th was scratched. I have got another one I want to bet. Have them call me right back." The male voice stated, "I gave them your number; haven't they called you yet?" The officer replied, "Yes, but the horse I wanted was scratched and I want them to call me back at the same number." The male voice answered, "O.K." About four minutes later the telephone numbered Madison 92098 rang and the officer answered it. Deiro said, "This is Eddy for Vac again. In the 6th give me Sudden Shock, 2 to win." The male voice repeated the offer or wager and said, "O.K." Deiro had ascertained that there was a horse named "Sudden Shock" running in the sixth race at Santa Anita. Deiro further testified that he was familiar with the ways and means of bookmaking in Los Angeles county, and he described what the terms and words used in the telephone talks meant. He also stated that one means of bookmaking is through an operation known as a "call back" in which system the bettor telephones a given telephone number, known as a "call back spot." The bettor gives his own telephone number and identification to the person at the "call back spot." There is an office where records are kept, and this office then telephones the "call back spot" and receives the telephone numbers and identification left there. This office then telephones the bettors and accepts their wagers.

Officer Hand of the same police department was in the vicinity of 3608 South Griffin Street. Deiro contacted Hand by the police radio system, and in response to that call Hand and two other officers went to the front door of 3608 South Griffin. Hand knocked on the front door and stated, "Police officers, you are under arrest for bookmaking." There was no response at the door, and having waited a short time and having heard the sounds of running in the house and of a toilet flushing, Officers Hand and Jordan kicked open the back door and entered. Appellant was found in the bathroom and was asked what he was hiding there, and he replied, "I just got here. I just walked in the door, just two or three minutes before you knocked." Officer Hand informed appellant that he had been stationed outside of the house on the street for about thirty minutes and that he had not seen anyone enter or leave the place, and therefore it was impossible for appellant to have arrived just five minutes before. The officer again asked appellant what time he had arrived, and appellant did not answer. At about this time the telephone rang and Hand answered it. A male voice stated, "This is Dock for Larry, Capitol 20057", and the phone was then hung up. Hand called Deiro and Deiro then called the number Capitol 20057. An unknown male voice answered and stated, "This is Dock, in the 6th give me Wireline 2 to win and 2 to place." Other wagers similar in type were given. Hand found a magazine near the telephone in the house with the numbers 92098 written on it. The appellant was searched and two keys were found on his person. Hand tried one of the keys and found that it worked the front door, and the appellant stated the other key fitted the back door.

Appellant contends that (1) the trial court considered hearsay evidence which was admitted to show probable cause for the entry and the arrest, although the appellant raised no issue as to probable cause; (2) the trial court considered hearsay evidence upon the issue in chief, over objection, and (3) the

evidence was insufficient to sustain the verdict.

[1] Apparently it is appellant's belief that the testimony of the officer concerning probable cause for the arrest of appellant should not have been received because at the preliminary hearing the appellant failed to contend that there was no probable cause for his arrest. In other words, it is appellant's contention that only when the defendant raises the issue of probable cause may a committing magistrate receive such evidence. Appellant relies upon *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535, as authority for his position. In the *Boyles* case the officers obtained a key to a hotel room from the manager of the hotel. They entered the room and waited until the defendant knocked on the door, at which time the officers opened the door and grabbed the defendant's hand in which there were two bindles of heroin. At the preliminary hearing the officer testified he thought that a felony was being committed at the time of the arrest. The prosecuting attorney asked what reason he had for the belief and the defendant objected upon the ground that the answer would be hearsay and a conclusion. The court sustained the objection. The defendant's motion under section 995, Penal Code, was granted. The Supreme Court held, among other things, that the defendant having successfully prevented the prosecution from presenting any evidence as to what information the officer had obtained from others, the defendant could not then contend the evidence was necessarily illegally obtained, and reversed the order granting the motion under section 995. There is nothing in the *Boyles* case to sustain appellant's contention. We believe the evidence as to probable cause was properly received by the magistrate in the instant case.

[2] Appellant next asserts that the trial court considered the hearsay evidence introduced to establish probable cause on the main case. The record does not disclose anything from which such an assertion could be made. It is presumed that the trial court considered only that matter

which was relevant and competent, and considered that only for purposes for which it was legally admissible. *People v. Powell*, 34 Cal.2d 196, 204-205, 208 P.2d 974; *People v. Torres*, 98 Cal.App.2d 189, 192, 219 P.2d 480; *People v. Sisson*, 31 Cal.App.2d 92, 98, 87 P.2d 420; *Pasadena Research Laboratories v. United States*, 9 Cir., 169 F.2d 375, 385; *Hoffman v. United States*, 9 Cir., 87 F.2d 410, 411.

[3] The appellant must have known the allegedly inadmissible evidence was in the transcript of the preliminary hearing when he stipulated that the cause should be submitted thereon to the trial judge. There was no motion of the appellant to strike any such testimony from the transcript, nor does the record disclose any request of the appellant that the trial judge make rulings upon any of the appellant's objections made at the preliminary hearing. Under such circumstances, it would appear that the appellant invited what is now claimed to be error, and should not be heard to complain. *People v. Suggs*, 142 Cal.App.2d 142, 145, 297 P.2d 1039; *People v. Rhodes*, 137 Cal. App. 385, 392, 30 P.2d 1026.

[4-6] The résumé of the evidence heretofore set forth discloses that there were two sets of telephone calls, that is, two calls which Deiro made to the telephone numbered Capitol 52639, when he spoke to appellant, and two calls Deiro received at the telephone numbered Madison 92098, from an unknown male voice. The prosecution attempted to show, and we think as did the trial court, that they did show beyond reasonable doubt that appellant was assisted by unknown accomplices, was illegally accepting wagers and purported wagers over the telephone. The fact that the words of wager were spoken in an offer and were accepted by either appellant or his accomplice was the very fact in issue. The rule is stated in *People v. Henry*, 86 Cal.App.2d 785, at page 789, 195 P.2d 478, at page 480:

"* * * There is a well established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether

certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence.

* * *

The circumstances of this case disclose a very real connection between the various calls made and received. The trial court could well have had in mind the language in the case of *People v. Allen*, 113 Cal.App. 2d 593, at page 596, 248 P.2d 474, 475, where it is said:

"Appellant violated the law not by taking bets from those who telephoned her relay spot, but by aiding the book-maker to contact his patron. By giving such aid, the proprietor or keeper of the relay spot becomes a principal in violating the statute."

The judgment of conviction is affirmed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.



154 Cal.App.2d 829

Hugh CORWIN and Mary E. Corwin, his wife, Plaintiffs and Respondents,
v.

Paul J. HAMILTON and Joan Hamilton, his wife, Defendants and Appellants.
Civ. 9177.

District Court of Appeal, Third District,
California.
Oct. 31, 1957.

Action by lessors for rental accrued. From judgment of the Superior Court, Siskiyou County, James M. Allen, J., for lessors, lessees appealed. The Third District Court of Appeal, Van Dyke, P. J., held that where lessees holding under five-year lease, vacated premises before end of first year,

and lessors locked or barricaded doors to protect property thereafter, evidence sustained trial court's findings that lease was in full force and effect between parties, that there had been no acceptance of tendered surrender, and that there had been no constructive eviction.

Affirmed.

1. Landlord and Tenant ⇨172(2)

Where lease mentioned only three specified rooms and made no mention of any appurtenances, and lessees could enter by front door of building, permitting use of back door was mere convenience to lessees, which lessors could terminate at will, and the use of lessors' vacant lot adjoining building for parking purposes was likewise permissive, so that lessors' placement of barrier across lot and barricade at back door was not an eviction of lessees.

2. Landlord and Tenant ⇨231(8)

In lessors' action against lessees for rental accrued under five-year lease, where lessees vacated premises before end of first year and lessors locked or barricaded door to protect property thereafter, evidence sustained findings that lease was in full force and effect between parties, that there had been no acceptance of tendered surrender, and that there had been no constructive eviction.

3. Landlord and Tenant ⇨124(2)

Ordinarily, lease of office in building includes right to use all hallways, elevators, stairs and doors that provide access to office leased, and such right accompanies lease as incidental thereto, without being particularly mentioned.

4. Landlord and Tenant ⇨277

Owner of leased property has right to come on property if he finds tenants have moved, and to take steps to protect property.

5. Appeal and Error ⇨205

Error could not be predicated on trial court's exclusion of lessees' evidence as to

their reasons for vacating premises where no offer of proof was made to disclose nature or relevance of proposed testimony.

Burton, Lee & Hennessy, Yreka, for appellants.

Frank W. Shuman, Redding, for respondents.

VAN DYKE, Presiding Justice.

On February 26, 1954, appellants, as lessees and respondents, as lessors entered into a written lease for a term of five years, whereby the respondents leased to appellants the "southerly front three rooms facing Florence Avenue of the Corwin Building, situate in Dunsmuir, California". Early in January, 1955, the appellants removed their possessions from the leased premises, and, paying no further rent were sued by the respondents in this action for rental accrued. Respondents obtained judgment and therefrom this appeal is taken.

The complaint alleged the making of the lease and the nonpayment of rent from February 1, 1955, to September 30, 1955, that being the period ensuing between the first failure to pay rent and the filing of the action. The answer admitted the making of the lease, denied generally the accrual and nonpayment of rent and affirmatively pleaded eviction resulting from respondents' having barricaded the entrance to the leased premises, thereby preventing use thereof by appellants. They further alleged that prior to January, 1955, they had removed their possessions and belongings from the leased premises, had advised respondents of their intention to surrender their lease and that respondents had accepted surrender and terminated the lease. The trial court found against appellants in respect of all the defenses urged.

It was in the trial court, and it is here, the contention of appellants that although the lease made no mention of any right to use other than the three rooms specifically described therein yet they were entitled to use for auto parking purposes a vacant

lot owned by respondents which was contiguous to the lot upon which the office building was situated; that they were also entitled to use the back door of the office building as an entrance to the building. They contended further that after they had moved from the leased premises the respondents had barricaded the back door of the office building so that it could no longer be used in connection with the rooms they had rented and that respondents had prevented the use of the adjoining lot for parking purposes by tenants of the building, including appellants; that by these acts respondents had constructively evicted appellants and they had impliedly accepted the tendered surrender of appellants' leasehold.

The evidence presented falls far short of establishing these propositions as a matter of law and the court's findings to the contrary find ample support in the record. Appellant Paul J. Hamilton, who is a dentist and who practiced his profession in the three rooms leased by appellants, testified that he vacated the rooms under the following circumstances and for the following reasons: When he rented the rooms two doctors were also renting offices on the same floor of the building with one of whom he shared a reception room. He was just beginning his dental practice in Dunsmuir and a substantial part of the professional employment he had obtained came through referrals from the doctors. When he learned that these doctors, one of whom had erected a so-called medical building at another location in town, were both moving into the new building he became, as he put it, "panicky" as to the effect upon his practice and determined to move into the same building into which the doctors were going. Up to that time it appears he had no complaint concerning any failure of respondents to abide by their obligations under the lease, and had vacated his rooms solely because of what he considered to be his financial betterment. He testified that he was well aware he was then bound by the lease. It appears that shortly following appellants' removal of their posses-

sions from the rented rooms Hugh Corwin, one of the respondents, came to Dunsmuir to look over respondents' building. He found the entire floor upon which appellants' rooms were located had been vacated and the doors were standing open; that the water had not been turned off; that in view of the severity of the weather he took measures, as he testified, to protect his property from weather damage and from vandalism. He turned off the water in the upper floor rooms to keep the pipes from freezing. He nailed a light bar across the rear door entrance to the upper floor. He padlocked the front door leading to that upper floor and gave a key to the appellants. Respecting the adjacent lot, he found that members of the public had been using it for parking and in doing so had damaged the down spout at the rear of his building. Accordingly, he said, he placed a chain barricade across the entrance to that vacant lot in order to keep, as he put it, unauthorized persons from going to the rear of the building. He closed windows that had been left open. He notified appellants in writing that he was holding the leased premises for their benefit and that the steps he had taken were solely for protective purposes. On February 1, 1955, respondents' attorney wrote to appellants, advising them that respondents were not consenting to a termination of the lease and were holding the premises available for use by appellants. Again, on March 22, 1955, respondents wrote appellants, advising them that while they were taking precautions to protect their property their actions connected with the premises were for such purpose only and that the premises were still being held for their use. It is without dispute that the adjacent lot which had for long been used by tenants of the building for parking purposes was in fact wholly unimproved, rocky, steep and rough.

[1,2] It is apparent from the foregoing that the court was fully warranted in holding that the lease was in full force and effect between the parties hereto; that there had been no acceptance of tendered sur-

render and that there had been no constructive eviction. Indeed, it may well be doubted whether, under the evidence in this record, any other finding by the trial court would have found support in the evidence. We quote the following from the memorandum opinion filed by the trial judge which appears in the record here:

"The question for the Court to resolve in this case is, did the lease which made no mention of any appurtenances but only mentioned three rooms facing Florence Avenue on the 2nd floor of the Corwin Building, located at 724 and 726 Florence Avenue, Dunsmuir, California, include the right to use the vacant lot for parking purposes and also the right to free and unobstructed access through both the front and back doors of the building to these rooms?

* * *

[3] "Ordinarily, when a person leases offices in a building, it includes the right to use all hallways, elevators, stairs and doors that provide an access to the office that he leased, and this goes along with the lease as incidentals thereto, without being particularly mentioned.

"We will consider the right to use the vacant lot along the side of the building as a parking lot. I do not believe that it could successfully be maintained that the plaintiffs could not have built a building on this lot if they had wished, and by no stretch of the imagination could this parking lot be included in a lease which did not mention any appurtenance, so if they had a right to build a building on it they would have a right to close it. The status of this lot, as the Court considers it, was merely a convenience; as long as the plaintiffs were not making any use of the lot for other purposes, they had no objections to tenants parking their cars there, but I do not believe it could be successfully maintained that they had any absolute right to prevent him from using the lot for other purposes if he saw fit to do so. So the Court will hold that the defendants had no legal complaint because the plaintiffs had placed a barrier across this lot.

"We will now consider the back door. It was not necessary for the tenants of the building to use the back door to enter their offices. They could enter by the front door. Therefore, the Court will consider that the back door was a mere convenience also, and that the plaintiffs would have a right to close it if they saw fit. The court is not exactly clear as to whether the back door opens on to the vacant lot or on to the rear of the building, but in either event, as it was not mentioned in the lease, and as the tenants had access through the front door, I do not believe that they could prevent the owner of the building from closing the back door if he saw fit. It was also a mere convenience to the tenants, so the Court must hold that the putting of the barrier across the lot and the barricading of the back door was not an eviction of these tenants.

[4] " * * * The owner of property which is leased, has a right to come on the property if he finds that the tenants have moved, and take steps to protect his property, and if the steps that Corwin took were with the intent to protect his property and not with the intent of taking possession, then there was no acceptance of the surrender. The letters he wrote in connection with this show that he did not intend to accept the surrender and this being the case, the lease was not terminated, and as the Court heretofore said, the acts of the plaintiff did not amount to an eviction and the acts of the plaintiff also did not amount to an acceptance of the surrender, and the Court cannot but hold that this lease is still in full force and effect and although the rule is rather harsh, the defendants having signed the written lease and agreeing to pay rent for five years, cannot be relieved from this obligation."

Both as to the law therein announced and as to the effect of the facts therein recited this court is in accord with what we have quoted from the trial court's memorandum.

[5] Appellants next contend that the trial court erred in refusing to allow them

to introduce evidence concerning their reasons for moving out of the leased premises. As hereinbefore recited, appellant Paul J. Hamilton did testify concerning his reasons for moving. It appears, therefore, that what the appellants now complain of is that they were not permitted to prove why the doctors had moved from the building, it being indicated in the briefs that the doctors' reasons for moving would have been predicated upon some improper conduct of the respondents as lessors of the premises occupied by the doctors. No citation of authority is required to uphold the ruling of the trial court, since it is apparent that the doctors' reasons for moving—even though based upon some violation of the terms of their month to month leases—would not support any defense advanced by appellants in this action. However, even if it were possible that such proof would be admissible, we could not on this record predicate error in the court's ruling for the reason that the record does not disclose what the witnesses would have testified to. The trial court, therefore, was not informed how or in what manner the testimony sought to be elicited would be relevant or material and this court is equally in the dark. All that appears is that counsel addressed the court, saying that there was a line of questioning he wanted to go into in order to find out the reasons why other tenants left the building because if respondents had performed certain acts which drove other tenants out they would effect a constructive eviction also of the appellants. No offer of proof was made. "[T]he exclusion of testimony will not be reviewed when there is nothing in the record to show its purpose, materiality, or relevancy, * * *. Error in sustaining an objection to a question asked a witness will not be reviewed where there is nothing to show that the witness' answers would have been relevant and competent." (3 Cal.Jur.2d, Appeal and Error, page 805.)

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

155 Cal.App.2d 33

Carl LEUTENEKER and Nelda Leuteneker, Plaintiffs and Respondents,

v.

T. N. FISHER, Defendant and Appellant.

Joe W. RUESS and Dorothy T. Ruess, his wife, Plaintiffs and Respondents,

v.

Thomas N. FISHER and Gertrude R. Fisher, his wife, Defendants and Appellants.

Civ. 9216.

District Court of Appeal, Third District,
California.

Nov. 6, 1957.

Separate actions to recover damages to the lands of plaintiffs as result of a "controlled burn" which was ignited on the defendant's lands and permitted to escape to the lands of plaintiffs. Judgment for plaintiffs in the Superior Court, Nevada County, James Snell, J., and the defendants appealed. The District Court of Appeal, Warne, J. pro tem., held that the evidence supported the judgment for plaintiff and the fact that an assistant ranger took charge of the setting and control of the fires did not relieve defendants from liability.

Judgment in each case affirmed.

1. Negligence ☞134(4)

In action for damages to the lands of plaintiffs as result of a "controlled burn" which was ignited on the defendants' lands and permitted to escape to the plaintiffs' adjoining lands, evidence justified a judgment for the plaintiffs.

2. Negligence ☞21

That an assistant ranger of the Division of Forestry was present during a "controlled burn" permitted on the lands of defendants and took charge of setting and control of the fires did not necessarily relieve the defendants from exercising due

diligence to avoid damage to the property of plaintiff. West's Ann.Public Resources Code, §§ 4880, 4883; West's Ann.Health and Safety Code, § 13008.

Grayson Price, Chico, for appellant.

Jay Pfotenhauer, San Francisco, for respondents Leuteneker.

William J. Cassettari, Grass Valley, for respondents Ruess.

WARNE, Justice pro tem.

Respondents brought separate actions to recover damages to their lands as a result of a "controlled burn" which had been ignited on appellants' land and escaped to the respondents' adjoining lands. The cases were consolidated for trial and tried by the court sitting without a jury. The trial court found that the respondents had suffered damage to their lands by reason of the negligence and carelessness of the appellants in maintaining the fire on their said lands. A money judgment was rendered in favor of each respondent.

[1] Subject to certain conditions appellants were issued a permit by the Division of Forestry to conduct a controlled burn on their lands. In compliance with certain precautionary requirements for the burn, appellants bulldozed a fire trail around the area of the proposed burn 75 to 100 feet in width, but failed to give respondents the required notice of the time of the intended burning. Neither did appellants comply with the condition of the permit that "Brush along County Road on East side to be pushed back 60' or more." There is testimony that the fire, which spread to respondents' property, started within 50 feet across the road in this area. The appellant Fisher, while a witness, admitted that the fire which damaged respondents' land had its origin from the fire which had been ignited on his (appellants') adjoining land. There is evidence that the fires were set under living trees; that piles of debris and slash were burned under living trees

and that in one instance there was a spectacular burn of a cedar tree which "went up with a roar and created quite a vortex." It was a warm day in August. A Mr. Overmire testified that on five occasions he objected to the practice of lighting fires under trees and questioned it "very vociferously". He also testified to falling sparks in the area, making it necessary for him to move his car and the members of his family to a safer position. He said that he had been parked near the place where the fire jumped the road; that while this condition prevailed it was decided to light but one more fire which was to be the last; that soon after this last fire was ignited it escaped easterly across the county road upon other property of the appellants. From then on the fire was out of control and ultimately damaged respondents' lands. It also appears that appellants had no one stationed east of the road near the point where the fire jumped to extinguish any spot fires that might be caused by flying sparks. We feel that this evidence supports the findings of the trial court.

[2] An assistant ranger of the Division of Forestry was present during the burn and took charge of the setting and control of the fires. However, the fact that he directed and supervised the burning does not necessarily relieve appellants from the duties imposed by law of exercising due diligence to avoid damage to the property of others while conducting the burn authorized by the permit. Sec. 4883, Pub.Res.Code; see also Section 13008, Health and Safety Code. The burn was ignited by appellants on their land and for their sole use and benefit. It was not to serve a public purpose as contended for by appellants. The most that Section 4880 of the Public Resources Code requires of the Division of Forestry in relation to the actual burning authorized by a controlled burn permit is that it " * * * shall provide stand-by

fire protection, to such extent as personnel, fire crews, and fire fighting equipment are available." While a person conducting a controlled burn should ordinarily follow the directions of the state ranger, it is, nevertheless, within his power not to proceed if the precautions taken by the state ranger are inadequate and in that event he should discontinue the burning. He is not required to surrender to the state ranger's judgment for, as stated in *Wood & Iverson, Inc., v. Northwest Lumber Co.*, 138 Wash. 203, 244 P. 712, 714:

"It is a mistake to say he is compelled in such a case to surrender entirely to the forester's judgment. While he is possibly required to follow the directions given by the forester, clearly it is always within his power to refuse to proceed if he thinks the forester's precautions inadequate, and within his power to take precautions in addition to those prescribed by the forester. In other words, if an owner undertakes to abate the nuisance of this sort by burning under the direction of the forester, he is an actor in the proceedings; a joint actor with the forester it may be, but liable, nevertheless, for any loss caused to a third person by a negligent performing of the burning."

We conclude that there is no merit in appellants' contention that participation of the assistant state forester relieved them from the exercise of due diligence nor did it relieve them of liability for damages caused by their negligence in maintaining the fire.

No other point presented in the briefs requires discussion.

The judgment in each of the cases is affirmed.

SCHOTTKY and PEEK, JJ., concur.

154 Cal.App.2d 531

The PEOPLE of the State of California,
acting by and through the Department of
Public Works, Plaintiff and Appellant,

v.

Richard Henry CHEDA, Hector Rubini,
Nancy Rubini, Marin County Abstract
Company, a corporation, Defendants and
Respondents.

The PEOPLE of the State of California,
acting by and through the Department of
Public Works, Plaintiff and Appellant,

v.

Richard Henry CHEDA, Hector Rubini,
Nancy Rubini, Aaron Schwartz, Carl
Schwartz, Mario Bottini, and Thomas E.
Schaal, Defendants and Respondents.

Civ. 17570.

District Court of Appeal, First District,
Division 2, California.

Oct. 21, 1957.

Condemnation proceeding, wherein plaintiff deposited in court the total of awards for three parcels involved, and portion of amount was paid out to certain of defendants. From order of the Superior Court, Marin County, Thomas F. Keating, J., denying plaintiff's application for deduction from deposited amount, of an amount sufficient to discharge lien of sanitary district securing unpaid assessments on such property and not then due, plaintiff appealed, and District Court of Appeal granted writ of supersedeas requiring trial court to retain amount of such lien pending further court order. The District Court of Appeal, Draper, J., held that condemner's statutory right to deduct from judgment the amount necessary to discharge such lien remained only as to parcel for which award had not been paid over to former owner.

Order affirmed in part and reversed in part; writ of supersedeas continued in part and discharged in part.

1. Eminent Domain ⇐161

Condemner's right to withhold from funds yet unpaid to condemnees an amount sufficient to discharge lien which is an in-

cumbrance upon land involved may be asserted after interlocutory judgment fixing amount of award. West's Ann.Code Civ. Proc. § 1248(8).

2. Eminent Domain ⇐165

In case of indebtedness secured by lien against property condemned, condemner's only remedy is statutory right to deduct the indebtedness from judgment awarded condemnees, and condemner has no recourse once full amount of judgment is in hands of former owners. West's Ann.Code Civ. Proc. § 1248(8).

3. Eminent Domain ⇐161

Where there was no evidence that amount of liens upon condemned land was deducted in jury's determination of value of land, and awards had been paid into court, such deposit by condemner did not terminate its right to deduct amount necessary to discharge liens upon land for which award had not yet been paid over to former owner. West's Ann.Code Civ.Proc. § 1248 (8).

Robert E. Reed, Holloway Jones, Jack M. Howard, John P. Horgan, John H. Tallett, and Robert J. DeFea, San Francisco, for appellant.

Harold B. Lerner and Raymond H. Shone, San Francisco, for respondents.

DRAPER, Justice.

After entry of judgment in this condemnation action, plaintiff deposited in court \$149,710.50, the total of the awards for the three parcels involved. A portion of this amount was paid by the clerk of the court to certain of the defendants. Plaintiff then filed an affidavit alleging that the property was subject to the lien of a sanitary district securing assessments then unpaid. On plaintiff's application, defendants were ordered to show cause why the amount of the lien should not be deducted from the amount remaining on deposit. The clerk was directed to retain the remaining deposit until disposition of the order to show cause. At hearing, it was established that there were three assessments for a total,

with interest to due date of bonds issued thereon, of \$19,409.41, that these assessments were secured by lien, and that they were not due at date of entry of judgment. The trial court nonetheless denied the deduction sought by plaintiff and discharged the order to show cause. Plaintiff appealed. We granted writ of supersedeas requiring the trial court clerk to retain \$19,409.41 pending further order of this court.

Appellant relies upon Code of Civil Procedure, section 1248(8), which provides: "When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid."

On its face, this section appears fully to support appellant's position that the amount of the lien should be deducted from the judgment. Respondents, however, argue that appellant's right to compel deduction terminated upon deposit by it, in court, of the full amount of the judgment. There is no question that, once the amount of the judgment is paid to the owner by the condemner, the latter has no cause of action against the former owner for the amount of any pre-existing lien later discovered and paid by the condemner. *Marin Municipal Water Dist. v. North Coast Water Co.*, 40 Cal.App. 260, 180 P. 620. As stated there (40 Cal.App. at page 262, 180 P. at page 621), the code section "gives to the person taking property by proceedings in eminent domain the right to retain from the sum of money to be paid for it the amount necessary to discharge any lien existing thereon, but his neglect to adopt this course would not give rise, in the absence of some other provision of law creating it, to a right of action to recover it when once paid." In the case at bar, appellant asserts no cause of action against respondents. It seeks only to withhold from funds yet unpaid to respondents an amount

sufficient to discharge a lien which is clearly an encumbrance upon the land.

[1] The right so to withhold may be asserted after interlocutory judgment fixing the amount of the award. *City of Los Angeles v. Superior Court*, 2 Cal.2d 138, 39 P.2d 401. As pointed out in that opinion (2 Cal.2d at page 140, 39 P.2d at page 401), "The purpose of the statute is obviously to prevent a situation wherein the condemner will pay the full value of the land, and thereafter will be forced to pay again to holders of liens on the land, when the liens become due."

There is no suggestion that the amount of the liens was deducted in the jury's determination of the value of the land, or that any evidence warranted any such deduction. To permit respondents to recover the full value of the land, and still leave the condemner obligated to pay the amount of the liens, would be to confer upon respondents the very benefit which the code section is designed to deny them.

[2, 3] Where full payment has been received by the owner, there is nothing from which the indebtedness secured by lien can be deducted. Since the condemner's only remedy is the statutory right to deduct from the judgment, it has no recourse once payment is in the hands of the owner. *Marin Municipal Water Dist. v. North Coast Water Co.*, supra. We see no reason to extend this rule to the situation where the award has been paid into court, but has not been withdrawn by the owner. There the subject matter from which to make the deduction continues in existence and remains unpaid. In such case, reason clearly indicates that the right of deduction remains in the condemner.

At oral argument in this court, it developed that two of the parcels here involved fall within one branch of this rule, and one parcel in the other. Counsel stipulated that the full awards for Parcels A and C had been paid to and received by respondents before the existence of the liens was disclosed to the trial court. It

follows that, as to these two parcels, there is no fund from which to withhold the amounts of the liens. Since there is no personal liability upon respondents, appellant cannot recover the amount of the two assessments which related to these parcels only. However, the funds now held pursuant to our writ of supersedeas constitute a part of the award for Parcel B. That parcel is subject to the lien securing Assessment 405. The right to withhold, therefore, exists as to the amount necessary to discharge that lien, (City of Los Angeles v. Superior Court, *supra*).

The order is affirmed as to Parcels A and C and reversed as to Parcel B. The writ of supersedeas is discharged as to the two liens which affect land lying only in Parcels A and C, and is continued, until appropriate order of the trial court in consonance with this opinion, as to the lien of Assessment 405. Neither order as to the writ of supersedeas shall be effective until issuance of remittitur herein.

KAUFMAN, P. J., and DOOLING J., concur.



In the Matter of the ESTATE of Joseph Vincent DE LAVEAGA, also known as J. V. de Laveaga, Deceased.

Juanita Valerie de Laveaga SOMAVIA, remainderman-beneficiary of the trust created by the last will and testament of Joseph Vincent de Laveaga, Deceased, Appellant,
v.

Margaret Broyer BETTS, as executrix of the last will and testament of Gertrude C. de Laveaga, Deceased, Objector and Respondent. *

Civ. 17365.

District Court of Appeal, First District,
Division 1, California.

Nov. 5, 1957.

Rehearing Denied Dec. 5, 1957.

Hearing Granted Dec. 30, 1957.

Proceedings on a trustee's final account, wherein the executrix of the life

* Opinion vacated 326 P.2d 129.

tenant beneficiary filed objections to the account claiming that predistribution income should be paid to estate of the life tenant. From a judgment of the Superior Court, San Mateo County, Edmund Scott, J., directing that predistribution income be paid to the estate, the remainderman appealed. The District Court of Appeal, Peters, P. J., held that the original decree of distribution and subsequent accounts of the trustee which made no reference to predistribution income but treated that amount as a part of corpus of trust were *res judicata* on that issue.

Judgment reversed.

1. Trusts ⌚273

Wills ⌚733(1)

Where will or trust is silent on the subject, right of life beneficiary to income accrues from date of testator's death and not from date of distribution.

2. Executors and Administrators ⌚314(11)

The issue of right of life beneficiary to trust income may properly be presented and litigated at time of distribution of testator's estate.

3. Executors and Administrators ⌚315(6)

All issues actually litigated and passed upon and properly before court at time of distribution of estate, when that decree becomes final, are *res judicata* and may not be relitigated when trustee files his periodical accounts or at time of final distribution. West's Ann.Prob.Code, § 1021.

4. Executors and Administrators ⌚315(6)

Where at time of distribution by executor no issue is presented as to right of life tenant to predistribution income or as to date from which it should be paid, issue is not concluded by decree of distribution and life tenant may seek predistribution income at time of first or later accounting by the trustee. West's Ann.Prob.Code, § 1021.

5. Executors and Administrators ⌚513(9)

Judgment ⌚729

If at time of distribution, or upon approval of trustee's first and subsequent accounts, an issue is not raised, approval of

such accounts is not *res judicata* as to any matters omitted from such accounts and those matters may be raised at time of final distribution. West's Ann.Prob.Code, § 1021.

6. Trusts ⇨328

Where a clear mutual mistake has been made in treating a sum as corpus and not income, or vice versa, such mistake may be corrected at time of final distribution in spite of court approval of prior accounts.

7. Judgment ⇨731

If an issue with respect to a testamentary trust was in a real and fundamental sense passed upon at time of distribution or on prior hearings, the orders made are *res judicata*, but if issue was not so passed upon, it may be raised later and up until the time of final distribution. West's Ann.Prob.Code, § 1021.

8. Executors and Administrators ⇨315(6)

Where decree distributing estate to testamentary trustee provided for distribution of specified amount described as constituting one-third of cash residue available for distribution, and provided that trustee should pay over "as the same shall come in" rents and profits therefrom, decree, although making no specific reference to predistribution income, necessarily determined that no part of it was income and decree was *res judicata* on that issue. West's Ann.Prob.Code, § 1021.

9. Judgment ⇨743(1)

Where decree making distribution to testamentary trustee made no specific reference to predistribution income, but included that amount as corpus of trust, subsequent accounts of trustee making no reference to predistribution income established conclusively that everything distributed to trustee was being treated as corpus and that the only income was that accruing from date of distribution.

cisco, for appellant Juanita de Laveaga Somavia.

Richard I. McCarthy, C. J. Goodell, Ralph Bancroft, San Francisco, for objector and respondent Margaret Broyer Betts, as executrix of the Last Will and Testament of Gertrude C. de Laveaga, Dec'd.

PETERS, Presiding Justice.

The remainderman of a testamentary trust appeals from a judgment directing the trustee to pay from the assets of the trust to the executrix of the life tenant the sum of \$26,240, plus interest, such sum being the amount of income earned during probate administration of the trust and distributed to the trustee, who, for many years, treated it as principal.

The facts are not in dispute. Joseph Vincent de Laveaga died testate on October 2, 1931. He left a large estate. He was survived by a daughter of his first marriage, Juanita de Laveaga Somavia, and by his second wife, Gertrude C. de Laveaga. The will devised two-thirds of the residue of estate to the daughter, appellant herein, and one-third in trust to the Wells Fargo Bank & Union Trust Co. with directions that the income should be paid to his wife for life or until her remarriage, and upon her death or remarriage the trust was to terminate and the principal paid over to his daughter. One-third of the residuum amounted to about \$450,000.

About a year after the testator's death the executor, also the Wells Fargo Bank, filed its first and final account. This account contained a detailed itemized account of receipts and disbursements, and contained a summary showing that the total receipts exceeded total disbursements by \$145,024.12. The statement of decedent's assets in the account listed the \$145,024.12 as "Cash" in its first item. This account was settled, approved and allowed as rendered, and the estate was distributed as provided in the will on October 20, 1932. The distribution to the trustee was made without any segregation or designation as to the portions representing the original estate assets or the portions that were in-

Burnham Enersen, Robert Edmondson, Katherine M. Griffin, McCutchen, Thomas, Matthew, Griffiths & Greene, San Fran-

come earned by the assets during the period of probate. The decree of distribution distributed to the trustee, among other things, cash in the sum of \$77,894.24, "being one-third ($\frac{1}{3}$) of the cash residue available for distribution." Included in this amount was income earned during the period of administration, which the litigants stipulate was \$26,240. Notice of the filing of the executor's first account and of the petition for distribution, and notice of the time and place of hearing were properly given, and special notice was given to the life tenant. The life tenant made no objection to the account or to the petition and did not appeal from the decree approving the account and distributing the estate to the trustee.

In December, 1933, the trustee filed its first account and report and petition for settlement for the period November 10, 1932, to October 20, 1933. The account carefully and in detail designated as "principal" all of the assets distributed under the terms of the decree of distribution without allocating to "income" any portion of this amount. The item of "principal" included the whole of the predistribution income. The account shows that the trustee had invested the total amount of cash received under the decree of distribution (except for a small amount), together with other trust principal, in stocks and bonds which were listed as "assets" of the trust. The account also clearly disclosed that the trustee had paid to Mrs. de Laveaga all of the income earned from the date of distribution but had paid no income earned prior to that date. Notice of the filing of this account and the time and place of hearing were given, and a special notice was given to the life tenant. No appeal was taken from the order settling this first account of the trustee. Between 1933 until the death of the life tenant in 1953 ten consecutive accounts were rendered, and approved, all with notice given and no objections filed. No appeals were taken. None of these accounts paid to the life tenant or designated or segregated as a separate part of the trust corpus the predistribution income.

On January 23, 1953, the life tenant died. On July 15, 1953, the trustee filed its final account and petition for a decree declaring the trust terminated. Respondent, as the executrix of the life tenant, filed objections to this account, and for the first time claimed that the predistribution income should now be paid to the estate of the life tenant. The trial court agreed and ordered that \$26,240, the amount of the predistribution income, plus interest, should be paid to the estate of the life tenant. The remainderman appeals.

Appellant's basic contention is that the decree of distribution to the trustee, and the trustee's first and subsequent accounts are conclusive on the issue as to whether the life tenant was entitled to any predistribution income. It is urged that the decree of distribution to the trustee effectively determined that all the property distributed was corpus, and that when that order became final the life beneficiary's only right was to the income therefrom. Thus, so it is claimed, the life tenant's right to predistribution income was foreclosed by the decree and annual accounts. Respondent maintains that the issue as to whether the life beneficiary was entitled to this income was not raised or presented to the court in the prior proceedings, and that there never has been an adjudication of this question.

[1,2] The problem presented is not a simple one. It is now settled law, at least since the 1942 decision in the *In re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825, that where the will or trust is silent on the subject, the right of the life beneficiary to income accrues from the date of the testator's death and not from the date of distribution. That case, and others *In re Estate of Dasher*, 53 Cal.App.2d 721, 128 P.2d 380, and *In re Estate of Schiffmann*, 86 Cal.App.2d 638, 195 P.2d 484 also hold that the issue of the right to such income may properly be presented and litigated at the time of distribution.

[3] It is also well settled, of course, that all issues actually litigated and passed

upon and properly before the court at the time of distribution, when that decree becomes final, are *res judicata* and may not be relitigated when the trustee files his periodical accounts or at the time of final distribution. That principle is too well settled to require citation of authority. In this connection, and with particular reference to the problem here presented, section 1021 of the Probate Code provides: "In its decree, the court must name the persons and the proportions or parts to which each is entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees."

Under these rules there is no doubt but that when the executor's account and the petition for distribution to the trustee were filed, or at the time of the trustee's first account, the issue as to the life tenant's right to predistribution income could have been presented and passed upon. If it was so presented at either such time, then such determination is *res judicata* and cannot be relitigated at the time of final distribution. Respondent concedes this to be the law.

[4,5] The cases have also held that, where, at the time of distribution by the executor, no issue is presented as to the right of the life tenant to predistribution income or as to the date from which it should be paid, the issue is not concluded by the decree of distribution. In such a case the life tenant is not precluded by the decree of distribution, and may seek the predistribution income to which he is entitled at the time of the first or later accounting by the trustee. That was the precise ruling in *Re Estate of Dare*, 196 Cal. 29, 235 P. 725 heavily relied on by respondent. See also *In re Estate of Marré*, 18 Cal.2d 184, 114 P.2d 586. Thus the rule is that, if at the time of distribution or upon the approval of trustee's first and subsequent accounts, an issue is not raised, approval of such accounts is not *res judicata* as to any matters omitted from such accounts, and such mat-

ters may be raised at the time of final distribution. In *re Estate of Adams*, 131 Cal. 415, 63 P. 838; In *re Estate of Ross*, 179 Cal. 358, 182 P. 303; In *re Estate of Hovland*, 38 Cal.App.2d 439, 101 P.2d 500. In the *Adams* case the questioned item was never included in any prior account, and never had been passed upon. In the *Ross* case the court, in settling the first account, expressly reserved decision on the question involved, so that that issue never was passed upon and could be litigated later. The *Hovland* case is closer in point, but also distinguishable from the instant case. The court there pointed out that in none of the current accounts had the title to the \$4,000 item involved been put in issue or determined, although it had been inventoried as an asset of the estate. It should also be pointed out that the *Hovland* case involved title to money which the executor held as trustee for a third person and not for a legatee.

[6] Along with the rule of these cases, and probably as a corollary to them, has grown up the rule that where a clear mutual mistake has been made in treating a sum as corpus and not income, or vice versa, such mistake may be corrected at the time of final distribution in spite of court approval of prior accounts. The leading case is *In re Estate of Eilert*, 131 Cal.App. 409, 21 P.2d 630, relied upon by the trial court in holding that it had the power on final distribution to award the life tenant the predistribution income. In that case, the trustee erroneously paid to the life tenant earnings which actually represented increase in value of the corpus of the trust under the mistaken belief, shared by all involved, that such earnings were income. The mistake was not discovered until the trustee filed his fifth annual account. It was held that on the hearing of that account, which alleged the discovery of the mistake and requested instructions, the probate court had the power to rectify the mistake even though the orders approving the previous accounts were final. It was held that the mistake made was "extraneous and collateral to the merely formal inquiry made by the court

upon the hearing." 131 Cal.App. at page 415, 21 P.2d at page 633; see also *In re Estate of Hill*, 149 Cal.App.2d 779, 309 P.2d 39.

[7] These rules are not entirely consistent one with the other, and are difficult to apply to a particular factual situation. The basic test, implied or expressed in these cases, is whether, on distribution or on the prior hearings, the issue involved was, in a real and fundamental sense, passed upon. If so, the orders made on the prior proceedings are *res judicata*. But if the issue was not, in a real and fundamental sense, passed upon on the prior hearings, it may be raised later and up until the time of final distribution. In such a case the decree of distribution to the trustee and the orders approving prior trustee accounts, are not *res judicata*.

[8] How do these rules apply to the present case? Appellant claims that the decree of distribution effectively determined that all property distributed to the trustee was corpus, and that the life tenant's only right was to income from that corpus. It is therefore urged that the life tenant's right to predistribution income was foreclosed by that decree that became final over 20 years ago. Respondent urges that the issue as to whether the life tenant was entitled to predistribution income was not raised or presented or passed upon by the court at the time. Thus, the question presented is whether the decree of distribution, or the court in passing upon the trustee's petition for approval of its first account, actually passed upon the life tenant's right to predistribution income.

What does the order distributing the estate to the trustee actually provide? It provides:

"It is further ordered, adjudged and decreed that there be and there is hereby distributed unto Wells Fargo Bank & Union Trust Co., as trustee upon the trusts hereinafter set forth and declared for the benefit of Gertrude C. de Laveaga, the following described personal property, to-wit: cash in the sum of (\$77,894.24),

being one-third ($\frac{1}{3}$) of the cash residue available for distribution * * *

"It is further ordered, adjudged and decreed that all the rest, residue and remainder of the estate of said Joseph Vincent de Laveaga, deceased, and any other property not now known or discovered which may belong to said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows:

"Two-thirds ($\frac{2}{3}$) thereof unto Juanita Valerie de Laveaga Somavia;

"One-third ($\frac{1}{3}$) thereof unto Wells Fargo Bank & Union Trust Co., in trust, nevertheless, for the following uses and purposes, to-wit:

"To use, manage and control the same and to collect the rents, issues and profits therefrom and to pay all necessary and proper charges and expenses incurred in the management and conduct thereof and to pay over monthly, as the same shall come in, the net rents, issues and profits derived therefrom after the payment of all necessary and proper charges thereof including a just and reasonable compensation for the services of the Trustee and its attorneys, to Gertrude C. de Laveaga, widow of said decedent, * * * until she dies or remarries. At the time of the death of said Gertrude C. de Laveaga, or at her remarriage, if she should remarry, said trust shall absolutely cease, and terminate and the trust shall vest in and be paid and delivered to Juanita Valerie de Laveaga Somavia."

It will be noted that the decree expressly states that the trustee shall pay to the life tenant the income "as the same shall come in" from the sum distributed to it. The language used is not ambiguous. No one reading the decree or the petition and report filed with it can reasonably doubt that the court was presented with the problem, and actually decided, that all the property distributed to the trustee was corpus and that the life tenant's only right was income from that corpus. While it is true that the decree does not specifically refer to predistribution income, the specific direction that one-third

of the residue be distributed to the trustee necessarily determined that all of the property distributed was corpus and no part of it was income. Thus, the decree is *res judicata* on the issue.

[9] If any doubt existed as to whether the court passed on the issue at the time of distribution to the trustee, such doubt was set at rest by the orders approving the first and subsequent accounts of the trustee. Neither the first nor any subsequent account showed any entry relating to predistribution income. Those accounts clearly and unequivocally told the court and the life tenant that the life tenant was being paid all the income from the estate distributed to the trustee, which included predistribution income, and was not being paid any predistribution income. The accounts clearly show that everything distributed to the trustee was being treated as corpus, and that the trustee was treating it as corpus, and paying income on it to the life tenant only from the date of distribution. As already pointed out, the first account opens with the receipt by the trustee of \$75,216.84 from the executor on November 10, 1932, pursuant to the decree of distribution. This is the only money received by the trustee from the executor, and the accounts clearly show this. The trustee placed this cash item in the "principal" column. The account also shows that subsequently the trustee invested as a "principal disbursement" in stocks and bonds all of the principal receipts, including all but a small amount of the \$75,216.84, rather than distributing any portion to the life tenant as an "income disbursement." The investments are clearly designated as "assets" of the trust.

Thus it would appear that, at the time of distribution and at the time the first account of the trustee was approved, the action taken by the court necessarily included a determination that everything distributed was corpus and that there was no predistribution income.

In all material respects the problem here presented is identical with that involved in *Re Estate of Tynan*, 129 Cal.App.2d 364,

276 P.2d 809, decided by this court in December of 1954. We there held that the life tenant was bound by the decree of distribution which designated all predistribution income as part of the corpus. That is precisely this case. In the *Tynan* case, as here, the decree of distribution expressly distributed the whole of the residue of the estate, using the following language (129 Cal.App.2d at page 365, 276 P.2d at page 810):

"* * * to Lester M. Tynan, as trustee, in trust, upon the following terms and conditions, and for the following uses, trust and purposes, to wit:

"That by the terms of said trust, said trustee shall divide the same into two equal shares for the benefit of decedent's husband, Clarence Tynan, during his lifetime, and upon his death, one share for the benefit of each of the decedent's grandchildren, * *, and to hold the said equal shares in trust for the following purposes and uses:

"(a) To collect, recover and receive the rents, issues, profits, dividends, interest and income of said separate trusts and after deducting all proper charges arising out of the administration thereof, to pay the balance as follows:

"(1) During the life of decedent's husband, Clarence Tynan, to pay over to him the entire net income of each separate trust.

"(2) Upon the death of said Clarence Tynan, and during the term of said trust, to pay over so much of the net income of each separate trust to the grandchild for whom said share shall have been set apart, as decedent's said trustee shall in his or her uncontrolled discretion determine, so as to permit such grandchild to live in the circumstances and have the comforts to which said grandchild shall be accustomed, and to accumulate the balance of the net income of each separate trust and add the same to the principal of such trust."

The decree concluded with a specific description of the residue. At the time the trustee filed his first account the life tenant made his claim for predistribution income. The probate court held that the decree of

distribution was conclusive on the issue and this court, stating that the decree had directed distribution of all property as corpus in plain and unambiguous terms, affirmed the order of the trial court. In so holding this court distinguished cases like *Estate of Dare*, 196 Cal. 29, 235 P. 725, and the others cited, in the following language (129 Cal.App.2d at page 367, 276 P.2d at page 812): "There have been cases in which the decree of distribution did not determine the issue of income received during probate, leaving that open, hence not precluding later litigation concerning it. * * Such are the cases which appellant invokes. They are not this case."

In holding that the life income beneficiary came within the scope of Probate Code section 1021, *supra*, and was conclusively bound by the decree of distribution, this court stated (129 Cal.App.2d at page 366, 276 P.2d at page 811): "It is true, as appellant contends, that he was not entitled to compel payment of income during probate. The executor was under no duty to make payments and the trustee could not be compelled to do so prior to the receipt of the trust property by him. During probate administration appellant's remedy (which he did not pursue) was confined to asking the probate court to distribute a portion of the trust fund to the trustee to be used for appellant's support. In *re Estate of Marré*, 18 Cal.2d 184, 190, 114 P.2d 586. That did not preclude the probate court from determining, in its decree of distribution, what was corpus and what was not, under its duty to 'name the persons and the proportions or parts to which each is entitled'. Prob.Code, § 1021. Appellant was a 'person interested in the estate' and as such entitled to appear and 'resist the application' for distribution. Prob.Code, § 1020. He was one of the 'heirs, devisees and legatees' and to whose 'rights' the decree became conclusive. Prob.Code, § 1021. Thus, it has been held that an issue concerning income which accrued during probate administration may be raised upon appeal from a decree of distribution. In *re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825; In *re Estate*

of *Dasher*, 53 Cal.App.2d 721, 128 P.2d 380; In *re Estate of Schiffmann*, 86 Cal.App.2d 638, 195 P.2d 484. Instances in which belated claims for interest were precluded by decrees of distribution which had become final are furnished by In *re Estate of Schmierer*, 168 Cal. 747, 145 P. 99; In *re Estate of McLellan*, 8 Cal.2d 49, 52, 63 P.2d 1120; *McLellan v. McLellan*, 17 Cal.2d 552, 110 P.2d 1034; In *re Estate of McLellan*, 14 Cal.App.2d 271, 57 P.2d 1338."

The case is on all fours with the instant one, and would clearly be conclusive were it not for an even later decision of another appellate court rendered in April of 1957—In *re Estate of Hill*, 149 Cal.App.2d 779, 309 P.2d 39. This case was decided after the briefs herein were prepared, and was called to our attention at the time of oral argument.

In the *Hill* case the court held that when the trustee of a testamentary trust has paid to one beneficiary that which should have been held for or paid to another, the probate court has the power to compel the one that was overpaid either personally to repay the amount or to require the trustee to withhold such amount from the share of the overpaid beneficiary, unless such beneficiary has so changed his position as to make it inequitable to compel restitution. In that case, the principal life tenant, who was also executor and trustee, had treated income earned during probate as principal. Upon his death his executrix filed the trustee's 14th trustee account, allocating the predistribution income for the first time to the income account of the trust. The court held that the decree of distribution and the approval of the prior accounts did not amount to a binding adjudication of the problem. In this connection the court stated (149 Cal.App.2d 784, 309 P.2d at page 42): "The decree of distribution did not determine the issue. The decree should not do so, for the allocation is to be made by the trustee, not the executor, even though they be the same person. In *re Estate of Dare*, 196 Cal. 29, 35, 235 P. 725. * * * Even if there had been acquiescence on the part of *Hill*, the original

trustee, it would not be binding on the subsequent income beneficiaries or the charities or on the remaindermen. Inasmuch as the will does not provide to the contrary, the rule in *Re Estate of Platt*, [supra] must be followed and the instant order must be corrected so that the income beneficiaries may be awarded the income derived during the period of probate. *The decree of distribution did not make an allocation between the corpus and the income.* It merely distributed the probate income and other property to the trustee as an aggregate. Thereupon the trustee became obligated to make the appropriate allocation. In *re Estate of Dare*, supra, 196 Cal. 29, 36, 235 P. 725; In *re Estate of Marré*, 18 Cal.2d 184, 190, 114 P.2d 586." (Emphasis added.)

In discussing the legal effect of approving the prior accounts the court, on the same page, stated: "All the accounts of the trustee, except the sixth [the trustee had learned of his mistake by this time and requested instructions as to proper disposition to be made of the probate income, but after the remainderman filed an answer arguing that the court was without jurisdiction to hear the petition, the petition was denied 'for lack of jurisdiction'], treated the probate income as corpus and made no distribution to anyone. The contention that the orders settling those accounts are *res judicata* finds no support in law. So to contend raises an issue between the income beneficiaries on the one hand and the remaindermen on the other which is not present upon a trustee's accounting. In *re Estate of Charters*, 46 Cal.2d 227, 236, 293 P.2d 778; In *re Estate of Roberts*, 27 Cal. 2d 70, 79, 162 P.2d 461; *Church v. Security-First Nat. Bank*, 40 Cal.App.2d 529, 538, 105 P.2d 148; *Landis v. Grimes*, 38 Cal. App.2d 324, 327, 100 P.2d 1089; In *re Estate of Blake*, 157 Cal. 448, 456, 108 P. 287."

On its face the opinion appears to fall within the rule that when the petition for distribution or prior accounts do not raise or pass upon an issue, the orders approving are not *res judicata* on that issue. The court was careful to point out that "The decree of distribution did not make an allo-

cation between the corpus and the income." The opinion does not quote the pertinent language of the decree of distribution or the pertinent sections of the trustee's first account. The opinion simply states that the executor's final and supplemental accounts and petition for distribution made no specific reference to probate income. Thus, on its face, the case seems to fall within the rule of the *Eilert*, *Dare* and *Marré* cases, heretofore cited. If this is the correct interpretation of the case it is not in conflict with the *Tynan* case, which, incidentally, it does not discuss or cite. If we are correct in our holding that in the instant case the decree of distribution and the order approving the first account passed upon the issue of the disposal of predistribution income, then the instant case is clearly distinguishable from the *Hill* case. But there are perplexing and difficult questions raised by some of the language in the *Hill* case. The court emphasized that in the decree of distribution there was "no specific reference to probate income." If that statement implies that a specific reference to probate income in the decree is essential before it can become *res judicata*, it is directly contrary to the *Tynan* case, and other cases cited. The *Hill* case also states that not only did the decree of distribution not determine the issue as to who was entitled to the predistribution income, but such "decree should not do so." A similar statement is made as to the trustee's annual accounts. This seems to imply that, even though the issue were presented in prior proceedings, a determination made at such time would not be *res judicata* in future proceedings. If this is the meaning of the language then the *Hill* case is not only contrary to the *Tynan* case but also to the other cases cited on this issue.

It is always unfortunate where a trustee pays money over to a person not entitled, or fails to pay such money to a person entitled. But that issue, like other issues, must be determined at some time in the proceedings, and once determined should be binding on the parties. In the instant case we think that the issue was passed upon in

the decree of distribution and at the time of approving the first account of the trustee. If there is any conflict in theory between the Hill and Tynan cases, and we believe that there is, we think the rule heretofore announced in the Tynan case is sound and should be followed. Under the rules of that case the trial court was bound by the prior determinations that there was no distributable income payable to the life tenant.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.



155 Cal.App.2d 62

Ella Mary JOSLIN, Plaintiff and Respondent,

v.

Ray O. GERTZ, Executor of the Estate of Jo Guynn, also known as Josle Guynn, and also known as Jo Feeny, Deceased, Defendant and Appellant.

Civ. 22328.

District Court of Appeal, Second District, Division 2, California.

Nov. 8, 1957.

Rehearing Denied Nov. 25, 1957.

Hearing Denied Dec. 30, 1957.

Action by creditor against executor of debtor's estate for amount allegedly due on book account. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., entered judgment for creditor, and executor appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to support finding that an account was stated by and between creditor and decedent.

Affirmed.

1. Account, Action on §18, 22

To maintain an action on a book account it is necessary for book to show against whom charges are made, and in

whose favor the charges run, and this may be shown by production of book from possession of plaintiff and his identification of it as book in which he kept account between himself and debtor.

2. Account, Action on §17

An open book account may consist of a single entry reflecting establishment of an account between the parties, and may contain charges alone if there are no credits to enter.

3. Account, Action on §17

Money loaned is proper subject of an open book account, but a mere private memorandum does not constitute a book account.

4. Executors and Administrators §221(4)

In action by creditor against executor of debtor's estate for amount allegedly due on book account, evidence supported finding that decedent was indebted to creditor on an open book account in principal sum of \$7,000 plus interest.

5. Account, Action on §17

Account kept in bound volume in which other business transactions were recorded was a book account and not merely a private memorandum.

6. Account Stated §1

To constitute an account stated there must be an acknowledgment of a previous indebtedness, and agreement that balance is correct, and a promise, either express or implied, to pay such balance, and amount of balance agreed to be owing must appear or be readily ascertainable from total figures then in existence and agreed to.

7. Account Stated §19(3)

In action by creditor against executor of debtor's estate for amount allegedly due on book account, evidence supported finding that an account was stated by and between creditor and decedent.

8. Witnesses §165

The dead man's statute does not prevent party from giving testimony relative to identity of books of account produced, and fact that he kept books of original

entries which were made at time of transactions. West's Ann.Code Civ.Proc. § 1880, subd. 3.

9. Witnesses ☞165

In action by creditor against executor of debtor's estate, for amount allegedly due on book account, creditor was entitled to identify account in question and testify that she made entries at times therein stated. West's Ann.Code Civ.Proc. § 1880, subd. 3.

10. Witnesses ☞165

In action by creditor against executor of debtor's estate for amount allegedly due on book account, testimony of creditor's husband that decedent knew of account and charges therein and admitted the correctness thereof was not barred by dead man's statute where he was not a party to action and money lent had been creditor's separate property. West's Ann.Code Civ. Proc. § 1880, subd. 3.

11. Appeal and Error ☞1051(1)

In action by creditor against executor of debtor's estate for amount allegedly due on book account, even though creditor was permitted to give testimony that contravened dead man's statute, admission of testimony was harmless where there was other competent evidence to support findings and judgment. West's Ann.Code Civ.Proc. § 1880, subd. 3.

12. Account Stated ☞20(3)

Findings that advances by creditor to debtor were on basis of an open book account and that approximately a month later an account was stated by and between parties on same debt were not inconsistent.

Alfred E. Frazier, Red Bluff, for appellant.

Charles E. Ogle, Morro Bay, for respondent.

FOX, Justice.

Plaintiff provided her sister (Jo Guynn), the deceased herein, funds for the purchase of a home. Reimbursement not having been made prior to the sister's death on May 15, 1955, plaintiff filed a claim with the executor, who disallowed it. Plaintiff brought this action in two counts: (1) an open book account, and (2) an account stated. From a judgment in plaintiff's favor, the executor has appealed.

In 1949 plaintiff and her husband loaned plaintiff's sister Jo \$5,000. This loan was evidenced by a promissory note secured by a trust deed on property that Jo owned in Santa Cruz. An account of the periodic payments by Jo on the loan was kept by plaintiff on page 147 of the account book here in question. This loan was paid off in 1953 when Jo sold the Santa Cruz property.

In March, 1952, Jo entered into an escrow for the purchase of a home in Morro Bay. On the 28th of the month, plaintiff withdrew \$3,000 from her savings account which, on the 31st, she paid into the escrow to enable it to be closed.¹ On April 16, 1952, plaintiff withdrew \$4,000 from her funds. A little more than \$3,500 of this money was used to pay off the bank's first lien on the property Jo Guynn had purchased and the balance was applied on the second lien of the sellers.

On page 148 of the account book plaintiff entered these transactions. The heading reads:

"Loaned Jo Guynn on her Morro Bay house at 1170 Bonita St."

Then there are these entries:

"March 31, 1952	at 3% interest	\$3,000.00
April 16, 1952	" 3% "	\$4,000.00"

The book was kept in plaintiff's possession and the entries were in her handwriting. The funds were her separate property.

Approximately a month after the second transaction, plaintiff's husband was present

1. \$2,809.38 was used to meet escrow requirements. A bank money order in

favor of Jo Guynn for \$190.62 represented the balance of the \$3,000.

in their home when plaintiff exhibited the above entries in the book to her sister Jo. He testified: "She [Jo] said it was the correct amount she had borrowed, after she showed her the ledger." A little later he phrased the matter in this fashion: "She [Jo] said the amount my wife had entered in the book was correct."

The court found that initially "Jo Guynn was indebted to plaintiff on an open book account in the principal sum of \$7,000 plus interest as alleged in paragraph I of plaintiff's first cause of action," but that approximately one month after the second advance (that is the \$4,000 transaction on April 16, 1952) "an account was stated by and between plaintiff and decedent Jo Guynn, as alleged in paragraph I of plaintiff's second cause of action, and that said account stated constituted a new contract between plaintiff and decedent Jo Guynn whereby decedent Jo Guynn became indebted to plaintiff in the principal sum of \$7,000.00 together with interest thereon, as alleged in paragraph I of plaintiff's second cause of action."

In seeking a reversal, the executor contends that (1) there is no evidence of either a book account or an account stated; (2) the court erroneously and prejudicially admitted testimony of plaintiff in contravention of the "dead man's statute" (Code Civ.Proc. § 1880, subd. 3);² (3) the findings are uncertain and on inconsistent theories; and (4) the judgment has resulted in a miscarriage of justice.

[1-3] A book account is defined in *Wright v. Loaiza*, 177 Cal. 605, 606-607, 171 P. 311, 312, as "a 'detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.'" It is, of course, necessary for the book to show against whom the charges are made. *Block v. D. W. Nicholson Corp.*, 77 Cal.App.2d 739, 746, 176 P.2d 739. It must also be made to appear in whose favor the charges run. This

may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor. *Bailey v. Hoffman*, 99 Cal. App. 347, 349, 278 P. 498; *Boehmke v. Westfall*, 106 Cal.App. 754, 758, 289 P. 920. An open book account may consist of a single entry reflecting the establishment of an account between the parties, (*Robin v. Smith*, 132 Cal.App.2d 288, 291, 282 P.2d 135) and may contain charges alone if there are no credits to enter. *Tabata v. Murane*, 76 Cal.App.2d 887, 890, 174 P.2d 684. Money loaned is the proper subject of an open book account. *George Rice & Sons v. Cowan*, 46 Cal.App. 225, 189 P. 132. Of course a mere private memorandum does not constitute a book account. *Robin v. Smith*, supra.

[4] Applying these principles to our factual situation, it is clear there is ample evidence to support the trial court's finding that initially the decedent "was indebted to plaintiff on an open book account in the principal sum of \$7,000 plus interest." Plaintiff had possession of the account book and produced it at the trial. She identified the account and testified she made the entries on the dates therein stated. Plaintiff's husband testified the money involved was the plaintiff's separate fund and that the entries were in her handwriting. This clearly established plaintiff as the person in whose favor the charges were made. *Bailey v. Hoffman*, supra. The account heading definitely identifies Jo Guynn as the party against whom the charges were entered. In *Boehmke v. Westfall*, supra, the account kept by the daughter was simply headed "Mother owes." This was held to be sufficient to identify the account as being against plaintiff's mother. The testimony of plaintiff's husband reveals that decedent knew of the account and the charges therein and admitted the correctness thereof.

2. The pertinent portion of the statute reads as follows:

"The following persons cannot be witnesses: * * * Parties * * * to an action * * * against an executor

* * * upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

Defendant relies upon *Lee v. De Forest*, 22 Cal.App.2d 351, 71 P.2d 285, and *Tillson v. Peters*, 41 Cal.App.2d 671, 107 P.2d 434, in support of his proposition that the entries in plaintiff's account book cannot constitute an open book account. These cases are not here applicable. They involved periodic payments under lease agreements which fixed the time for payment of the several obligations. To permit such obligations to be transformed into an open book account would be to make for the parties a contract different from that upon which they had agreed. Moreover, in the *Tillson* case, which involved an oral lease, the court pointed out (41 Cal.App.2d at page 674, 107 P.2d at page 436) that the complaint did "not pretend to state a cause of action based on a book account" and that in any event the memorandum was insufficient to create an open book account (41 Cal.App.2d at pages 677-678, 107 P.2d at page 437). In the case at bar an open book account was entirely consistent with the transactions involved and reasonably within the contemplation of the parties, and the first cause of action clearly alleged an open book account.

[5] There is no merit in defendant's contention that this was merely a private memorandum. The account was kept in a bound volume in which other business transactions were recorded, viz., the payments made by Jo on the previous loan on the Santa Cruz property.

[6] To constitute an account stated there must be an acknowledgment of a previous indebtedness, since such indebtedness constitutes the consideration upon which the new contract is based. Also, there must be an agreement that the balance is correct, and a promise, either express or implied, to pay such balance. *Block v. D. W. Nicholson Corp.*, 77 Cal.App.2d 739, 176 P.2d 739; *Bennett v. Potter*, 180 Cal. 736, 745, 183 P.156. The amount of the balance agreed to be owing must appear or be readily ascertainable from the total of

figures then in existence and agreed to. *Metropolitan Water Dist. of Southern California v. Adams*, 57 Cal.App.2d 574, 577, 134 P.2d 882; *Kimball Motor Truck Corp. v. Fickett*, 114 Cal.App. 65, 69-70, 299 P. 566.

[7] Measured by these principles, it is apparent there is ample evidence to support the finding that "approximately one month after April 16, 1952 [which was the date of the second transaction] an account was stated by and between plaintiff and decedent Jo Guynn. * * *" This finding is obviously based on the testimony of plaintiff's husband. It disclosed that when plaintiff showed Jo her book account of their financial transactions Jo acknowledged such previous indebtedness created by the advance of funds for her by plaintiff on March 31 and April 16, 1952, and that she recognized such items as correct. The total was readily ascertainable by the simple addition of the two amounts. And it was entirely reasonable for the trial court to draw the inference that under the circumstances Jo impliedly promised to pay the account thus agreed upon.

[8-10] In arguing that plaintiff's testimony was inadmissible under the dead man's statute defendant overlooks the fact that "it is the established law of California that section 1880, subdivision 3, of the Code of Civil Procedure does not prevent a party from giving testimony relative to: (1) the identity of books produced, and (2) the fact that he kept books of original entries, which were made at the time of the transactions." *Kains v. First Nat. Bank*, 30 Cal. App.2d 447, 450, 86 P.2d 935, 936. Under this rule plaintiff was entitled to identify the account in question and testify that she made the entries at the times therein stated. As previously pointed out, this testimony, together with that of plaintiff's husband³ is sufficient to sustain the findings of the trial court and the judgment based thereon.

[11] It is true that plaintiff was permitted to give testimony beyond that above

3. The testimony of plaintiff's husband was not barred by the dead man's statute since he was not a party to the action and since the loaned money was plaintiff's separate property. *Cullen v. Bisbee*, 168

Cal. 695, 698-699, 144 P. 968; *Manford v. Coats*, 6 Cal.App.2d 743, 745, 45 P. 2d 395; *Alvarez v. Ritter*, 67 Cal.App.2d 574, 579, 155 P.2d 83.

noted and that such testimony contravened the dead man's statute. The admission of this testimony, however, was harmless since there was ample other competent evidence to support the findings and judgment. *Alvarez v. Ritter*, 67 Cal.App.2d 574, 579, 155 P.2d 83.

[12] There is no merit in defendant's contention that the findings are either uncertain or on inconsistent theories. They are crystal clear that at the outset the advances by plaintiff for her sister Jo were on the basis of an open book account, and that approximately a month after the second transaction "an account was stated by and between plaintiff and decedent * * *."

There is likewise no merit in defendant's contention that "the judgment has resulted in a miscarriage of justice." It is not disputed that plaintiff provided the funds for the purchase of her sister's home and that an appropriate record was made thereof. The inference is clear that these advances were loans, and the testimony establishes that the loans were the foundation of an account stated. Defendant did not produce any contrary evidence on these issues.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



155 Cal.App.2d 158

John Charles ABELL, Plaintiff and Appellant,

v.

D. D. WATSON, Real Estate Commissioner of the State of California, Defendant and Respondent.

Civ. 22110.

District Court of Appeal, Second District,
Division 1, California.

Nov. 12, 1957.

Hearing Denied Jan. 6, 1958.

Proceeding for a writ of mandate by real estate salesman to compel real estate commissioner to revoke order suspending license of salesman, who had arranged for

sale of client's property to salesman's sister or her nominee without knowledge of such fact by client. From judgment of the Superior Court, Los Angeles County, John J. Ford, J., denying the petition, the salesman appealed. The District Court of Appeal, Drapeau, J. pro tem., held that evidence sustained finding of breach of fiduciary duty by salesman to his client, even though client did not care and made no complaint against salesman.

Judgment affirmed.

Mandamus §168(4)

In proceeding on petition by real estate salesman for a writ of mandate to compel real estate commissioner to revoke an order suspending license of salesman, who arranged for a sale of client's house to salesman's sister or her nominee without disclosing such fact to client, evidence sustained finding of breach of fiduciary duty by salesman to his client, even though client did not care to whom property was sold and made no complaint against salesman. *West's Ann.Bus. & Prof.Code*, § 10176(i).

Macfarlane, Schaefer & Haun, Henry Schaefer, Jr. and Jerol R. Hodges, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

John Charles Abell, appellant in this case, is a real estate salesman, licensed by the Division of Real Estate of the Department of Investment of California. Mr. Abell was agent for William W. Hubbard, to sell Mr. Hubbard's dwelling house.

Mr. Hubbard said he wanted \$17,500 net to him. So Mr. Abell arranged an escrow, in which the purchaser named was Mr. Abell's sister or her nominee. The escrow was closed by payment of the purchase price and a deed conveying the property to Mr. Abell's wife.

But Mr. Abell did not tell Mr. Hubbard that the purchaser was to be either his sister or his wife.

The Real Estate Commissioner charged Mr. Abell with fraud and dishonest dealing as defined in the real estate code. Business and Professions Code, § 10176(i); and see, *Adams v. Herman*, 106 Cal.App.2d 92, 234 P.2d 695.

A hearing examiner for the Division of Real Estate heard the charges, found them true, and recommended the suspension of Mr. Abell's license for three months.

The Real Estate Commissioner adopted the report and recommendation, and later denied a petition for rehearing.

Mr. Abell petitioned the superior court for a writ of mandate, to compel the Real Estate Commissioner to revoke the order. After hearing, this petition was denied, and Mr. Abell appeals to this court from the judgment.

The hearing examiner found, among other things:

"That these facts should be taken into consideration for the purposes of mitigation; that respondent, from and since 1949, has been licensed and actively engaged in the real estate business; that he is married and has a family and depends upon the real estate business for his livelihood; that from the period between 1950 and 1954 respondent was an active producer, earning for his employing broker as her share of his commissions a sum in excess of \$30,000.00; that there arose friction between respondent and his employing broker which resulted in respondent's desiring to transfer to another employing broker; that at the time of the transfer respondent's employing broker refused to make a transfer, at such time complaining to the Division of Real Estate; that although after the opening of escrow respondent's employing broker became aware of the fact that the purchaser of the property was respondent's sister, this fact was not communicated to Hubbard; that the Hubbard property had been listed with the Vogel Co. for a period of time, and that that

company was not able to make a sale; that upon the trial of this matter Hubbard testified that it made no difference to him that the property was sold to respondent's sister, that all that he wanted was to receive the sum of \$17,500.00 net, and that he had received that sum; that the Hubbard transaction was set up in escrow to provide for no commission; that during the course of the escrow respondent's employing broker became aware of that fact, and that the escrow was corrected to provide for payment of commission to respondent's employing broker; that the reason the escrow was set up without providing originally for commission payment was because of the fact that Hubbard desired it to be set up in that fashion; that the evidence does not establish that respondent intended to at any time deprive his employing broker of any share of commission to which she might have been entitled."

Mr. Abell emphasizes that Mr. Hubbard made no complaint against him. Mr. Hubbard said that he didn't care whether or not the property was sold to Mr. Abell's sister or to his wife; that when he got \$17,500, he got all he wanted.

We don't think the record would sustain a finding of fraud or dishonest dealing by Mr. Abell, in the generally accepted meaning of these words. But the record does sustain a finding of breach of fiduciary duty by Mr. Abell to his client, whether Mr. Hubbard cared or not. The *Adams* case (*Adams v. Herman*, supra, 106 Cal.App.2d 92, 234 P.2d 695) holds that such a breach of fiduciary duty comes within the definition of fraud and dishonest dealing, as these words are used in the code. In the circumstances of this case a full disclosure prior to the sale of the property to the wife of appellant should have been made.

To hold otherwise would be to approve a practice by which a real estate broker or salesman could himself purchase a client's property without his knowledge, by having it conveyed to the wife or other

relative of the broker or salesman. This would open the door to all sorts of chicanery and double dealing, and would be contrary to the purpose and intent of the real estate code.

The rule is to be found in the Adams case, supra, 106 Cal.App.2d at page 99, 234 P.2d at page 699, taken from 2 American Jurisprudence, page 208, section 257:

“The general principle which denies the agent the right, without the knowledge and consent of the principal, to become the purchaser of property which he is employed to sell for the principal is aimed at an indirect or collusive sale or transfer, as well as a direct sale or transfer to the agent. *It precludes the agent from selling or conveying to the agent's spouse, to a corporation in which the agent has a large concealed interest, indirectly to himself in the name of a third person, and even to a clerk of the agent who is engaged in the affairs of the vendor relating to the sale of the land.*” (Italics are in the reported decision.) The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



154 Cal.App.2d 857

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John Robert HARRINGTON, Defendant
and Appellant.

Cr. 3359.

District Court of Appeal, First District,
Division 2, California.

Nov. 4, 1957.

Defendant was convicted of burglary, rape, robbery, and attempted rape, and from judgment of the Superior Court, City and

County of San Francisco, Orla St. Clair, J., and order denying new trial, he appealed. The District Court of Appeal, Dooling, J., held that where possible harmful effect of prosecutor's alleged improper remark, which was not objected to, could have been obviated by appropriate instruction, assignment of error thereto would not be considered on appeal, and where court explicitly instructed jury to disregard improper remarks to which objection was made, no prejudice resulted to defendant.

Affirmed.

1. Criminal Law Ⓒ1037(1)

Only where harmful effect of misconduct of counsel could not be obviated by appropriate instruction will an appellate court consider such question in absence of any objection in trial court.

2. Criminal Law Ⓒ1037(1)

Where alleged improper remark of prosecutor was not objected to and was such that any harmful effect thereof could have been obviated by an appropriate instruction, assignment of error thereto would not be considered on appeal.

3. Criminal Law Ⓒ730(7)

In criminal prosecution, prosecutor's remarks, that story of complaining witness had been checked was not prejudicial misconduct as stating facts unsupported by evidence, in view of court's explicit instruction that jury disregard any reference to statement, and of prosecutors' acknowledgment of impropriety of such remarks.

4. Criminal Law Ⓒ730(7)

In criminal prosecution, prosecutor's assertion that complaining witness had identified and described her assailant on date of crimes was not prejudicial misconduct where court subsequently informed jury that record contained no evidence to such effect.

5. Criminal Law Ⓒ1171(1)

In criminal prosecution, prosecutor's remark that defendant's counsel had tried many rape cases as public defender was too inconsequential to result in prejudice to accused.

William L. Ferdon, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., San Francisco, City and County of San Francisco, Philip J. Hanley, Deputy Dist. Atty., San Francisco, for respondent.

DOOLING, Justice.

Appellant was found guilty by a jury of burglary, rape and robbery committed on or about October 16, 1955 and of burglary and attempted rape committed on or about May 31, 1956.

The victim of the first set of crimes, a young unmarried woman, was on October 16, 1955, living alone in an apartment adjacent to the apartment building in which appellant was living with his wife. On that night, having undressed and donned pajamas, she discovered a man hiding in her closet. He was armed with a table knife which he had found in the apartment. He asked for money and threatened to kill her if she did not keep quiet. She pointed out her purse and he took \$7 from it. He directed her to go into her bedroom and forced her onto her bed and there accomplished an act of intercourse with her. At all times he continued to hold the knife in one hand. Before leaving he demanded more money but when she told him that she did not even have carfare he left 50 cents, wiped off the knife and left through the bedroom window. A scream and a thud were heard by a visitor to another apartment in the building. No fingerprints other than those of the occupant were found in the apartment and no footprints were discovered in the area outside the bedroom window. Medical examination of the victim disclosed evidence of recent intercourse.

The second victim, also a young unmarried woman, lived alone in the same apartment building as appellant. On the night of May 31, 1956, she was awakened by a hand on her shoulder. She discovered appellant, completely nude, standing over her.

He placed his hand on her throat and forced her back on the bed and lay partly on top of her. He attempted to remove her pajamas and told her that he would not hurt her. She succeeded in escaping and ran to the street. As she left the room she seized a robe, which admittedly belonged to appellant, and appellant's slippers were found in her apartment. Appellant was arrested in his apartment shortly afterwards.

Appellant admitted that the robe and slippers found in the second apartment were his but testified that he had been drinking heavily that evening and had no recollection of entering the apartment or of anything that had occurred therein. He did have a recollection, according to his testimony, of looking through the apartment window and seeing the young lady asleep in her bed. There was testimony that while appellant had been drinking rather heavily that night he conversed and answered questions intelligently and in the opinion of the witnesses did not seem to be intoxicated.

Appellant denied that he was the man who had entered the first apartment on the night of October 16, 1955, but the victim of the crimes committed that night positively identified appellant as the perpetrator of them. She testified that after his arrest for the later crimes she saw his picture in a newspaper and immediately recognized him even before reading the news story. She testified that he was wearing a light blue suit. There was testimony that appellant did not own a light blue suit and that on the night in question appellant had been wearing a dark blue suit. Appellant's wife testified that on October 16, 1955, she was pregnant and had difficulty in sleeping but had no knowledge of appellant leaving their apartment that night.

The only claim of error is alleged misconduct of the prosecutor in argument, which appellant urges must be considered prejudicial because, with the two sets of charges being tried together, a greater burden was cast on appellant since the jury would inevitably be influenced in deciding one set of

issues by the cumulative effect of the evidence offered in proof of the other set of issues.

[1, 2] The first instance of asserted misconduct occurred in the prosecutor's opening argument, in which he stated (referring to the lack of appellant's fingerprints): "Well, it happens all the time. I mean, we are not always so fortunate. In fact, it is a rare occasion when we do have fingerprints * * *." This was a statement of facts not in evidence in violation of the rule of *People v. Kirkes*, 39 Cal.2d 719, 249 P.2d 1. However, no objection was made and it is only where the harmful effect of the misconduct could not be obviated by an appropriate instruction that an appellate court will consider such a question in the absence of any objection in the trial court. *People v. Hampton*, 47 Cal.2d 239, 302 P.2d 300. We are satisfied that the quoted language was not of such a character that a proper instruction would not have cured any possible harmful effect on the jury.

[3] The next instance involved the following statement:

"Mr. Ferdon makes mention that there was no checking of her story. Inasmuch as he has seen fit to say that, I'll tell you this, and Mr. Ferdon, I believe, will not doubt my word: That, of course, her story was checked. Do you think that a young 18-year-old girl—I don't mean that I'm omniscient, or wise, or anything of the type, but do you think an 18-year-old girl can take a completely—completely fabricated story, and run it by Police Inspectors and members of the District Attorney's Office, if the girl had spun the whole thing from whole cloth? Do you think that if there were any doubts concerning her story, or if we did not believe it—"

Appellant's attorney assigned this as misconduct and the District Attorney stated: "I'll agree, your Honor; I'll drop the thought." It is urged by appellant that this was prejudicial misconduct in that the

District Attorney stated a fact not supported by evidence—that the story was checked. Also, this was a statement of belief, prior to trial, by the District Attorney and his associates, in appellant's guilt.

Appellant contends this error could not be cured and the remarks of the trial court, designed to cure the error, only deepened it.

The Court said:

"You understand, ladies and gentlemen of the jury, that it is not within the province of any counsel to comment, and lead you to believe that he knows facts that aren't before you, and, naturally, that would be wrong. You decide things only on the facts that are brought before you here in the courtroom, so any intimation that Mr. Hanley knows any facts—I don't know whether he does or not, but, if he does, I instruct you to disregard any reference to them by Mr. Hanley, and block it out of your minds, any thought that he may be persuasive because he knows facts that you do not know. His business is to discuss only the facts that are here before you."

While the trial judge might well have omitted the comment: "I don't know whether he does or not" (i. e., know any facts not in evidence) the Court's final instruction was explicit: "I instruct you to disregard any reference to them * * *." We must assume that the jury obeyed this direction and the remarks were not of an inflammatory character nor such as not to be cured by this explicit instruction to the jury. Following this admonition the prosecutor himself acknowledged the impropriety of these remarks and concluded: "I am not intimating that I have any knowledge of anything more than has appeared here, understand that; and, as I know you understand, you are the exclusive judges of the evidence in this case * * *." We can not believe that this incident resulted in any prejudice to appellant.

The third instance of alleged misconduct concerned the following statement:

"You know how she—you know how she identified the man, and I will say this, and this is—and this, I believe, is proper, in view of the inferences raised: You may not know it, but Mr. Ferdon knows it, that [the witness] identified that man in that fashion on that particular day of October 17th."

Defense counsel objected and assigned these remarks as misconduct. The judge stated:

"Now, you have heard the colloquy, ladies and gentlemen, * * * I accept Mr. Ferdon's statement as true, that he doesn't know whether the lady identified the man or not. Mr. Hanley now says he means 'description.' I do recall there was some testimony by the girl as to description. Disregard the colloquy between counsel, and you go ahead, Mr. Hanley."

[4] There was no evidence that the witness described or identified her assailant on October 17, 1955. Whatever confusion may have existed in the minds of the jurors as a result of these remarks the true state of the record was later made perfectly clear to them. The jury during their deliberations returned to the courtroom and asked to see the testimony which indicated when the witness first gave her description of her assailant. The Court informed them: "literally, there is no evidence in the record which shows that." It is extremely unlikely that the jury in their deliberations thereafter could have given any weight to the prosecutor's assertion to the contrary.

[5] The last assignment concerns a remark by the prosecutor: "Mr. Ferdon well appreciates that in rape cases * * * he has tried many in his years as a Public Defender."

Appellant's counsel, without asking for any action by the court, denied that he had tried more than three or four such cases. The incident was inconsequential and could not have resulted in prejudice.

On the whole record we find no prejudicial misconduct.

Judgment and order denying new trial affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



155 Cal.App.2d 184

Robert E. SCHERB and Lawrence Paul Scherb, Plaintiffs and Respondents,

v.

Dorothy L. NELSON, Individually and as Executrix of the Will of Charles Alfred Bromfield, Deceased, Defendant and Appellant.

Civ. 22289.

District Court of Appeal, Second District,
Division 3, California.

Nov. 12, 1957.

Children's action to have trust impressed upon property which their (deceased) stepfather took by distribution of their mother's estate. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained plaintiffs' contention that their mother and stepfather had made oral agreement that each should be sole beneficiary of other and that plaintiffs should be sole beneficiaries in event plaintiffs' mother was not living when their stepfather died.

Affirmed.

I. Appeal and Error 996

It is not province of reviewing court to revalue inferences deducible from evidence.

2. Appeal and Error ⇨1010(1)

Rule requiring evidence of statement by person since deceased to be clear and convincing to be acceptable as sufficient proof of making of statement is for trier of fact, and is unavailing on appeal.

3. Evidence ⇨588

When witness testifies to fact as of his own knowledge, and trier of fact believes that witness has told truth, his testimony is convincing as to existence of fact.

4. Wills ⇨58(2)

In children's action to have trust impressed upon property which their (deceased) stepfather took by distribution of their mother's estate, evidence sustained plaintiffs' contention that their mother and stepfather had made oral agreement that each should be sole beneficiary of other and that plaintiffs should be sole beneficiaries in event plaintiffs' mother was not living when stepfather died.

5. Wills ⇨67

When two persons execute mutual wills, pursuant to oral contract, and one of parties dies before either revokes his will, and survivor accepts benefits of decedent's will, and then revokes his own will, a constructive fraud, sufficient to raise an estoppel, has been practiced on the first decedent and on the beneficiaries of the oral contract, and the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the contract.

6. Witnesses ⇨206

Statements made by parties to attorney, in presence of each other, respecting agreement they have made or are making with each other, are not privileged.

7. Witnesses ⇨206

In children's action to have trust impressed upon property which their (deceased) stepfather took by distribution of their mother's estate, it was not error to admit, over objection of privilege, attorney's testimony as to his conversations with the decedents respecting preparation of their wills and purpose they desired to accomplish.

8. Appeal and Error ⇨187(2)

Point, that executrix had been improperly joined as a defendant, was not of sufficient importance to deserve consideration when presented for first time on appeal, in children's action to have trust impressed upon property which their (deceased) stepfather took by distribution of their mother's estate.

Fred W. Chase, Glendale, for appellant.

F. Walter French, Santa Monica, for respondents.

SHINN, Presiding Justice.

The mother of plaintiffs, Josephine, married Charles A. Bromfield in 1917. She was then a widow and the owner of several parcels of real property. She died in 1944 leaving a will which was admitted to probate on the petition of Charles, who was named as sole beneficiary and who took distribution of the entire estate. Charles died in 1953. He left a will which gave a third cousin, defendant Dorothy L. Nelson, the greater part of his estate and left plaintiffs nothing. His estate is now in course of administration and Dorothy is acting as executrix.

The purpose of the present action is to have a trust impressed upon the property which Charles took by distribution of Josephine's estate and which was owned by him at the time of his death. The material allegations of the complaint are that at the time Josephine made her will, she and Charles, with the knowledge and consent of plaintiffs, made an oral agreement that each would make a will naming the other as sole beneficiary and providing that if the latter should not be living, plaintiffs would be the sole beneficiaries. It was further agreed that the respective wills would at all times be and remain in full force and effect. At the request of Josephine and Charles, wills were prepared by Lawrence Scherb. Josephine kept her promise; Charles made a will, as agreed, but in 1950 made another will, as mentioned above, without the knowledge or consent of plaintiffs. The court found the allegations of the complaint to be

true and rendered judgment impressing a trust upon the property. Dorothy L. Nelson, individually and as executrix, appeals.

The grounds of appeal are (1) insufficiency of the evidence; (2) error in the admission of testimony given by Lawrence Scherb, and (3) that judgment should not have been rendered against Nelson as executrix.

Lawrence Scherb is an attorney; Robert is a physician; their uncle, David J. Crikelair, is a brother of Josephine.

All three testified on the subject of the oral agreement. Both Lawrence and Robert testified that their mother, in the presence of Charles, stated that she and Charles had agreed to make mutual wills which would name the other as beneficiary and that by the wills all the property of the survivor would go to the plaintiffs and that Charles stated that they had made this agreement. David Crikelair testified that after the death of Josephine, in conversations with Charles, the latter stated to him that he had made an agreement with Josephine that he would leave his estate by will to the plaintiffs. The testimony of these witnesses was explicit and the terms of the agreement of Josephine and Charles as stated by them were definite and clearly expressed. Moreover, there were significant circumstances which added materially to the testimony of the witnesses. In 1945 Charles wished to make a new will which would divide \$2,000 among certain of his relatives. He asked Lawrence whether this would be agreeable to him and Robert and was informed that they approved. Lawrence prepared such a will and sent it to Charles. In 1945 Lawrence owed Charles a balance of some \$400 upon a promissory note for \$1,300 which he had borrowed from Charles. In discussing the balance of the loan Charles forgave the indebtedness, stating that Lawrence would get the money upon his death. Although plaintiffs and Charles had always maintained friendly relations Charles ceased to communicate with plaintiffs and was distant and abrupt in his conversations with Lawrence when called by telephone. When the estate of

Josephine's mother was distributed, after the death of Josephine, there was due as Josephine's share a balance of \$1,052 which the executor, Dave Crikelair, wished to pay to Lawrence and Robert. Charles was willing to divide the money three ways but Lawrence insisted that it go to Charles in compliance with his mother's agreement and he sent the check to Charles. Attached to the last will of Charles was a note reading: "4-20-53 To Whom It May Concern. It is my wish that under no circumstances are the Scherbs to be notified of either my illness or death. (Signed) Charles A. Bromfield." Charles had given Dorothy Nelson oral instructions to the same effect but the latter was not willing to obey them unless they were in writing. As a result Lawrence and Robert did not learn of the death of Charles for about two years after it had occurred.

[1] The argument as to the sufficiency of the evidence does not challenge the testimony of the witnesses as being devoid of evidentiary value. It is asserted that the court should have found that Josephine and Charles merely agreed to make their wills in certain terms and that there was no understanding that they would not be revoked and other wills made. It is not our province to revalue the inferences deducible from the evidence.

[2-4] It is contended further that evidence of a statement and agreement of a person since deceased is weak evidence, and must be clear and convincing to be acceptable as sufficient proof of the making of the statement or agreement. But the argument is unavailing at this stage of the litigation. The rule is for the trier of fact. *West v. Stainback*, 108 Cal.App.2d 806, 816, 240 P. 2d 366; *Barry v. Beamer*, 8 Cal.App. 200, 207-208, 96 P. 373. When a witness testifies to a fact as of his own knowledge and the trier of fact believes he has told the truth, the testimony is necessarily convincing as to the existence of the fact. The learned trial judge believed the testimony of the plaintiffs and their uncle, and with good reason. It is suggested that if it had

been the intention of Josephine that her sons would ultimately receive her estate she could have given Charles a life estate with remainder to the sons. True, but the reasonable inference is that she would have given Charles but a life estate if she had not trusted him to keep his agreement. Particularly significant are the circumstances we have related, namely, Charles' asking the consent of the sons to make provision for some of his relatives, his forgiving the debt of Lawrence and the latter's refusal to take any part of his grandmother's estate. Charles' change of attitude toward his stepsons and his unwillingness to have them advised of his illness or death reasonably indicated that he did not intend to keep the promise he had made with Josephine. The evidence, in our opinion, admitted of no reasonable interpretation or conclusion contrary to those of the trial court.

[5] When two persons execute mutual wills, pursuant to an oral contract, and one of the parties dies before one of them revokes his will, and the survivor accepts the benefits of the decedent's will and then revokes his own will, a constructive fraud, sufficient to raise an estoppel, has been practiced on the first decedent and on the beneficiaries of the oral contract; the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the contract. *Brown v. Superior Court*, 34 Cal.2d 559, 563-564, 212 P.2d 878.

[6,7] When Lawrence Scherb was questioned as to his conversations with Josephine and Charles respecting preparation of the wills and the purpose they desired to accomplish, an objection was made that the statements of the parties were privileged because Lawrence was to act as the attorney for both in the preparation of the wills. The objection was overruled. No authority is cited in the briefs of defendant upon this claim of error. The law is that statements made by the parties to an attorney in the presence of each other, respecting an agreement they have

made or are making with each other are not privileged. *Harris v. Harris*, 136 Cal. 379, 384-385, 69 P. 23; *Piercy v. Piercy*, 18 Cal.App. 751, 761, 124 P. 561; 27 Cal.Jur. 53-54; *Leitch v. Gay*, 64 Cal.App.2d 16, 22, 147 P.2d 631. The statements concerning the agreement made by Josephine and Charles were not made in confidence. The court did not err in overruling the objection.

[8] The third point is that Dorothy L. Nelson, as executrix, was not a necessary or proper party and that the judgment should not have run against her as executrix. It is argued that she could do nothing but cause distribution of the estate in accordance with the will and that she could only be held as trustee of the title as distributee of the estate. It does not appear that the point was made to the trial court that the executrix was improperly joined as a defendant and it is not of sufficient importance to deserve consideration when suggested for the first time on appeal.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



155 Cal.App.2d 26

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Jasper Lewis TAYLOR, Defendant and
Appellant.

Cr. 5836.

District Court of Appeal, Second District,
Division 3, California.

Nov. 6, 1957.

Rehearing Denied Nov. 27, 1957.

Hearing Denied Dec. 30, 1957.

Accused was convicted of assault with a deadly weapon after three prior felony convictions. The Superior Court of Los

Angeles County, H. Burton Noble, J., rendered judgment adjudging accused to be an habitual offender and imposing sentence accordingly, and accused appealed. The District Court of Appeal, Shinn, P. J., held that since two of three prior convictions for burglary, charged in information, had been suffered in Oklahoma and could have been for offenses that would not have constituted burglary in California, accused's admission that he had suffered three prior felony convictions, as alleged in information, was insufficient to support finding that accused was habitual offender within West's Ann.Pen.Code, § 644(b), in absence of proof that offenses of which accused was convicted in Oklahoma were equivalent to any offense enumerated in such statute.

Judgment reversed in part and cause remanded with directions.

1. Criminal Law ⚖️1202(1)

Proof that accused has previously suffered three convictions for offenses enumerated in habitual criminal statute is necessary to support finding that accused is an "habitual offender," and proof merely that accused has previously suffered three felony convictions is insufficient. West's Ann.Pen.Code, § 644(b).

See publication Words and Phrases, for other judicial constructions and definitions of "Habitual Offender".

2. Criminal Law ⚖️1202(1)

Where one of prior convictions was suffered in another state, in order to support finding that accused is an habitual offender, it must appear that minimum elements of foreign offense are substantially similar to minimum elements of one of the offenses enumerated in habitual criminal statute. West's Ann.Pen.Code, § 644(b).

3. Criminal Law ⚖️1202(3)

Prior convictions for burglary in Oklahoma, on which finding that accused was habitual offender was in part based, could have been for offenses that would not con-

stitute burglary in California, and hence accused's admission that he had previously suffered three convictions, as alleged in information was insufficient to support finding that he was habitual offender subject to sentence as such, in absence of proof that foreign offenses were equivalent to an offense enumerated in California habitual criminal statute. 21 Okl.St. Ann. §§ 1431-1435; West's Ann.Pen.Code, §§ 459, 644(b).

4. Criminal Law ⚖️1202(3)

On appeal from judgment adjudging accused to be an habitual offender on basis of three prior convictions for burglary, two of which were suffered in Oklahoma, where conviction for burglary may be based on breaking and entering with intent to commit some misdemeanor other than petit theft, reviewing court must presume that accused was convicted of the least offense defined as burglary by Oklahoma statutes. 21 Okl.St. Ann. §§ 1431-1435; West's Ann. Pen.Code, §§ 459, 644(b).

5. Criminal Law ⚖️1202(3)

Accused's admission that he had previously been convicted of three felonies, as alleged in information, could not be construed on appeal as admission that two prior convictions in Oklahoma for burglary were competent to support a finding that he was an habitual offender within California habitual criminal statute. 21 Okl. St. Ann. §§ 1431-1435; West's Ann. Pen. Code, §§ 459, 644(b).

6. Criminal Law ⚖️1202(7)

Accused may challenge finding that he is habitual offender on direct appeal from judgment. West's Ann.Pen.Code, § 644(b).

7. Criminal Law ⚖️1202(7)

Where evidence is insufficient to support finding that accused is habitual offender, but such defect in proof may be remedied upon a retrial, reviewing court may remand cause for limited new trial on issue of disputed prior convictions. West's Ann. Pen.Code, § 644(b).

8. Criminal Law ¶1202(7)

Failure to prove that previous convictions for burglary in Oklahoma came within requirements of California habitual criminal statute could be remedied upon a retrial, and hence cause would be remanded for limited new trial on issue of disputed prior convictions and resentencing. 21 Okl.St. Ann. §§ 1431-1435; West's Ann. Pen. Code, §§ 459, 644(b).

William Bronsten, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Jasper Lewis Taylor was accused by information of assault with a deadly weapon with intent to commit murder. It was also alleged that he had been previously convicted of three felonies and had served separate terms of imprisonment therefor in state prison, to wit: A conviction of burglary in Oklahoma in 1939, a conviction of burglary in Oklahoma in 1941 and a conviction of burglary in California in 1947. Defendant pleaded guilty to assault with a deadly weapon, a lesser but necessarily included offense, and admitted the three prior convictions as alleged in the information. The court sentenced him to state prison for the term prescribed by law and adjudged him to be an habitual criminal under section 644(b) of the Penal Code. Taylor appeals from the judgment. He contends that the court erred in finding him to be an habitual offender. We agree.

[1,2] Under section 644(b) of the Penal Code an accused may not be sentenced as an habitual offender merely upon proof that he has previously suffered three felony convictions; the People must prove that he has suffered three convictions for offenses enumerated in section 644(b). Burglary is one of the included offenses.

In re McVickers, 29 Cal.2d 264, 267, 176 P.2d 40. If one of the prior convictions was suffered in another state it must appear that the minimum elements of the foreign offense are substantially similar to the minimum elements of one of the crimes listed in the California statute. *People v. Morton*, 41 Cal.2d 536, 539, 261 P.2d 523; In re McVickers, *supra*, 29 Cal.2d 264, 267, 176 P.2d 40, and cases cited.

[3] Defendant argues that he was improperly sentenced as an habitual criminal for the reason that there is no proof that the offenses for which he was convicted in the State of Oklahoma were equivalent to any enumerated in section 644(b). The point is well taken.

[4] In California, burglary is committed by the entry into certain specified structures "with intent to commit grand or petit larceny or any felony * * *". Pen. Code § 459. Under the Oklahoma statutes, first degree burglary is defined as the breaking and entering into the dwelling house of another in the nighttime "with intent to commit some crime therein." 21 Okl. St. Ann. § 1431. The requisite intent for second degree burglary is an "intent to commit some crime" (sections 1432, 1433, 1434), except that second degree burglary may also be committed by breaking and entering into certain specified structures "with intent to steal therein or to commit any felony." 21 Okl. St. Ann. § 1435. The information merely alleges that defendant was convicted in Oklahoma of "burglary, a felony" in 1939 and 1941 and that he served prison terms on each conviction. The records of the Oklahoma convictions are not before us. It may well be that defendant was prosecuted under the statutes which permit a conviction of burglary for breaking and entering with intent to commit some misdemeanor other than petit theft, and we must presume on the appeal that he was convicted of the least offense. *People v. Lohr*, 28 Cal.App.2d 397, 399, 82 P.2d 615. See, also, *People v. Richardson*, 74 Cal.App. 2d 528, 540, 169 P.2d 44.

[5-8] Since there was no proof that the two prior foreign convictions meet the minimum requirements of the habitual criminal statute, the finding that defendant is an habitual offender cannot be permitted to stand. Although Taylor admitted having suffered the previous convictions as alleged in the information, this is not to be construed on the appeal as an admission that the two Oklahoma convictions are competent to support a finding that he is an habitual criminal within the meaning of section 644(b). In *re* Pearson, 30 Cal. 2d 871, 874, 186 P.2d 401, and cases cited. See, also, *People v. Figuieredo*, 146 Cal. App.2d 807, 304 P.2d 161. It is well settled that an accused may challenge a finding that he is an habitual criminal on a direct appeal from the judgment. *People v. Keller*, 151 Cal.App.2d 201, 311 P.2d 14, and cases cited. Where the finding is supported by insufficient evidence and it appears that the defect in proof could be remedied upon a retrial, the reviewing court may properly remand the cause for a limited new trial on the issue of the disputed prior convictions. *People v. Morton*, supra, 41 Cal.2d 536, 542, 543-544, 261 P.2d 523, and cases cited. As the record now stands, the convictions of burglary in the State of Oklahoma could have been for offenses that would not have been burglary in California, and, consequently, the People have failed to prove that the two prior Oklahoma convictions come within the requirements of the habitual criminal statute. These defects in proof might be remedied upon a retrial. See, *People v. Richardson*, supra, 74 Cal.App.2d 528, 539-540, 169 P.2d 44.

That part of the judgment adjudging defendant an habitual criminal and imposing sentence is reversed and the cause is remanded to the trial court with directions to resentence defendant after the conclusion of the limited new trial on the issue of the challenged prior convictions.

PARKER WOOD and VALLÉE, JJ., concur.

154 Cal.App.2d 560

Olga SALGO, Administratrix of the estate of Martin Salgo, deceased, substituted in the place and stead of Martin Salgo, Plaintiff and Respondent,

v.

LELAND STANFORD JR. UNIVERSITY BOARD OF TRUSTEES, Stanford University Hospitals, Frank Gerbode, et al., Defendants and Appellants.

No. 17045.

District Court of Appeal, First District,
Division 1, California.

Oct. 22, 1957.

Rehearing Denied Nov. 21, 1957.

Hearing Denied Dec. 18, 1957.

Malpractice action. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Bray, J., held that question of fact had been presented with regard to whether sodium urokon injected in course of translumbar aortography could have affected plaintiff's spinal cord even if properly injected in aorta or whether it could only have resulted from a needle negligently inserted in spinal artery; and held that it had been prejudicial error to instruct as a matter of law that inference of negligence arose.

Reversed.

1. Appeal and Error $\S$ 1064(1), 1066

If *res ipsa loquitur* doctrine did not apply to malpractice action, or if instructions thereon were improper, judgment for plaintiff would have to be reversed, even if there were evidence of negligence.

2. Physicians and Surgeons $\S$ 18(6)

Doctrine of *res ipsa loquitur* is applicable in malpractice actions only where it is a matter of common knowledge among laymen or medical men or both that injury would not have occurred without negligence, and doctrine is not applicable in every case in which injury occurred while patient was under anesthesia.

3. Negligence ⇨121(1)

Mere fact that unfavorable result is somewhat rare does not give rise to inference of negligence.

4. Appeal and Error ⇨1064(2)

Trial ⇨194(16)

In malpractice action, question of fact was presented with regard to whether sodium urokon injected in course of translumbar aortography could have affected plaintiff's spinal cord even if properly injected in aorta, or whether it could only have resulted from a needle negligently inserted in spinal artery; and it was prejudicial error to instruct as a matter of law that inference of negligence arose.

5. Physicians and Surgeons ⇨18(6)

Where patient was under anesthesia and a different part of his body was injured than that which should have been involved in procedure, and there is no evidence that such result ordinarily might occur without negligence, *res ipsa loquitur* doctrine applies.

6. Physicians and Surgeons ⇨16

In absence of agreement, express or implied, that attending physician would perform aortography, which was procedure customarily performed by hospital personnel, attending physician could not be held liable to his patient for negligence of hospital team which performed procedure, even though it was ordered by him.

7. Physicians and Surgeons ⇨18(8)

Performance of 162 surgical procedures in a given area in particular way should be sufficient to establish custom or practice, and mere fact that majority of aortographies had been performed in two of hospitals in area did not require finding that surgical procedure was not the general custom but merely the custom of those two hospitals.

8. Physicians and Surgeons ⇨16

Furnishing by hospital of surgical team would not relieve attending physician of his obligation to determine competency of such team.

9. Appeal and Error ⇨843(3)

Even though no objection had been made to introduction of evidence, reviewing court, remanding case for retrial, would determine its admissibility.

10. Physicians and Surgeons ⇨18(7, 9)

In malpractice action, manufacturer's brochure, containing recommendations as to usage of drug, was admissible, but it could not establish as a matter of law the standard of care required of physician in use of drug.

11. Physicians and Surgeons ⇨15(5)

Mere fact of departure from drug manufacturer's recommendation, where such departure is customarily followed by physicians of standing in locality, does not make departure an "experiment," within rule making physician liable for experimentations unless patient was first warned thereof and consented thereto.

12. Physicians and Surgeons ⇨15(8)

A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form basis of an intelligent consent by patient to proposed treatment, and physician may not minimize known dangers in order to induce his patient's consent; but patient's mental and emotional condition is important, and in discussing element of risk a certain amount of discretion must be employed, consistent with full disclosure of facts necessary to informed consent.

13. Evidence ⇨556, 558(11)

On direct examination, medical text books are not admissible and, on cross-examination, they are admissible only if expert witness based his opinion either generally or specifically on medical work; and this rule does not permit reading to witness, who has not based his opinion on medical work, text or brochure, extracts therefrom as part of question.

14. Trial ⇨119, 127

It is improper to refer in argument, in malpractice action, to judgments given

in other malpractice actions, whether brought against doctors or lawyers, or to refer to any protection either has against such actions.

Joseph Rankin, Oakland, for appellants Board of Trustees of Stanford.

Peart, Baraty & Hassard, George A. Smith, San Francisco, Richard G. Logan, Oakland, of counsel, for appellant Gerbode.

Thomas J. Cunningham, Mark Owens, Jr., Berkeley, for Regents of University of California as amicus curiae on behalf of appellants.

Lawrence Howe, Jr., Paul G. Gebhard, Chicago, Ill., Vedder, Price & Kaufman, Chicago, Ill., of counsel, for American College of Surgeons as amicus curiae on behalf of appellant Gerbode.

Fitz Gerald Ames, Sr., George Olshausen, San Francisco, for respondents.

BRAY, Justice.

In a malpractice action the jury awarded Martin Salgo¹ the sum of \$250,000 against defendants Leland Stanford Jr. University Board of Trustees, Stanford University Hospitals,² and Dr. Frank Gerbode. The trial court reduced the award to \$213,355. All defendants appeal from the judgment entered thereon.³

Questions Presented.

1. Was *res ipsa loquitur* applicable, and if so, were the instructions thereon proper?⁴

1. Subsequent to the judgment Martin Salgo died and his widow as administratrix was substituted as plaintiff. Wherever the word "plaintiff" appears in this opinion, it refers to the deceased.

2. The Stanford Board of Trustees and Stanford University Hospitals are one entity. The entity owns and operates the Stanford University Hospitals in San Francisco and will hereafter be referred to as Stanford Hospitals.

3. An amicus curiae brief on behalf of the defendants was filed by the Regents of the University of California and one on

2. Liability of Dr. Gerbode for negligence of hospital team.

3. Instructions on alleged other negligence of defendant Gerbode.

4. Experimentation and the manufacturer's brochure.

5. Instructions on (a) duty to call specialist; (b) physician's duty to disclose; (c) failure to produce evidence.

6. Medical texts as evidence.

7. Reference to malpractice judgments.

Evidence.

Dr. Gerbode has been licensed to practice medicine in California since 1937. He specializes in surgery, surgery of the heart, major vessels, and in thoracic surgery, with a special interest in cardiovascular surgery. He is recognized as an outstanding authority and is a professor of surgery at Stanford Medical School. Plaintiff was 55 years of age, with a history of eye condition indicating premature aging. About two or three years prior to the occasion upon which this suit is based, he had developed cramping in his legs upon walking and for approximately a year had been treated with drugs by a physician. This doctor referred him to Dr. Gerbode as a specialist in the surgical treatment of arterial diseases. December 31, 1953, at Stanford Hospitals, Dr. Gerbode examined plaintiff. His chief complaint was cramping pains in his legs, mostly in the

behalf of Dr. Gerbode was filed by the American College of Surgeons.

4. As will hereafter appear, the judgment must be reversed because of error affecting all defendants, namely, improper instructions on *res ipsa loquitur*. For the guidance of the trial court at the retrial we are considering herein some of the questions raised on this appeal without designation of whether they are raised by all or merely one of the defendants. We do not deem it necessary to discuss all of the questions raised on this appeal, particularly those dealing with other theories of negligence than those discussed herein.

calves, causing intermittent limping. This condition had started gradually, becoming increasingly more severe. He complained of pain in his hips and lower back on exercise. He also had right side abdominal pain. Dr. Gerbode's examination found a man who looked much older than his stated age. Both legs were atrophic in the thighs and calves. The right leg was blue. No pulses below the femoral pulse on each side were palpable. There was a weak femoral pulse on the left and none on the right. Upon raising the legs they blanched. This is a characteristic of advanced arterio-insufficiency. Dr. Gerbode then diagnosed a probable occlusion of the abdominal aorta which had impaired the blood supply to the legs and other areas and an advanced arteriosclerosis. Dr. Gerbode was uncertain whether the decreased circulation was limited to the legs alone, or to something blocking the blood higher up. Plaintiff's blood pressure was 180/90, which Dr. Gerbode felt was due to the generalized arteriosclerosis. The latter is a serious disease and one which might cause a stroke in the brain or a coronary occlusion to the vessels of the heart.

Dr. Gerbode advised plaintiff that he had evidence of serious circulatory disturbance, that the examination indicated that plaintiff might have a block in his abdominal aorta, and that there was something else wrong as shown by the pain in his right side and back. Dr. Gerbode told plaintiff of the seriousness of his condition and that plaintiff should enter the hospital for a thorough evaluation of his condition; that one of the things the doctor wished to have done was a study of plaintiff's aorta, which would entail an anesthetic and an injection of some material in the aorta to localize the block; also x-rays of his gastro-intestinal tract would be taken. Dr. Gerbode stated that if his clinical findings were borne out by the further examination contemplated his condition would be helped by an operation removing and replacing a segment of the aorta. Such an operation would improve the circulation to the

legs and back and prolong his life. Dr. Gerbode did not explain all of the various possibilities to plaintiff of the proposed procedures but did say that his circulatory situation was quite serious. Dr. Gerbode reported to the referring physician and recommended the performance of an aortography in order to locate the block and its extent so that proper surgery could be done. A study of the gastro-intestinal tract was also necessary. An aortography consists of injecting in the aorta an x-ray contrast medium and then taking x-ray pictures of the abdominal aorta and its branches to discover the block, if any.

At Dr. Gerbode's suggestion plaintiff entered the hospital on January 6, 1954. That afternoon Dr. Gerbode ordered, among other things, x-rays of the chest and abdomen after a barium swallow. The x-rays were taken and showed marked calcification in the abdominal aorta, iliac and femoral vessels. This presence of calcium indicated that the illness was of long duration. Dr. Gerbode requested in writing that the aortography be performed by the hospital's x-ray department.

The normal procedure is for the attending surgeon to tell members of the house staff team who are to perform the procedure basically what the problem is. Dr. Gerbode did this with Dr. Ellis and Dr. Andrews of the staff. Dr. Ellis was to perform the aortography. Dr. Ellis had five years practice in surgery and was in charge of all special diagnostic procedures at the hospital, such as aortographies, that had to do with the injection of radio-opaque or contrast material in various arteries and blood vessels of the body.

On January 7th Dr. Ellis called on plaintiff in his hospital room and informed him that he was to do the aortography and would do it the next afternoon. He explained that he would inject some material into the aorta and take films at that time to see if they could ascertain the precise condition of plaintiff's circu-

latory system. The next afternoon Dr. Ellis saw plaintiff and informed him that the procedure had been postponed until the following day because plaintiff still had some barium in his intestines from the first x-ray study.

On January 6th Dr. Howard, an anesthesiologist, saw plaintiff and examined him to determine if he was fit to receive the anesthetic. When the procedure was postponed, Dr. Clark saw the patient on January 7th and informed him the procedure would take place on the next day.

On the afternoon of January 8th Dr. Ellis went to the x-ray room where plaintiff was lying on a table. Present were the anesthesiologist, Dr. Bengle, Dr. Andrews, a radiologist, and several technicians. Dr. Gerbode was there at the beginning of the procedure but gave no instructions and did not participate in the procedure. Plaintiff was already anesthetized and asleep. Dr. Ellis was inserting the needle in plaintiff's aorta when Dr. Gerbode came in the room. As the patient was apparently in good condition Dr. Gerbode left and did not see the patient again until the next morning.

An aortography is a procedure requiring an anesthesiologist, a radiologist and a surgeon. The function of the surgeon (Dr. Ellis) is to insert the needle necessary for the injection of material into the aorta and to discuss with the radiology department the materials used and the timing. A hollow No. 16 or No. 18 needle is used. The hollow is closed with a metal rod or stylette. It is approximately $\frac{1}{32}$ inch in diameter and 6 inches long. The patient is placed on his abdomen, face down on the table, and given a general anesthetic. A sensitivity test is then done to determine if the patient is sensitive to the radio-opaque material to be used. The needle is inserted to the left of the spinal column approximately 3 to 4 inches to the left of the midline of the back underneath the 12th rib. The needle is inserted in an upward direction toward the front of the body so as to enter the aorta which lies in front of the

spinal column. The material used here was 70 per cent sodium urokon. This under an x-ray will appear in contrast to the body tissues. One c.c. of it was injected into a vein in plaintiff's arm. He appeared not to be sensitive to it. After the surgeon feels the needle penetrate the wall of the aorta a metal rod is removed from the needle and blood flows from the aorta through the hollow needle. A syringe is then attached to the needle. In this case 30 c.c.'s of sodium urokon were then injected at a fairly rapid rate. Defendants' witnesses testified that there was no difficulty in inserting the needle on the first attempt and that it was only inserted once. (Plaintiff contends otherwise, as will hereafter appear.) The injection took only a few seconds and then a series of x-rays were immediately taken by a machine already in position. While the films were still wet Dr. Ellis and the radiologist, Dr. Stone, examined them. They showed that the descending aorta in the abdomen just below the vessels leading to the kidneys was blocked. In a consultation between Drs. Ellis, Stone and Andrews (another radiologist) it was deemed desirable to take additional x-rays in order to determine the extent or length of the block. During this time plaintiff was kept under anesthesia and the needle remained in place, it being the custom so to do while the doctors are determining whether additional x-rays are necessary. This obviates the necessity of again inserting the needle. The doctors hoped that by changing the timing of the pictures in relation to the time of making the second injection they might be better able to delineate the vascular tree. Twenty c.c.'s of sodium urokon were then injected, without changing the position of the needle, and additional x-rays taken, particularly of the body further down than in the first pictures. Then entire procedure seemed to proceed in a normal manner, and the patient seemed that evening to have recovered from the anesthesia. At 5 o'clock Dr. Gerbode was informed by Dr. Ellis that the procedure had been routine and gone well. The next morning when plaintiff

awoke he noticed that his lower extremities were paralyzed. This condition is permanent.

1. *Res Ipsa Loquitur*.

[1] The court instructed that the doctrine applied. If it did not, or if the instructions thereon were improper, the judgment will have to be reversed, even though there should be evidence of negligence of any or all defendants. *Dees v. Pace*, 118 Cal.App.2d 284, 257 P.2d 756.

The application of the doctrine of *res ipsa loquitur* in malpractice cases is a development of comparatively recent years. Before that time, the facts that medicine is not an exact science, that the human body is not susceptible to precise understanding, that the care required of a medical man is the degree of learning and skill common in his profession or locality, and that even with the greatest of care untoward results do occur in surgical and medical procedures, were considered paramount in determining whether the medical man in a given circumstance had been negligent. But gradually the courts awoke to the so-called "conspiracy of silence." No matter how lacking in skill or how negligent the medical man might be, it was almost impossible to get other medical men to testify adversely to him in litigation based on his alleged negligence. Not only would the guilty person thereby escape from civil liability for the wrong he had done, but his professional colleagues would take no steps to insure that the same results would not again occur at his hands. This fact, plus the fact that usually the patient is by reason of anesthesia or lack of medical knowledge in no position to know what occurred that resulted in harm to him, forced the courts to attempt to equalize the situation by in some cases placing the burden on the doctor of explaining what occurred in order to overcome an inference of negligence. One other

fact contributed to the application of the doctrine, namely, that certain medical and surgical procedures became so common that in many of them the laymen knew that if properly conducted untoward results did not occur,⁵ and in others medical men (when it was possible to get them to admit it) from their specialized knowledge knew that without negligence the result would have been a good one.

The great difficulty in the application of the doctrine is to determine where to draw the line. To apply it in all cases where an unexpected result occurs would hamstring the development of medical science. No medical man would dare to use new procedures, especially in surgery, because if injury resulted he would be *prima facie* guilty of negligence. Medical science has developed in leaps and strides in the past few years. Procedures that 40 years or even 10 years ago, would have been considered impracticable and fatal are now being successfully used; for example, surgery upon the heart. Even the procedure used in this case, translumbar aortography where the aorta is punctured and a foreign substance injected in order to determine the location of a suspected block, is one which but a few years ago would not have been attempted but one which is of great value in determining whether or not corrective surgery is needed and advisable. Thus a great responsibility rests upon the courts—to determine the point at which the doctrine will apply in order to be fair to a patient who has received a result which either common knowledge of laymen or of medical men teaches ordinarily would not occur without negligence, and to be fair to the medical men if there is a result which could occur without negligence and which should not impose upon them the presumption of negligence.⁶

Cases in which the doctrine has been applied follow: *Ragin v. Zimmerman*, 206

5. Such a procedure is injection in the muscles of the arm. See *Bauer v. Otis*, 133 Cal.App.2d 439, 443-445, 284 P.2d 133.

6. See discussion in article "California Malpractice," vol. 9, *Stanford Law Rev.*, p. 737.

Cal. 723, 276 P. 107,⁷ *Costa v. Regents of University of California*, 116 Cal.App.2d 445, 254 P.2d 85, and other California cases applying the doctrine to x-ray burns both in diagnosis and treatment; cases such as *Timbrell v. Suburban Hospital, Inc.*, 4 Cal.2d 68, 47 P.2d 737, dealing with burns by hot water bottles, hot compresses or heating pads; *Bauer v. Otis*, supra, 133 Cal.2d 439, 284 P.2d 133, injection in the arm muscles; *Cavero v. Franklin General Benevolent Soc.*, 36 Cal.2d 301, 223 P.2d 471, death of child during tonsil removal due to erratic and excessive administration of anesthetic.

In these cases application of the doctrine was denied: *Farber v. Olkon*, 40 Cal. 2d 503, 254 P.2d 520, shock therapy; *Engelking v. Carlson*, 13 Cal.2d 216, 221-222, 88 P.2d 695, removal and transportation of ligaments in knee (this case was disapproved in *Seneris v. Haas*, 45 Cal.2d 811, 827, 291 P.2d 915, 53 A.L.R.2d 124; *Dees v. Pace*, supra, 118 Cal.App.2d 284, 257 P.2d 756, hysterectomy; *Bennett v. Los Angeles Tumor Institute*, 102 Cal.App. 2d 293, 227 P.2d 473, x-ray burns; *Pink v. Slater*, 131 Cal.App.2d 816, 281 P.2d 272, removal of scars.

[2] A study of the cases both pro and con on the application of the doctrine in malpractice actions demonstrates that the doctrine is applicable only where it is a matter of common knowledge among laymen or medical men or both that the injury would not have occurred without negligence. See *Seneris v. Haas*, supra, 45 Cal.2d 811, 824-825, 291 P.2d 915, 53 A.L.R. 2d 124. Plaintiff contends that there is an additional situation in which the doctrine will apply, namely, where the patient is under anesthesia and injury occurs, particularly to a different part of the patient's body than the one on which the work was

to be performed, and that such application of the doctrine should be made here, because the aorta was the vessel involved and there was evidence that the spinal column was injured. Plaintiff cites *Dierman v. Providence Hospital*, 31 Cal.2d 290, 292, 188 P.2d 12; *Ybarra v. Spangard*, 25 Cal. 2d 486, 490, 154 P.2d 687, 162 A.L.R. 1258; *Meyer v. McNutt Hospital*, 173 Cal. 156, 159, 159 P. 436; and *Bauer v. Otis*, supra, 133 Cal.App.2d 439, 284 P.2d 133. However, an examination of those cases shows that while at first blush it appears that it is the mere fact that the patient is under anesthesia that causes the doctrine to apply, actually it is not so, and the doctrine applies because the results were ones which either laymen or medical men know ordinarily do not occur without negligence. To apply the doctrine in every case merely because the patient is under anesthesia would put a hopeless burden on the medical profession. It must be remembered that the doctrine goes further than to require the doctor to explain what happened, as, of course, he will have to do to overcome the plaintiff's charge of negligence,—it infers that he was negligent.

There can be little question but that aortography and its results, because it is a relatively new diagnostic procedure, is not a matter of common knowledge among laymen. (Plaintiff contends and one of his witnesses testified that translumbar aortography was not used enough in the bay area to constitute routine procedure.) Very few laymen have ever heard of it. So far as laymen are concerned, it cannot be said that it is a matter of common knowledge that injury results only where there has been negligence in its use. Particularly is this so, when it is performed upon a person with the advanced degree of arteriosclerosis possessed by plaintiff. It

7. The x-ray was used for diagnosis and not for treatment. From this fact plaintiff concludes that in every case of diagnosis, as distinguished from treatment, the doctrine applies. Thus, here, because the aortography was for diagnosis only, plaintiff contends the doctrine neces-

sarily applies. The cited case does not so hold. There might have been more reason for advocating that as a rule some years ago when diagnosis did not as it does in many cases today and as it did in this case, include surgical procedures.

is a matter outside the realm of the laymen's experience, and hence common knowledge as a basis for the application of the doctrine does not exist. See *Dees v. Pace*, supra, 118 Cal.App.2d 284, 257 P.2d 756.

[3] This brings us to the question of whether there was any professional evidence calling for the application of the doctrine. Plaintiff's medical witness did not testify upon this subject, but all the witnesses agree that paralysis is a rare complication of aortography. This fact does not prove that it normally does not occur in the absence of negligence. "The mere fact in itself that an unfavorable result is somewhat rare does not give rise to" the inference of negligence. *Dees v. Pace*, supra, 118 Cal.App.2d 284, 289, 257 P.2d 756, 759. None of the defendants' witnesses testified directly that the paraplegia would not occur without negligence. Dr. Wylie testified that there are risks attendant upon this procedure, that the risk of vessels constricting or occluding as the result of the drug used in the procedure is one of the risks which must be assumed and that there is little that can be done to guard against it. Dr. Naffziger testified that the risks had to be balanced against the importance to the patient of determining the exact diagnosis and the future treatment necessary.

[4, 5] With the exception of plaintiff's witness Dr. Edmeads, none of the experts could determine the exact cause of the paraplegia. In effect, they stated it might have been one of three: (1) constriction of the blood vessels in the spinal cord, due to the urokon; (2) direct damage to the spinal cord from urokon in the spinal cord circulation; (3) the plaintiff's condition, a partially blocked aorta, arteriosclerosis and high blood pressure of several years standing, obliteration of blood vessels and blood supply to legs, was such that sudden and total paralysis could occur at any moment. Their testimony was to the effect that the first two conditions could result from an aortography. Dr.

Edmeads from an examination of the x-rays showing the needle in place at the times of both injections, opined that the needle at the time of the second injection was near or in an artery supplying blood to the spinal column and that the urokon was injected thereby into the column, and that caused the paraplegia. Defendants disagreed with this diagnosis. There was no medical testimony upon which *res ipsa loquitur* could be based unless it be Dr. Edmeads' testimony that the needle may have been inserted in the wrong place. There was no testimony that in aortography, without negligence, a needle could be inserted in a spinal artery. In fact, the testimony was just to the contrary, that there should be no great difficulty in inserting the needle in the aorta. Dr. Edmeads' testimony, if believed, would bring the case within the rule of *Dierman v. Providence Hospital*, 31 Cal.2d 290, 292, 188 P.2d 12; *Ybarra v. Spangard*, 25 Cal.2d 486, 490, 154 P.2d 687, 162 A.L.R. 1258; and *Meyer v. McNutt Hospital*, 173 Cal. 156, 159, 159 P. 436, all supra, that where a patient is under anesthesia and a different part of his body is injured than that which should have been involved in the procedure, and there is no evidence that such a result ordinarily might occur without negligence, the doctrine applies. See *Seneris v. Haas*, supra, 45 Cal.2d 811, 823, 291 P.2d 915, 922, 53 A.L.R.2d 124: "* * * the jury, under appropriate instructions, should have been permitted to determine whether each of the conditions necessary to bring into play the rule of *res ipsa loquitur* were present." Here, there was a conflict in the testimony, defendants' experts testifying in effect that the urokon could have affected the spinal cord even if properly injected in the aorta and that such a situation might have occurred here; plaintiff's expert testifying in effect that the x-rays showed the needle to have been inserted in the wrong place. The jury were not told that the doctrine could apply only in the event they found that the needle had been inserted in the wrong place. On the contrary, the court instructed the jury

that as a *matter of law*, from the "happening of all the events involved in this case, however, *as established by the evidence*," (emphasis added) the inference of negligence arose. The jury were given no opportunity to determine the facts upon which the doctrine would or would not arise. This was prejudicial error.⁸

Although there was evidence on other theories of the case that would have supported the action of the jury, nevertheless the judgment will have to be reversed because of these prejudicial instructions, as there is no way of telling whether the jury decided as it did because of such improper instructions, or because negligence may have been proved otherwise.

2. Dr. Gerbode's Liability.

[6] Assuming that there was negligence in the performance of the aortography, we find no evidence which would make Dr. Gerbode liable therefor in the absence of an agreement, express or implied, that Dr. Gerbode himself would perform it, or of evidence supporting the other theories of negligence raised by plaintiff. Besides Dr. Gerbode, four doctors testified that it was not customarily for the attending physician to perform or to be present at the performance of an aortography, and that it is customary to have such a procedure performed by the hospital personnel who are accustomed to working together in the performance of this and other complicated diagnostic procedures and perform them regularly. There was no contradiction of this testimony. While Dr. Gerbode ordered the aortogram (and would be responsible for any negligence in prescribing such procedure) he cannot be held liable for the negligence of the team in the actual performance of it, as he neither participated in, nor had the right to direct it. When a patient is placed in a hospital his attending physician orders many procedures to be undertaken by the

hospital staff or employees. Common examples are urinalysis, blood counts and x-rays. Suppose that in extracting blood for a count the hospital personnel negligently infected the patient. It could not be contended that the attending physician was liable for that negligence. The same is true here. The attending physician cannot be held liable for acts over which he had and could have no control.

This discussion is limited solely to the effect of custom, in the absence of an express or implied agreement that the attending physician will direct the procedure.

[7] Plaintiff contends that because the majority of the aortographies performed in the bay area were performed in two hospitals, 89 at University of California Hospital, 168 at Franklin Hospital, 68 at all other hospitals (not including Fort Miley Hospital, the figures for which were not available), a total of 325, that it cannot be said there is a general custom but merely a custom of those two hospitals. This is a non sequitur. The record is not clear as to how many of this 325 were performed prior to plaintiff's operation. Conservatively at least one-half were. Assuming only 162 as the proper figure, the performance of that many surgical procedures in a given area in a particular way should be sufficient to establish a custom or practice.

[8] Of course, the furnishing by the hospital of a surgical team would not relieve the attending surgeon of his obligation to determine the competency of such team. (One of plaintiff's contentions is that Dr. Gerbode failed in this duty.) But to hold that the attending surgeon who does not participate nor have the right to participate in the procedure is liable for the acts of a competent team supplied by the hospital would be against the best interests of patients generally. The patient by the use of such a team gets the benefit of medical people who have become experts in the

8. As the case will have to be retried, we deem it advisable to point out, without determining the seriousness of such an error, that the words "evidence pre-

ponderates" in the last sentence of instruction No. 27 (*res ipsa loquitur*) is erroneous and should not be used.

particular procedure. That such is not the law is established by *Seneris v. Haas*, supra, 45 Cal.2d 811, 828-829, 291 P.2d 915, 53 A.L.R.2d 124, where the obstetrician who was engaged in the delivery of a baby was held not liable for the negligence of the accompanying anesthetist supplied by the hospital for negligence in giving the mother a spinal anesthetic. See, also, *Huber v. Protestant Deaconess Hospital Ass'n*, Ind.App., 1956, 133 N.E.2d 864; *Wiley v. Wharton*, 1941, 68 Ohio App. 345, 41 N.E.2d 255. In *Sherman v. Hartman*, 137 Cal. App.2d 589, 290 P.2d 894, we held that the attending physician who left the patient in charge of a hospital nurse while a blood transfusion was still running was not liable for the nurse's negligence. See also, *Hallinan v. Prindle*, 17 Cal.App.2d 656, 62 P.2d 1075 (hospital surgical nurse negligently placed formalin instead of novocaine on surgical tray and surgeon injected it in patient); *Hohenthal v. Smith*, 72 App.D.C. 343, 114 F.2d 494 (hospital intern negligent in administering a hypodermoclysis). Cases like *Ales v. Ryan*, 8 Cal.2d 82, 64 P.2d 409; *Key v. Caldwell*, 39 Cal.App.2d 698, 104 P.2d 87; *Armstrong v. Wallace*, 8 Cal.App.2d 429, 47 P.2d 740, and others cited by plaintiff are not in point. They all deal with hospital employees who were under the direct control and supervision of the surgeon performing the operation.

As the case will have to be tried again, we deem it unnecessary to discuss plaintiff's other claims of liability of defendant Gerbode such as his claim that Dr. Ellis was inexperienced, that Dr. Gerbode knew that fact and was therefore negligent in permitting him to perform the aortography, that defendant in view of plaintiff's condition was negligent in prescribing an aortography, and further that the evidence showed an express or implied agreement that defendant would perform it himself. The court's instructions on this subject left the determination of these matters to the jury depending upon its findings on the controverted facts.

3. Instructions on Other Theories of Dr. Gerbode's Negligence.

A number of instructions were given upon the question of liability of Dr. Gerbode for negligence of the surgical team (admittedly employees of defendant hospital). Reading them, it is difficult to tell whether some of them were not instructions that as a matter of law Dr. Gerbode was liable for their negligence, if any, or whether the jury were to determine the facts upon which such liability was based. The jury were not told clearly that in considering whether, in the absence of an express or implied understanding that he would participate in the procedure, the attending physician's liability for negligence of those participating in spite of a custom or practice to the contrary would depend upon whether the attending physician in view of that custom had any right to control the procedure. Two instructions, No. 25 on the "borrowed servant doctrine," and No. 26 which seems to assume that the team was assisting Dr. Gerbode and under his direction, leave it doubtful even when read with all the other instructions in the case, whether the jury would understand that the instructions only applied in the event the jury should find the facts upon which the rules of law there stated must be based. Plaintiff advanced several theories of Dr. Gerbode's liability. One was that as attending physician defendant Dr. Gerbode was liable for the acts of the team regardless of the general custom. Most of the other theories were based upon a conflict in the evidence, such as whether there was an express or implied contract that Dr. Gerbode would personally perform or direct the procedure, and whether Dr. Gerbode informed plaintiff of the type of procedure to be undertaken. Those were jury questions.

4. Experimentation and the Manufacturer's Brochure.

An instruction was given to the effect that if a surgeon seeks fields of experimentation in treating his patients he is accountable for any damages proximately caused

by any unskillful treatment of the patient. A further instruction was given to the effect that if urokon was injected in greater amount than that recommended by the manufacturer's brochure and if the jury found that such injection constituted experimentation, then all participating would be guilty of negligence unless the patient was first warned of the experimentation and consented to it. The first question to be considered hereunder is the admissibility of the brochure. It was published by the manufacturer of the sodium urokon. It stated that for translumbar aortography in an adult, "10 to 15 cc of 70% Urokon is adequate" and that aortography should not be repeated within 24 hours. The parties differ as to the meaning of the language. Plaintiff contends it negatives a second injection. Defendants contend it only negatives a second insertion of the needle, and that the second injection, the needle remaining in place after the first injection, in nowise contravenes the instruction. The uncontradicted evidence was that the second injection if deemed necessary is customary. In the "first run" in plaintiff's case, 30 c.c.'s, and in the "second run" 20 c.c.'s, a total of 50 c.c.'s, were injected. Dr. Wylie testified that it was customary to use 50 c.c.'s on the first run; Dr. Williams that the customary dosage was from 30 to 70 c.c.'s; Dr. Stone that 30 c.c.'s were the customary first run dosage; Dr. Abrams that 50 c.c.'s were the custom frequently followed by an additional 50 c.c.'s on the second run. There was no expert testimony that the amount used was improper. It is rather significant that the brochure recommends the use of 50 c.c.'s of urokon in another procedure involving injection of the contrast medium for visualization of the heart itself.

Defendants and amicus curiae urge that a manufacturer's brochure is not admissible in evidence and does not establish a standard of care. They contend drug manufacturer's recommendations are always conservative and are quickly outdated, that they expect and the custom is that after a material has been available for a period of

time, physicians using it rely primarily on their own experience and the published literature of colleagues concerning its use in actual practice. They contend that the miraculous developments which have taken place in the effective use of antibiotics and other drugs might never have been accomplished if physicians were required to follow blindly the suggestions of the manufacturers who prepare but do not use them.

[9-11] No objection was made to the introduction of the brochure at this trial, but the matter must be determined for the benefit of the court at a retrial. *Julien v. Barker*, 1954, 75 Idaho 413, 272 P.2d 718, 724, held admissible an instruction sheet issued by the manufacturer of and accompanying the anesthetic charged to have been negligently administered. The court stated (272 P.2d at page 724): "* * * it is not conclusive evidence of standard or accepted practice in the use of the drug by physicians and surgeons, nor that a departure from such directions is negligent. But it is prima facie proof of a proper method of use, given by the maker, which must be presumed qualified to give directions for its use and warnings of any danger inherent therein. [Citations.]" Thus, while admissible, it cannot establish as a matter of law the standard of care required of a physician in the use of the drug. It may be considered by the jury along with the other evidence in the case to determine whether the particular physician met the standard of care required of him. The court's instruction on the subject should have been limited to this effect.

The mere fact of a departure from the manufacturer's recommendation where such departure is customarily followed by physicians of standing in the locality does not make that departure an "experiment." There was in this case no evidence of experiment and the instructions concerning "experiment" should not have been given. Instructions without support in the evidence should not be given. *Rodenberger v. Frederickson*, 111 Cal.App.2d 139, 142, 244 P.2d 107.

5. Instructions.

(a) *Duty to Call a Specialist.*

It is difficult to understand the basis for these instructions. They informed the jury that it is the duty of a general practitioner to call in a specialist if the prudent practitioner would have done so. (These did not deal with the performance of the aortography by Dr. Ellis.) The evidence showed that Dr. Carson, plaintiff's physician, referred him to Dr. Gerbode because he was a specialist in the field of vascular surgery in which aortography is a diagnostic adjunct. It also showed that he is eminent in that field. He had had much experience with aortography before sodium urokon was used. His supposed ignorance is blamed upon his not knowing what was contained in the brochure, not being familiar with the Standard Nomenclature of Diseases and Operations published by the American Medical Association, and not knowing the effect of urokon injected elsewhere than in the aorta. The uncontradicted expert testimony was that the aortography was sound medical practice under the circumstances. There was nothing in the evidence justifying the giving of these instructions.

(b) *Duty to Disclose.*

[12] Plaintiff, his wife and son testified that plaintiff was not informed that anything in the nature of an aortography was to be performed. Dr. Gerbode and Dr. Ellis contradicted this, although admitting that the details of the procedure and the possible dangers therefrom were not explained. The court gave a rather broad instruction upon the duty of a physician to disclose to the patient "all the facts which mutually affect his rights and interests and of the surgical risk, hazard and danger, if any * * *." A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician may not minimize the known dangers of a procedure or operation in order to induce his patient's consent. At the same time, the physician

must place the welfare of his patient above all else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action. One is to explain to the patient every risk attendant upon any surgical procedure or operation, no matter how remote; this may well result in alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk; it may also result in actually increasing the risks by reason of the physiological results of the apprehension itself. The other is to recognize that each patient presents a separate problem, that the patient's mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed consent. *Hunt v Bradshaw*, 1955, 242 N.C. 517, 88 S.E.2d 762; cf. *Simone v. Sabo*, 1951, 37 Cal.2d 253, 231 P.2d 19; *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A., N.S., 505.

The instruction given should be modified to inform the jury that the physician has such discretion consistent, of course, with the full disclosure of facts necessary to an informed consent.

(c) *Failure to Produce Evidence.*

Three instructions were given on this subject, one general and two applying only to the defendants. They should not have been given. There was no evidence in the case to justify the instructions. Defendants produced the witnesses engaged in the procedure and endeavored to explain the cause of the injury. Whether they successfully explained it or negated the facts upon which the charge of negligence was based was a matter for the jury, and the jury were so told. (There were many instructions on the duty and liability of defendants, unnecessarily repetitive.) There was nothing in the case to show, whether *res ipsa loquitur* applied or did not, that there was any suppression of evidence or failure to produce any evidence by defendants.

6. Medical Texts as Evidence.

[13] One of the questions which will undoubtedly be raised at a retrial is the admissibility of medical text books, pamphlets and periodicals. In *Gluckstein v. Lipsett*, 93 Cal.App.2d 391, 209 P.2d 98,⁹ we reviewed the cases in California dealing with the subject and held that on direct examination medical text books were not admissible. On cross-examination they were admissible *only* if the expert witness "has based his opinion either generally or specifically on a medical work or medical works * * *" (93 Cal.App.2d at page 403, 209 P.2d at page 106.) This rule has been in nowise changed. This rule does not permit reading to a witness who has not based his opinion on a medical work, text or brochure, extracts therefrom as a part of a question.

7. Reference to Malpractice Judgments.

[14] It is improper in argument to refer to judgments given in malpractice actions whether brought against doctors or lawyers or to refer to any protection either has against such actions.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.



155 Cal.App.2d 171

Morgan S. STARK et al., Plaintiffs and Respondents,

v.

Harold L. SHAW et al., Defendants,
Shaw Construction Co., a corporation,
Appellant.

Civ. 22456.

District Court of Appeal, Second District,
Division 2, California.

Nov. 12, 1957.

Rehearing Denied Dec. 10, 1957.

Hearing Denied Jan. 6, 1958.

Action for damages for breach of a roofing contract. From a judgment in

favor of plaintiffs in the Superior Court of Los Angeles County, Julian Beck, J., the defendant appealed. The District Court of Appeal, Fox, Acting P. J., held that a reasonable time for performance of the agreement had expired on May 17, 1954; that the roofing company did not acquiesce in the delays and was ready and able to perform its part of the agreement; and that the contractor's license law was not violated because the roofing company had a license while another contractor did not.

Judgment affirmed.

1. Contracts ⇨212(2)

Where contract between a roofing company and defendants specified no time for commencing performance of the agreement, a reasonable time was implied. West's Ann. Civ.Code, § 1657.

2. Contracts ⇨303(5), 315

Where in order for roofing company to perform its part of the contract defendant was required to construct the houses, defendant's unexcused failure to commence construction within the required time constituted a breach of contract excusing the roofing contractor from performance and permitting him to recover for any loss occasioned by the breach. West's Ann.Civ.Code, § 1657.

3. Contracts ⇨176(10)

The question of what constituted a reasonable time for performance of a contract is a fact question and in determining what period of time is reasonable the situation of the parties, the nature of the transaction and the particular facts should be considered. West's Ann.Civ.Code, § 1657.

4. Contracts ⇨212(1)

Where defendant represented at time roofing contract was entered into that construction of houses involved would start approximately April 1 and parties contemplated that construction would start promptly, a reasonable time for starting construction expired on May 17.

9. See article on California Malpractice, vol. 9, Stanford Law Review, p. 731, at pp. 742-743, *supra*.

5. Appeal and Error ⇨931(1)

When sufficiency of evidence to support a finding is challenged, an appellate court must view the evidence and reasonable inferences therefrom in the light most favorable to respondent.

6. Contracts ⇨322(4)

In action by roofing contractor for breach of contract for roofing of a large number of houses, evidence does not establish that the contractor acquiesced in the delays and made no demand that defendant start construction of the houses.

7. Contracts ⇨278(1)

In action by roofing contractor for breach of contract to roof houses, where approximately three weeks was required after commencing construction of a house before it was ready for roofing and no construction had been started within a reasonable time after the contract was entered into, roofing contractor's duty to begin performance never arose.

8. Contracts ⇨350(1)

In action by roofing contractor for breach of contract to roof houses, evidence authorized finding that the roofing contractor would have been able to arrange the financing for the undertaking.

9. Insolvency ⇨24

In some situations "insolvency" refers to an excess of liabilities over assets, whereas in others it refers to inability to meet one's obligations as they mature in the ordinary course of business.

See publication Words and Phrases, for other judicial constructions and definitions of "Insolvency".

10. Contracts ⇨322(4)

In action by roofing contractor for breach of contract to roof houses, evidence did not establish that the contractor was guilty of a prior continuing breach of the agreement by reason of its insolvency.

11. Damages ⇨40(2)

A party to a contract is entitled to recover against the other party who violated it, damages for the profits he would have made out of it had it been performed, and it is no objection that they cannot be

directly and absolutely proved, since only reasonable certainty is required. West's Ann.Civ.Code, § 3300.

12. Damages ⇨190

In action by roofing contractor for breach of contract to roof houses, evidence established that by performance of a contract the contractor would have made a profit and the amount thereof.

13. Licenses ⇨39.43

Where a licensed contractor undertakes to perform a contract jointly with an unlicensed person or entity, no recovery is permitted.

14. Licenses ⇨39.43

A roofing contractor was entitled to recover for breach of contract as against contention that contract was to be performed jointly with another not licensed under the contractors' license law, though the contractor was licensed, where there was no evidence showing that joint performance was contemplated.

15. Contracts ⇨354

In roofing contractor's action for breach of contract for the roofing of houses, findings of the trial court were not contradictory.

16. Assignments ⇨123, 129

Under the statute, an assignee of an interest in a pending action has the option of being substituted in the action or continuing it in the name of the assignor and where no such substitution is sought by the assignee, the action is properly continued in the name of the original parties. West's Ann.Code Civ.Proc. § 385.

17. Appeal and Error ⇨1071(6)

In roofing contractor's action for breach of contract fact that the court did not find which assignment took precedence was not prejudicial where the second assignee had notice of the prior assignment and conceded that the prior assignment prevailed.

18. Damages ⇨176

In roofing contractor's action for breach of contract, excluding evidence showing that if the contractor's figures were used no future profits could be anticipated was

proper since they decided the decisive issue was a reasonable certainty of a profit under the particular contract, and the contractor's past profits and losses were immaterial.

19. Witnesses $\S$ 275(6)

In roofing contractor's action for breach of contract, rejecting cross-examination of plaintiff as to cost and type of shingles used in performing the contractor's prior contract with the defendant and whether the roofing company made a profit from such contract was proper as irrelevant.

Hindin & Susman, Los Angeles, for appellant.

Murchison & Cumming, Los Angeles, for respondents.

FOX, Acting Presiding Justice.

This is an action for damages for breach of contract. From a judgment in favor of plaintiffs, defendant Shaw Construction Company has appealed.

In 1952 the Shaw Construction Company began the development of certain tracts in a subdivision in the eastern portion of Los Angeles County known as La Mirada. The program contemplated building 10,000 homes over a four-year period. One of the first units developed by the company consisted of 312 homes. A contract for roof-

ing these houses was let in June, 1953 to La Mirada Roofing Company, which was a family corporation organized in February, 1953 by Morgan S. Stark for this specific purpose. An appropriate license was granted the roofing company. Mr. Stark had been engaged in the roofing business for some 25 years and had a license therefor. He had been roofing houses for the Shaw Company for several years. More recently, he had been engaged in the business in partnership with his wife under the firm name of Morgan S. Stark Co. Neither the partnership nor Mrs. Stark had a roofing contractor's license.

Early in March, 1954, before the roofing of the 312 homes had been fully completed, Mr. Shaw, president of defendant corporation, requested Stark to submit a bid for roofing 936 houses he planned to build immediately on four other tracts in La Mirada. Pursuant to this request, Stark, on March 12, submitted a bid which totaled approximately \$355,000. It was accepted by Mr. Shaw on behalf of the corporation that same day. It was out of this contract¹ that this lawsuit arises. The contract did not specify a date on which defendant would start building the houses or on which the roofing would begin. Shaw, however, represented that construction would begin in less than three weeks (approximately April 1st) and proceed at approximately 10 houses per day. It required about three weeks from the time a house

1. The contract reads as follows:

"March 12, 1954

"Shaw Construction Co.
650 South Spring St.
Los Angeles 14, California

"Gentlemen:

"We respectfully submit the following bid for roofing on Tracts 19041 and 1818—186 units. 18976—475 units. 15930, 275 units. La Mirada, California
"Apply No. 1 5/2-16" red cedar shingles 5" exposure. Double eaves. Boston type hips and ridges. All work to be done in accordance with F.H.A., V.A. and County requirements.

3 Bedroom houses, Plans 1 and 2, 8 elevations

Average price \$360.63 each.

4 Bedroom houses, Plans 3 and 4, 10 elevations.

Average price \$398.69 each.

"These quotations are based on No. 1 R.C. Shingles at \$8.75 per square, f.o.b. mill, plus freight and freight tax. Labor at today's scale, plus insurance, etc. In the event of an increase or decrease in labor or material costs, the above prices are subject to revision.

"Yours very truly
La Mirada Roofing Co.
By Morgan S. Stark

"State Contr. Lic. 137436

Workmen's Comp. 63917

March 12, 1954

Accepted: Shaw Construction Co.

By: Harold L. Shaw"

was started until it was ready for roofing. At the time this contract was entered into Shaw advised Stark that the financing for his building venture had been arranged with a large and well-known financial institution operating in Southern California. At that time Tracts 18976 and 19041 had been graded both as to streets and as to lots. In Tract 15930 the streets and some of the lots were graded and temporary water was available. Water was also available in Tract 18976, on which were located more than half of the building sites here involved. No foundations, however, had been dug or poured.

Nothing having been done toward starting construction, Stark contacted Shaw during the last week in March and made specific inquiry as to a starting date. Shaw stated construction would begin in "approximately 15 days, not later than the 15th of April." Early in April Shaw told Stark he had been delayed but he expected to start in two or three weeks. In the latter part of April Stark had another conversation with Shaw respecting a starting date. The latter stated he would be starting "very shortly."

Early in May Stark and Shaw had a lengthy discussion concerning the entire situation. Stark told him that he was "getting pretty tired of this situation"; that he "had been living on promises since January of 1953, and something was going to have to be done about it"; that he "had been put to tremendous expenses—that it was on his [Shaw's] say-so, that he said he was going to build the houses, and the work had not proceeded"; that he (Stark) was "in serious financial difficulty"; and he wanted to know what Shaw was going to do. Shaw then reiterated that construction would start soon, and he promised to have some money for Stark on May 17 for the latter to apply on the expenses which had been incurred. On that date no money was forthcoming and no construction had been started. Hence, on May 24, plaintiffs, as assignees of the roofing company, commenced this lawsuit on the theory that defendant's continued failure to commence construction

of the houses constituted a breach of contract.

[1,2] Defendant's first contention is that there is insufficient evidence to support the court's finding that "a reasonable time for performance of the agreement had expired on May 17, 1954." "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." Civil Code, § 1657. Since the contract between the roofing company and defendant specified no time for commencing performance of the latter's promises, a reasonable time is implied. In order for the roofing company to perform its part of the contract, it was necessary for defendant to construct the houses; the very nature of the contract gives rise to an implied promise on defendant's part so to do. Defendant's unexcused failure to commence construction within the required time would constitute a breach of contract, which excuses the other party and permits him to recover for any loss occasioned by the breach. *Sobelman v. Maier*, 203 Cal. 1, 9, 262 P. 1087; *Fountain v. Semi-Tropic Land & Water Co.*, 99 Cal. 677, 680-681, 34 P. 497; *Eubanks v. Milton G. Cooper & Son, Inc.*, 68 Cal.App.2d 366, 372, 156 P.2d 775.

[3] The question of what constitutes a reasonable time is always a fact question. *Lyon v. Goss*, 19 Cal.2d 659, 673, 123 P.2d 11; *Leiter v. Handelsman*, 125 Cal.App.2d 243, 251, 270 P.2d 563. In determining what period of time would be reasonable, the situation of the parties, the nature of the transaction, and the facts of the particular case should all be considered. *Lyon v. Goss*, *supra*, 19 Cal.2d at page 673, 123 P. 2d 11; *Kersch v. Taber*, 67 Cal.App.2d 499, 506, 154 P.2d 934.

[4,5] Shaw's representation at the time the contract was entered into that construction would start on approximately April 1st; the statement that the financing for the project had been arranged; the fact that the streets had been graded, water provided, and the sites for more than half of the houses had been graded; the vastness

of the entire project and the time schedule for its completion; the investment that was already necessarily involved; the desirability of putting the houses on the market so that they could be sold expeditiously at a profitable figure while there was a public demand for housing; all these circumstances reasonably support an inference that the parties contemplated that construction would start *promptly*. With this factual setting the arbiter of the facts could properly conclude that a reasonable time for starting construction expired on May 17th which was more than two months after the contract was made.²

[6] There is no merit in defendant's argument that the roofing company (1) acquiesced in the delays, and (2) made no demand that defendant start construction. The evidence discloses that Stark, on behalf of the roofing company, was constantly making inquiry concerning a starting date and was persistent in seeking the commencement of construction. He was helpless to do more. The roofing company cannot therefore be charged with acquiescence. Furthermore, the lengthy conference early in May between Shaw and Stark clearly indicated a demand on the part of the latter that the project get under way immediately.

Defendant's second contention is that "there is insufficient evidence to support the court's implied finding that nonperformance by the defendant as of May 17, 1954, constituted a breach of the agreement by the defendant." This contention has no merit in view of our determination that the trial court properly found a reasonable time for defendant to start construction had expired by May 17th. Such failure clearly constituted a breach of the contract. *Sobelman v. Maier*, *supra*; *Fountain v. Semi-Tropic Land & Water Co.*, *supra*.

[7] Defendant's third contention is that the evidence is insufficient to support the

court's finding that the roofing company was ready and able to perform its part of the agreement. Initially it should be noted that approximately three weeks was required after commencing construction of a house before it was ready for roofing. It is conceded that no construction had been started by May 17th. Consequently the roofing company's duty to begin performance never arose. Nevertheless, the roofing company had approximately a car load of shingles on hand that were available for use in the performance of this contract. Furthermore, the company had obtained a commitment for the additional shingles necessary to complete the job. Stark testified that the roofing company had men, machinery and equipment available to it for this venture. Any extra supervisory or clerical help could readily be obtained. In view of Stark's 25 years' experience in the roofing business it is a reasonable inference that he could work out such problems as to equipment and personnel as might arise.

[8] Defendant emphasizes the roofing company's poor financial condition at the time of, and immediately following, the execution of the contract. The roofing company had available labor, equipment, and facilities to go forward with its contract; it had some shingles on hand and a commitment for the purchase of such additional shingles as would be required to complete the project; it had a firm contract with a responsible subdivider and builder to roof 936 homes for approximately \$355,000; it was familiar with this particular type of operation in this locale since it was just completing a large roofing contract for defendant in the La Mirada development; it had a man of long and extensive experience in the roofing business in charge of its operations who was familiar with credit and financing practices in the industry; it is a matter of common knowledge that numerous financial institutions were then available to provide funds to

2. When the sufficiency of the evidence to support a finding is challenged an appellate court must view the evidence and the reasonable inferences therefrom in the

light most favorable to the respondent. *New v. New*, 148 Cal.App.2d 372, 306 P. 2d 987.

finance sound home building projects. From these facts and circumstances the trial court reasonably could draw the inference that the roofing company would be able to arrange the financing for this undertaking. To reach defendant's conclusion on this aspect of the case would require us to draw inferences contrary to those drawn by the trial court; this, of course, we are not permitted to do.

[9, 10] Defendant's next contention is that the roofing company "was itself guilty of a prior and continuing breach of the agreement by reason of its insolvency." In making this contention defendant points out that the liabilities of the roofing company exceeded its assets. It therefore assumes that the roofing company was insolvent. In so doing defendant has failed to appreciate the appropriate definition of insolvency. "Two distinct and well-defined meanings of the word have been generally recognized, depending upon the nature of the circumstances and the purposes for which it is used. * * * In some situations insolvency refers to an excess of liabilities over assets [citations]; whereas in others it refers to inability to meet one's obligations as they mature in the ordinary course of business [citations]. The latter meaning has been widely followed in the absence of controlling statutory definition [citations], especially where applied to persons engaged in commercial pursuits [citations]." *People v. Biscailuz*, 95 Cal.App.2d 635, 637-638, 213 P.2d 753, 755. A long line of cases in this state has applied this latter meaning in connection with commercial ventures. *Bell v. Ellis*, 33 Cal. 620, 625; *Sacry v. Lobree*, 84 Cal. 41, 47, 23 P. 1088; *Dixon Lumber Co. v. Peacock*, 217 Cal. 415, 421, 19 P.2d 233. At the time the contract in question was signed the roofing company was in active business and was in fact in the process of completing a large roofing contract for defendant in this subdivision. Upon the execution of the contract of March 12, which carried with it a substantial potential profit, the roofing company acquired an additional valuable asset not reflected in the balance sheet. Prior

transactions indicate that this contract could have been used to raise money (if needed) to meet the company's obligations as they occurred. Therefore, under the applicable definition above noted it does not appear that the roofing company was insolvent.

Defendant's fifth and sixth contentions relate to the sufficiency of the evidence to establish that by the performance of the contract the roofing company would have made a profit and the amount thereof. Defendant's first approach is that plaintiffs failed to establish with certainty that the roofing company would have made any profit at all had the agreement been performed. Defendant then takes the position that, in any event, the evidence is insufficient to support a finding that the roofing company was damaged "in any reasonably ascertainable amount" by reason of defendant's breach of the contract.

[11] "A party to a contract is entitled to recover, against the other party who violated it, damages for the profits he would have made out of it had it been performed. It is no objection to their recovery that they cannot be directly and absolutely proved. In the nature of things, the defendant having prevented such profits, direct and absolute proof is impossible." *McConnell v. Corona City Water Co.*, 149 Cal. 60, 66, 85 P. 929, 931, 8 L.R.A., N.S., 1171; see *Civ.Code.*, § 3300; *Buxbom v. Smith*, 23 Cal.2d 535, 541, 145 P.2d 305. Because it is difficult to measure with mathematical exactitude the detriment suffered in cases of this character, "it is frequently held that a reasonable certainty only is required." *Hensler v. City of Los Angeles*, 124 Cal.App.2d 71, 87, 268 P.2d 12, 23. In such cases the injured party is entitled to recover damages for the profits he would have made "by showing how much less than the contract price it will cost to do the work or perform the contract." *McConnell v. Corona City Water Co.*, supra.

By reason of the figures in the contract (see footnote 1) it was not difficult to determine the amount of money that would

be due the roofing company upon full performance by it. The major cost items in performing the contract were the shingles and labor. The cost of the shingles was figured at "\$8.75 per square, f.o.b. mill," to which was added "freight and freight tax." Labor was figured "at today's scale, plus insurance, etc." The amount of time required to apply a square of shingles was fairly definitely established. Hence the approximate labor cost per unit or per house was readily ascertainable. To protect against changes in prices of shingles or in the wage scale, the contract provided that "In the event of an increase or decrease in labor or material costs,³ the above prices are subject to revision." It is thus apparent that the two principal items of cost to the roofing company in the performance of its contract could be quite definitely calculated and that its compensation would be accordingly revised in the event of changes in either labor or material costs. Thus these two major items of expense were relatively well stabilized. It will be noted that freight charges and insurance were taken into account in making the contract. The amount of these items could be determined with substantial certainty.

The roofing company had storage facilities nearby for the shingles, and by reason of its operations in the La Mirada project was familiar with local conditions. The court took into consideration the need for equipment, the likely need for additional supervisory help on the job and clerical help in the office, and other incidental expenses.

[12] It is apparent that the court had before it all the items of expense likely to be incurred in the performance of the contract. Thus, the court could determine with reasonable certainty the roofing company's costs under the contract. The court was then in a position to ascertain the *fact* of a profit and the amount thereof. Examination of the record indicates there is ample evidence to support the trial court's finding as to the amount of damages.

Defendant vainly argues that the roofing company is not entitled to recover damages for loss of profits because its past operations do not afford a basis from which anticipated future profits may be ascertained. This theory is not here applicable. The problem is not whether the roofing company has made profits in the past, or whether, as a business, it will produce profits in the future; rather, the issue to be determined is whether the company was reasonably certain to make a profit under *this particular contract*.

[13, 14] In light of defendant's argument that the roofing company was not able to carry out this contract, it now suggests that the contract was to be performed jointly with the Morgan S. Stark Company, thus violating the contractors' license law. The roofing company had a license while the Stark Company did not. It is true that when a licensed contractor undertakes to perform a contract jointly with an unlicensed person or entity, no recovery is permitted. *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 308 P.2d 713; *Loving & Evans v. Blick*, 33 Cal.2d 603, 204 P.2d 23. But there is no evidence in this case which shows that joint performance was contemplated. The roofing company was formed for the express purpose of roofing the houses to be built in the La Mirada development; defendant had full knowledge of this fact. Defendant's agreement was solely with the roofing company. The fact that Stark and his partnership cooperated with the roofing company and that Stark himself operated it is of no consequence, since the contract was made by the corporate entity and performance by it was contemplated by all concerned.

[15, 16] Defendant's eighth contention is that the trial court made certain contradictory findings and failed to make findings on a material issue. The first alleged inconsistency is based on the fact that one finding states that on May 21, 1954, the La Mirada Roofing Company assigned its rights under the contract to Morgan S.

3. The trial court found that the *actual* price of shingles was \$8.50 per square and used that figure in fixing damages.

Stark Company, while other findings recite that after commencement of this action the Stark Company made certain assignments of this claim to others. Patently there is no inconsistency in these findings; they merely explain the course of events which the court found to have taken place. In this regard defendant also argues that if these findings are true, then it should have been permitted to bring the assignees before the court because they, rather than plaintiffs, were the real parties in interest. In other words, defendant asserts that plaintiffs could no longer maintain this action once they ceased to be the owners of the claim sued upon. But defendant overlooks Code of Civil Procedure, § 385. Under that statute an assignee of an interest in a pending action has the option of being substituted in the action or continuing it in the name of his assignor. *Davis v. Rudolph*, 80 Cal.App.2d 397, 401, 181 P.2d 765. Where no such substitution was sought by the assignee, the action was properly continued in the name of the original parties.

[17] Defendant also asserts that there is another contradiction in the findings: one finding recognizes an assignment by plaintiffs of all their right, title and interest under the claim sued upon to Asphalt Products Co. on June 18, 1954; another finding states that on September 12, 1955, plaintiffs executed an assignment for the benefit of creditors to Claude B. Cumming, one of plaintiffs' attorneys in this action. There is obviously nothing contradictory about these findings; they, like the findings mentioned above, merely recite the events that occurred. Since the court did not find which assignment took precedence, defendant argues that the trial court failed to make a finding on a material issue. This was not a

material issue, and in any event, defendant could suffer no prejudice by failure to find on this question, since the second assignee obviously had notice of the prior assignment and concedes that the prior assignment prevails.

[18] Defendant's final contention is that the court erred in excluding certain evidence and in unduly restricting cross-examination of Stark. The evidence in controversy related to the operations of the Morgan S. Stark Company and was for the purpose of showing that even if that company's figures were used instead of the La Mirada Roofing Company's figures, no future profits could be anticipated. This evidence was irrelevant since, as pointed out previously, the decisive issue was the reasonable certainty of a profit under this particular contract; the Stark Company's past profits and losses were of no consequence. Hence, the evidence was properly excluded.

[19] Defendant was not unduly limited in its cross-examination of Stark. The rejected questions related principally to: (1) the cost and type of shingles used in performing the roofing company's prior contract with defendant; and (2) whether the roofing company made a profit from such contract. The questions in the first group were irrelevant because the contract of March 12 covered both the cost and type of shingles to be used. And from what we have previously pointed out it is apparent that the questions in the second group were also irrelevant. The trial court's rulings were therefore proper.

The judgment is affirmed.

ASHBURN, J., concurs.

49 Cal.2d 359

**Elizabeth GILLESPIE, Plaintiff and
Respondent,**

v.

**Mary B. RAWLINGS, Defendant and
Appellant.**

L. A. 24611.

**Supreme Court of California,
In Bank.**

Nov. 12, 1957.

Rehearing Denied Dec. 11, 1957.

Action by employee against employer for injuries sustained when employee was riding in employer's automobile which collided with another automobile. The Superior Court, Los Angeles County, Jesse J. Frampton, J., rendered judgment for employee, and employer appealed. The Supreme Court, Schauer, J., held that where employer asked employee to accompany employer for purpose of enabling employee to familiarize herself with real estate activities and employee accepted ride because of employment relationship, advantage which would inure to employer from having employee acquire information which would enable her to better perform duties of her employment constituted tangible benefit which amounted to giving of compensation and made employee a passenger to whom employer was liable for ordinary negligence.

Affirmed.

Opinion, 309 P.2d 560, vacated.

McComb, J., dissented in part.

1. Automobiles ⇨181(2)

Tangible benefit, not mere pleasure, kindness or friendship alone, must be the principal inducement for a ride to constitute "compensation" within statute providing that no guest who accepts a ride in vehicle without giving compensation therefor has any right of action for civil damages against driver on account of personal injury. West's Ann.Vehicle Code, § 403.

2. Automobiles ⇨244(20)

In action by secretary against employer for injuries sustained in automobile acci-

dent while secretary was riding with employer, evidence sustained finding that employer had asked secretary to accompany employer for purpose of enabling secretary to familiarize herself with real estate activity in certain area rather than for principal purpose of mutual pleasure of companionship, and that secretary accepted ride because of employment relationship. West's Ann.Vehicle Code, § 403.

3. Automobiles ⇨181(2)

Where real estate broker asked secretary to accompany broker for purpose of enabling secretary to familiarize herself with real estate activity in certain area and secretary accepted ride because of employment relationship, advantage which would inure to broker from having secretary acquire information which would enable her to better perform her work constituted tangible benefit which amounted to the giving of "compensation" and made secretary a "passenger" to whom broker was liable for ordinary negligence. West's Ann.Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation" and "Passenger".

4. Automobiles ⇨244(20)

In action by employee against employer for injuries sustained when employer's automobile in which employee was passenger collided head on with another automobile, evidence was insufficient to support determination that employer had been guilty of wilful misconduct. West's Ann. Vehicle Code, § 403.

5. Automobiles ⇨244(20)

In action by employee against employer for injuries sustained when the employee was passenger of employer's automobile which collided head on with another automobile, evidence disclosed that employer's pulling into wrong lane and into oncoming automobile was a culpable error of judgment which amounted to negligence only. West's Ann.Vehicle Code, § 403.

6. Appeal and Error $\hookrightarrow$ 930(2), 1064(1)

Where conclusion that employee was passenger in employer's automobile rather than a guest flowed from facts as to which there was no substantial dispute, error in submitting to jury issue of wilful misconduct of employer was not prejudicial, and reviewing court would assume that jury understood instructions correctly and applied them to evidence, and that verdict for employee was based on determination that she was passenger, and not determination that defendant was guilty of wilful misconduct. West's Ann.Vehicle Code, § 403.

Parker, Stanbury, Reese & McGee and White McGee, Jr., Los Angeles, for appellant.

Wayne Veatch, Henry R. Thomas, Los Angeles, Albert L. Garvey, Huntington Park, and Henry F. Walker, Los Angeles, for respondent.

SCHAUER, Justice.

Defendant appeals from a judgment for plaintiff, pursuant to jury verdict, in an

action for personal injuries sustained when plaintiff was riding in an automobile operated by defendant. One count of the complaint alleges that plaintiff was a passenger for consideration, and one count alleges that defendant was guilty of wilful misconduct. Defendant urges that the evidence is insufficient to prove either that plaintiff was a passenger or that defendant was guilty of wilful misconduct. We have concluded that the judgment should be upheld upon the theory that plaintiff was a passenger, but not upon the theory that defendant was guilty of wilful misconduct.

On the day of the accident (Sunday, February 7, 1954) plaintiff was defendant's employe, but there is no contention that she was acting in the course and scope of her employment on that day.¹ Defendant was a real estate broker in Hermosa Beach. For four months before the accident plaintiff worked for defendant as receptionist and clerk.² Defendant's husband, although he was licensed as a real estate broker, was not active in the business; defendant was the "boss." Plaintiff testified that defendant "wanted me to learn all I could about

1. The complaint originally contained a count which alleged that at the time of her injury plaintiff was riding in the automobile in the scope and course of plaintiff's employment by defendant and that defendant was wilfully uninsured for workmen's compensation. Plaintiff dismissed this count.

Defendant did not allege and prove, and does not contend, that plaintiff's remedy is under the Workmen's Compensation Act rather than a tort action. Defendant could not now make such a contention. "An employer who contends that he is one of a class of persons protected from an action at law by the Workmen's Compensation Act must plead and prove the conditions necessary to bring himself within the statute. The employee is pursuing a common law remedy which existed before the enactment of the statute and which continues to exist in cases not covered by the statute. It is incumbent upon the employer to prove that the Workmen's Compensation Act is a bar to the employee's ordinary remedy." (Popejoy v. Hannon (1951), 37 Cal.2d 159, 173-174 [24], 231 P.2d 484.)

2. Plaintiff described her duties in the following manner: "I was to answer the telephone, and if there were no sales people in the office and some one inquired about property I was to find out what kind of property they wanted, and if I could, where they wanted it, and get their names, and get their telephone number, and have one of the sales people call them when they came back into the office. And then, twice a week we received listings from the multiple board that all the realtors belonged to * * *. And it was my work to go through these listings, and to make tickets for books for the sales people, and then, any property that had been sold, or any property that had been canceled, or if there were changes made on the listings * * *, I was to go through the tickets that I had made for the sales people and put all this information on there for them. * * *. And taking care of the ads in the paper, keeping them in a book, and as they were canceled to take them out of the book, and keeping a record of telephone calls that we had on each ad that was in the paper each day, and just general office work * * *"

the office so that when people came into the office I could have intelligent conversation with them regarding properties. * * * Even though I couldn't quote prices, or I couldn't sell." Plaintiff answered affirmatively the question, "Mrs. Rawlings told you, didn't she, that she thought that she'd * * * like to see you improve yourself, and would like to see you get a real estate license?" On one occasion defendant drove plaintiff to a property and showed plaintiff how to make a listing.

Plaintiff and defendant were members of the same church. Plaintiff was allowed time off, without loss of pay, to pursue church activities. On one occasion she attended a church lecture with the Rawlings, and on another occasion she attended a play with them. Plaintiff ordinarily worked five days a week, but on the following two occasions prior to the accident she worked on a normal day off: Defendant "told" plaintiff to attend a Saturday television program advertising real estate; after the program plaintiff and the Rawlings spent

about an hour answering telephone inquiries resulting from the program. Plaintiff went to the television program because when defendant said, "You'll go. You are to go with us," plaintiff "felt that since Mrs. Rawlings was the boss that it was the right thing for me to do to go with her." On a Sunday defendant asked plaintiff to go to the office so that defendant could "fix up her Social Security." Plaintiff answered the telephone during this Sunday afternoon and at defendant's request went with prospective customers and showed them an apartment. On these two occasions plaintiff did not receive and did not expect to receive any pay.

The accident occurred (as stated, on a Sunday) while the Rawlings and plaintiff were driving to Palmdale. According to plaintiff's testimony the purpose of the trip was "seeing the property [of the Rawlings and of a Dr. Lindsey] and the activity in the real estate there." Defendant had said to plaintiff, "I want you to go with us."³

"I couldn't quote prices * * * I couldn't quote down payments, I couldn't quote monthly payments. I could quote if we had two-bedroom houses in Hermosa, or if we had three-bedroom houses in Manhattan, or if we had property for sale in Redondo. It was my job to find out what size house people wanted * * * and about what they wanted to pay, and the location that they wanted. But, I couldn't go into any details or discussions about prices or sizes or things like that, descriptions, so to speak, of the legal description of the property, because I didn't have the license to do that."

3. Plaintiff's testimony concerning the purpose of the trip, in detail, is as follows:

"There had been much talk in the office about real estate activity in Palmdale. * * * There was much demand for homes, and there had been much discussion in the office concerning this activity in Palmdale of real estate, and when this friend brought me the little newspaper from Northrop on that week before the accident, because it had so much information in it about stores and houses, and a map of the Palmdale area, I took it into the office, and everybody in the office looked at it, and read it, and studied it,

and found out all they could about it. * * *

"Dr. Lindsey came in while the book was there. * * * And he was talking about the property of his, and he took the map and he marked his property * * * and he said to Mrs. Rawlings—She'd been talking about going up there to see her lots, they owned some lots somewhere there in the desert not too far, I think, from Palmdale. And he said, 'When you go up there to look at your lots I want you to look at my property, too.' * * *

"Mrs. Rawlings talked about going to see their lots, and about going to Palmdale to see the real estate activity, and to find out what she could about it, because she could have contacted her realtor and sold the property there through them if somebody came into the office for that. * * *

"And she said * * *, 'We are going up there, and I want you to go with us.'"

"Q. * * * At any time before you started out on that trip did either Mr. or Mrs. Rawlings tell you that you had any duties to perform on that trip? A. Nothing except to see the property.

"Q. Well, they didn't tell you that you had to see the property, did they? * * * [A]t no time before you start-

Defendant planned to return from Palmdale by way of Venice in order to obtain the signature of one Harris on a paper. Defendant testified that although she and her husband planned to look at the Lindsey property, the journey "was absolutely a pleasure trip."

The circumstances of the collision were as follows: The weather was clear and sunny. Defendant was driving north on a two-lane highway which curved slightly toward her left. Defendant's husband (who was fatally injured in the collision) was in the rear seat. Plaintiff was asleep in the front seat. Jean Novobilsky, who was driving ahead of defendant at about 50 to 55 miles an hour, saw defendant in his rear view mirror. As defendant came behind the Novobilsky car she turned to her left, out of her lane of traffic, and collided almost "head on" with a southbound car. There is no evidence of tire or skid marks attributable to defendant's car on the highway after the collision.

Section 403 of the Vehicle Code provides in material part that "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to * * * such guest during such ride, unless the plaintiff in any such action establishes that such injury * * * proximately resulted from the intoxication or wilful misconduct of such driver."

[1] As stated in *McCann v. Hoffman* (1937), 9 Cal.2d 279, 286, 70 P.2d 909, "where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given." (Accord, *Clifford v. Ruocco* (1952), 39 Cal.2d 327, 328 [footnote], 246 P.2d 651.)

ed out on that trip did either one of them tell you you had something to do on that trip? A. We were going to see the property, and that I was to see the property. * * *

"Q. But they didn't tell you that you were to come along for the purpose of

Some cases say that where the driver receives a tangible benefit which is a motivating influence for furnishing the transportation, the rider is a passenger. (*Whitmore v. French* (1951), 37 Cal.2d 744, 746 [4], 235 P.2d 3; *Thompson v. Lacey* (1954), 42 Cal.2d 443, 447 [6], 267 P.2d 1; *Martinez v. Southern Pacific Co.* (1955), 45 Cal.2d 244, 250 [5], 288 P.2d 868; *Harris v. Harfmann* (1952), 113 Cal.App.2d 615, 616-617, 248 P.2d 501; *Brandis v. Goldanski* (1953), 117 Cal.App.2d 42, 48, 255 P.2d 36 [pointing out the difference in language between the *Whitmore* and *Harris* cases, on the one hand, and the *Clifford* case, on the other]; *Kroiss v. Butler* (1954), 129 Cal.App.2d 550, 555-556, 277 P.2d 873; *Ray v. Hanisch* (1957), 147 Cal. App.2d 742, 748 [10], 306 P.2d 30.) The cases which use the phrase "a motivating influence" and those which use the phrase "the motivating influence" do not, because of this difference in phraseology, state different principles. The thought conveyed by both groups of cases is that the tangible benefit, not mere pleasure, kindness, or friendship alone, must be the principal inducement for the ride to constitute compensation. As pointed out in *Baker v. Novak* (1956), 144 Cal.App.2d 514, 520, 301 P.2d 257 (adopting remarks of the trial judge), "'it is knowledge common to everybody that in all such transactions a number of reasons may be involved. Thus when a man proffers an accommodation to a friend he may entertain in the back of his mind some thought that the friend may in the future be of some value to him. So when we speak of 'motivating influence' we mean something which is actually a moving cause of the ride and not some minor consideration that may have possibly entered the mind of the owner of the automobile.'" The District Court of Appeal in the *Baker* case says further, "We find nothing

performing some duty on or in connection with that trip did they? * * * A. No, but the thing is, we went to see the real estate activity in the Palmdale area, and that was when—what we talked about going for, and to see the Rawlings' lots."

ing in *McCann v. Hoffman*, 9 Cal.2d 279 [70 P.2d 909], in conflict, as to this point, with *Whitmore v. French*, 37 Cal.2d 744 [235 P.2d 3], or *Thompson v. Lacey*, 42 Cal.2d 443 [267 P.2d 1], or *Martinez v. Southern Pac. Co.*, 45 Cal.2d 244 [288 P.2d 868]. Where the context calls for the demonstrative and particular article 'the' that word is used. When, however, the court is directing its attention variously to one of several motives influencing conduct it uses the indefinite article 'a.' "

Among the benefits which, it has been held, are or could be found to be compensation are the prospect of a business profit from an anticipated purchase by the rider from the driver (*Halbert v. Berlinger* (1954), 127 Cal.App.2d 6, 19 [12a, 12b, 14], 273 P.2d 274 [airplane; rule is the same as in automobile cases]; *Whittemore v. Lockheed Aircraft Corp.* (1942), 51 Cal. App.2d 605, 611, 125 P.2d 531 [airplane; see *Whittemore v. Lockheed Aircraft Corp.* (1944), 65 Cal.App.2d 737, 739-743 (1a, 1b), 151 P.2d 670, question of fact]; *Piercy v. Zeiss* (1935), 8 Cal.App.2d 595, 599 [2, 3], 47 P.2d 818; *Riley v. Berkeley Motors, Inc.*, (1934), 1 Cal.App.2d 217, 220 [1], 36 P.2d 398 [prospective purchaser of car driving it under direction of salesman was passenger]; *Crawford v. Foster* (1930), 110 Cal. App. 81, 84-86, 293 P. 841), the creation of good will by the rendering of a service to a rider who has made a purchase (*Follansbee v. Benzenberg* (1954), 122 Cal.App.2d 466, 471 [7], 265 P.2d 183, 42 A.L.R.2d 832; *Whittemore v. Lockheed Aircraft Corp.* (1942), supra, 51 Cal.App.2d 605, 611, 125 P.2d 531), the rider's assisting the driver where the driver is transporting goods for the rider for compensation (*Schramko v. Saulter* (1956), 146 Cal.App.2d 549, 551-552 [2a-2b], 303 P.2d 1061; *Lerma v. Flores* (1936), 16 Cal.App.2d 128, 129-130, 60 P.2d 546), and the rendition or anticipated rendition of various types of service by the rider to the driver (*Kruzie v. Sanders* (1943), 23 Cal.2d 237, 241 [5], 143 P.2d 704; *Roberts v. Craig* (1954), 124 Cal.App. 2d 202, 211 [11], 268 P.2d 500, 43 A.L.R.2d 1146; *Christiana v. Rattaro* (1947), 81 Cal.

App.2d 597, 598-599, 184 P.2d 682; *Fachadio v. Krovitz* (1944), 62 Cal.App.2d 362, 363, 144 P.2d 646; *Weddle v. Loges* (1942), 52 Cal.App.2d 115, 121-122, 125 P.2d 914; *Duclos v. Tashjian* (1939), 32 Cal.App.2d 444, 450, 451, 90 P.2d 140 [plaintiff's decedent accompanied defendant to repair defendant's pump; the fact that decedent anticipated the benefit of employment "does not compensate and destroy by balancing an independent and separate compensation for the ride given by the rider to the driver"]; *Haney v. Takakura* (1934), 2 Cal.App.2d 1, 3-4 [1], 37 P.2d 170, 38 P.2d 160).

"[W]here the relationship between the parties is one of business and the transportation is supplied in the pursuit thereof for their mutual benefit, compensation has been given and the plaintiff is a passenger and not a guest." (*McCann v. Hoffman* (1937), supra, 9 Cal.2d 279, 286, 70 P.2d 909; *Jensen v. Hansen* (1936), 12 Cal.App. 2d 678, 682 [1], 55 P.2d 1201; *Parrett v. Carothers* (1936), 11 Cal.App.2d 222, 227-229 [4], 53 P.2d 1023; *Martinez v. Southern Pacific Co.* (1955), supra, 45 Cal.2d 244, 251-252 [12], 288 P.2d 868; *Thompson v. Lacey* (1954), supra, 42 Cal.2d 443, 446 [5], 267 P.2d 1.)

In *Sumner v. Edmunds* (1933), 130 Cal. App. 770, 778-779 [3], 21 P.2d 159, the plaintiff sought employment delivering newspapers for defendant company and was told by the manager of the automobile delivery routes that he would be given such employment if a vacancy should arise. Defendant Edmunds, who was employed to deliver papers by automobile, asked plaintiff to accompany him on his route so that plaintiff could familiarize himself with it. Plaintiff did so and was injured as the result of a collision caused by Edmunds' negligence. Although the trial court found that plaintiff "was riding as a guest," the District Court of Appeal held that plaintiff was a passenger. It appears that the appellate court was of the opinion that the crucial factor showing a "benefit" to defendants-appellants was that plaintiff "was travelling with appellant Edmunds at the instance and request of the appellants for

the purpose of learning the paper route, so that in the future, should the occasion arise, he might be able to take the route over from Edmunds" (at page 779 of 130 Cal.App., at page 163 of 21 P.2d). It is not necessary to go as far as the Sumner case to determine that there was a benefit to defendant in the present case.

[2, 3] Here it can fairly be said that the jury properly decided that defendant asked plaintiff to accompany defendant for the principal purpose of enabling plaintiff to familiarize herself with real estate activity in the Palmdale area, and particularly with the Rawlings and Lindsey properties, rather than for the principal purpose of mutual pleasure or companionship, and that plaintiff accepted the ride because of the employment relationship. (See *Thompson v. Lacey* (1954), supra, 42 Cal.2d 443, 446, 267 P.2d 1 ["It may be inferred that Thompson and Dreis went to the meeting with Kerns because they considered a suggestion by him that they do so as a command inasmuch as he was their supervisor"].) The advantage which would inure to defendant from having plaintiff acquire information which would enable her to better perform the duties of her employment constituted a tangible benefit which amounted to the giving of compensation and made plaintiff a passenger to whom defendant was liable for ordinary negligence.

[4] On the issue of wilful misconduct, the evidence is insufficient to support a determination favorable to plaintiff. The jury were instructed as follows on this issue:

"The words 'wilful misconduct' have a meaning in the law, additional to that which they have in common usage. If we were to use the words in their ordinary sense, they would mean simply the indulging in wrongful conduct by conscious choice. Such conduct might consist of doing something that ought not to be done or in failing to do something that ought to be done. But in order to be a basis for liability to a guest under our law, the misconduct must be something more than intentional and

wrongful; it must be done under circumstances which show either knowledge that serious injury to the guest probably will result, or a wanton and reckless disregard of the possible results.

"Wilful misconduct means something different from and more than negligence, however gross the negligence may be. A guest may not recover against her host unless the conduct of the host amounted to wilful misconduct, and that means intentional, wrongful conduct, done either with knowledge that serious injury to the guest probably will result, or with a wanton and reckless disregard of the possible results.

* * *

"[I]f you should find that defendant was negligent, and if you should find that she intentionally did something that was wrongful and which was a proximate cause of injury to plaintiff, still a case of wilful misconduct is not established unless you further find that such conduct was done with knowledge that serious injury to the plaintiff probably would result, or with a wanton and reckless disregard of the possible results."

[5] The law stated in these instructions accords with the law as developed in the cases, among others, of *Meek v. Fowler* (1935), 3 Cal.2d 420, 425-426, 45 P.2d 194; *Parsons v. Fuller* (1937), 8 Cal.2d 463, 468, 66 P.2d 430; *Weber v. Pinyan* (1937), 9 Cal.2d 226, 230-235, 70 P.2d 183, 112 A.L.R. 407; *Porter v. Hofman* (1938), 12 Cal.2d 445, 447-448 [1, 2], 85 P.2d 447; *Cope v. Davison* (1947), 30 Cal.2d 193, 198-199, 180 P.2d 873, 171 A.L.R. 667; *Mercer-Fraser Co. v. Industrial Acc. Comm.* (1953), 40 Cal.2d 102, 116-118 [8-14], 251 P.2d 955; *Hawaiian Pineapple Co. v. Industrial Acc. Comm.* (1953), 40 Cal.2d 656, 662-663 [2-10], 255 P.2d 431; and *Lynch v. Birdwell* (1955), 44 Cal.2d 839, 847-848 [8], 285 P.2d 919. On the evidence defendant could not properly be found guilty of that wanton and reckless disregard of possible consequences, or that knowledge of probable injury, which characterizes wilful misconduct. Viewing the evidence most favorable

to plaintiff it appears that defendant's pulling into the southbound lane and into an oncoming car was a culpable error of judgment which amounted to negligence only.

Plaintiff relies upon the often quoted statement that "one who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, 'takes a chance' on killing or injuring himself and others, who may be so unfortunate as to be riding with him, is guilty of wilful misconduct." (Parsons v. Fuller (1937), *supra*, 8 Cal.2d 463, 468-469, 66 P.2d 430; Emery v. Emery (1955), 45 Cal.2d 421, 426-427, 289 P.2d 218; Chandler v. Quinlan (1938), 25 Cal.App.2d 646, 648, 78 P.2d 235; Francesconi v. Belluomini (1938), 28 Cal.App.2d 701, 705, 83 P.2d 298; Jones v. Harris (1951), 104 Cal.App.2d 347, 352, 231 P.2d 561; Davis v. Oldendorph (1955), 130 Cal.App.2d 314, 318, 278 P.2d 956; Harlow v. Van Dusen (1955), 137 Cal.App.2d 547, 550, 290 P.2d 911; Fuller v. Chambers (1956), 142 Cal. App.2d 377, 380 [4], 298 P.2d 125; see also Van Fleet v. Heyler (1942), 51 Cal.App.2d 719, 725 [2a], 125 P.2d 586; Rawlins v. Lory (1941), 44 Cal.App.2d 20, 24 [5], 111 P.2d 973; Berryman v. Quinlan (1938), 29 Cal.App.2d 608, 610, 85 P.2d 202.) This statement must not be understood as a definition of wilful misconduct. Rather, it is a characterization of one aspect of such misconduct. If it were taken as a complete definition, then merely venturing onto a crowded highway, or performing any other act involving a mere passive disregard of foreseeable consequences, without wilfulness or wantonness or knowledge that injury would probably result, could be found to be wilful misconduct. That such is not the law is manifest from the language of the instruction hereinabove quoted and the cases from which it is derived.

[6] Having concluded that it could and should have been determined that plaintiff was a passenger but that the evidence is insufficient to support a finding of wilful misconduct, we must determine whether the judgment can be affirmed on the assumption that the jury's verdict was based on

a determination that plaintiff was a passenger and that defendant was negligent, rather than on a finding, unsupported by the evidence, that defendant was guilty of wilful misconduct. The conclusion that plaintiff was a passenger rather than a guest flows from facts as to which there is no substantial dispute: That plaintiff's employment involved her learning about real estate, that defendant told plaintiff that "I want you to go with us" on the trip which resulted in her injury, and that the purpose of that trip was the observation of real estate and real estate activity. It is true that defendant testified that the journey was "absolutely a pleasure trip," but she did not, and apparently could not, dispute the significant facts. Under these circumstances the error in submitting to the jury the issue of wilful misconduct cannot be prejudicial. On such a record it may be assumed that the jury understood the instructions and correctly applied them to the evidence (Oettinger v. Stewart (1944), 24 Cal.2d 133, 140 [4c], 148 P.2d 19, 156 A.L.R. 1221; Nunneley v. Edgar Hotel (1950), 36 Cal.2d 493, 500 [5], 225 P.2d 497), and that the verdict for plaintiff was based on a determination that she was a passenger, not upon a determination that defendant was guilty of wilful misconduct. (Cf. Huebotter v. Follett (1946), 27 Cal.2d 765, 770-771 [3, 4], 167 P.2d 193; Baker v. Novak (1956), *supra*, 144 Cal.App.2d 514, 515 [1], 301 P.2d 257; Winn v. Ferguson (1955), 132 Cal.App.2d 539, 542, 282 P.2d 515.) Since no miscarriage of justice (Cal. Const. art. VI, § 4½) appears, the verdict must be upheld.

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

McCOMB, Justice.

I concur in the opinion of Mr. Justice SCHAUER insofar as it discusses the theory of willful misconduct and holds that the evidence is insufficient to support the judgment on that theory. I dissent from the

holding that plaintiff was a passenger, rather than a guest, in defendant's automobile. I would reverse the judgment for the reasons stated by Mr. Justice Fourt in the opinion prepared by him for the District Court of Appeal in *Gillespie v. Rawlings* (Cal.App.), 309 P.2d 560.



49 Cal.2d 381

George F. FOX, III and Virginia C. Fox,
his wife, Plaintiffs and Respondents,

v.

James P. ACED and Bertha B. Aced, his
wife, also known as Bertha E. Burgh,
Defendants and Appellants.

S. F. 19484.

Supreme Court of California,
In Bank.

Nov. 12, 1957.

Rehearing Denied Dec. 11, 1957.

Action for breach of an agreement to exchange property. The Superior Court, San Mateo County, Murray Draper, J., rendered judgment for plaintiffs, and defendants appealed. The Supreme Court, McComb, J., held that the evidence would not sustain the trial court's finding that defendants had acted in "bad faith," within statute authorizing recovery of difference between price agreed to be paid and value of property agreed to be conveyed at time of breach.

Reversed.

Opinion, 312 P.2d 717, vacated.

Carter, J., and Gibson, C. J., and Traynor, J., dissented.

I. Exchange of Property ⇨4

Where final draft of addendum for agreement for exchange of property had been written by defendants, ambiguity, if any, would have to be resolved against them.

2. Exchange of Property ⇨8(4)

In action for breach of agreement for exchange of property, evidence would sustain finding that performance of defendants' obligation to their tenant to complete building had not been a condition of delivering property under exchange agreement, and that defendants had in fact breached exchange agreement.

3. Damages ⇨91(1)

Exemplary damages are not recoverable against a defendant who acts in good faith and under advice of counsel.

4. Exchange of Property ⇨8(4)

In action for breach of an agreement for exchange of property, evidence, on issue as to defendants' liability under statute for difference between price agreed to be paid and value, at time of breach, of estate agreed to be conveyed, would not sustain finding that defendants' breach of their contract had been committed in "bad faith." West's Ann.Civ.Code, § 3306.

Wexler & Wexler and Louis E. Wexler, Millbrae, for appellants.

Carr, McClellan, Ingersol & Thompson, Robert R. Thompson and Richard C. Amick, Burlingame, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs for the sum of \$2,950 after trial before the court without a jury, in an action to recover damages pursuant to the provisions of section 3306 of the Civil Code for an alleged breach of an agreement for the exchange of real property, defendants appeal.

On July 2, 1954, plaintiffs and defendants entered into an exchange agreement whereby plaintiffs, in exchange for certain industrial property, were to convey a certain house and lot to defendants and pay them \$14,000 in cash. The industrial property was subject to a lease and purchase agreement between defendants as lessor-vendor and Sequoia Metalcraft Co. and others (hereinafter referred to as "the tenant") as

lessee-vendee. An addendum to the exchange agreement provided:

"In the event either First Party [plaintiffs] or Second Party [defendants] is unable to deliver his property within ninety (90) days from the date of this contract, upon the terms specified, then this contract shall be null and void and each party, in that event, shall hereby release the other of and from all liability hereunder.

"First Party agrees to pay Fourteen Thousand & No/100 (\$14,000.00) Dollars cash on closing of this transaction. Rents to be prorated thirty (30) days from date of execution of this contract and payable on closing. Taxes, insurance, utilities and all other expenses relative to the upkeep of the subject properties are to be prorated as of the date of closing, which is to be no later than ninety (90) days from the date of this contract. Each party will pay expenses on property now owned by him until actual closing. Second Party agrees to complete all obligations now owing to lessee and to hold First Party harmless for any and all claims made by lessee thereunder."

The trial court found that (1) defendants breached the exchange agreement, and (2) "defendants' failure and refusal to perform said agreement on their part was deliberate, willful, capricious and without just cause and excuse, and without just or lawful reason therefor."

These questions are presented for our determination:

First: *Did defendants breach the exchange agreement?*

[1,2] *Yes.* Defendants claimed that they were unable within the 90-day period to deliver the industrial property "upon the terms specified" and that they were thereby released from all liability under the agreement by the provisions of the first sentence of the addendum set forth above.

Defendants were obligated under their lease-purchase agreement with the tenant to construct a building on the industrial property, and they predicate their inability to perform the exchange agreement upon the

ground that the construction of this building had not been completed.

This presents the question: Was the completion of such construction among "the terms specified" in the exchange agreement?

It was not expressly so specified in that clause of the agreement whereby defendants promised to convey the industrial property "free and clear of all encumbrances excepting easements, restrictions and rights of way of record and said Lease Agreement and said purchase agreement [between defendants and the tenant] and tax liens which are the responsibility of the tenant."

An intent not to include such completion among "the terms specified" is indicated by defendants' promise, expressed in the last sentence of the addendum, "to complete all obligations now owing to lessee and to hold First Party [plaintiffs] harmless for any and all claims made by lessee thereunder." This promise was calculated to meet the situation that would obtain if, when the sale was consummated, the sellers had not yet completely performed all of their obligations towards the tenant, including completion of the building. It indicated that the sale was to proceed regardless of such completion. The addendum was written by defendants, and any ambiguity should be resolved against them.

Likewise, the realtor through whom the parties negotiated testified that defendant James P. Aced explained to him that a lien filed against the property by one of the building contractors, Marshall Electric Co., was in litigation and Mr. Aced explained that he thought he could have this lien released quickly but wanted the 90 days to get rid of it, "that is why we set up the 90-day closing." It is thus clear that performance of defendants' obligation to the tenant to complete the building was not a condition of delivering the property.

The Marshall Electric Co. lien was paid off nearly 30 days before the expiration of the 90-day period; the only other lien involved was that of the general building contractor, Carlsay Co., in the amount of \$10,000—\$1,400 of which defendants dis-

puted as being for extras ordered by the tenant. About two weeks before the expiration of the 90 days, plaintiffs paid the \$1,400 on behalf of the tenant so that the only remaining lien on the ninetieth day was one which defendant James P. Aced testified he did not question. He admitted that he was agreeable to paying it and conceded that the lien could have been liquidated by using a portion of the money that plaintiffs had already put in escrow to defendants' credit.

Since defendants failed and refused to convey the property to plaintiffs, the finding of the trial court that they had breached the exchange agreement, in view of the above evidence, is amply supported by the record.

[3, 4] Second: *Was defendants' breach of their contract committed in "bad faith" within the meaning of that phrase as used in section 3306 of the Civil Code?*

No. Exemplary damages are not recoverable against a defendant who acts in good faith and under the advice of counsel. (*Selden v. Cashman*, 20 Cal. 56, 67; *Wolfson v. Hathaway*, 32 Cal.2d 632, 649, 198 P.2d 1; *Fetterly v. Salyer*, 96 Cal.App.2d 240, 244 [5], 215 P.2d 64; *Abbott v. '76 Land & Water Co.*, 103 Cal. 607, 609, 37 P. 527; *Bonesteel v. Bonesteel*, 30 Wis. 511, 513; *Devenny v. The Mascotte, D.C.*, 72 F. 684, 686; cf. *Johnson v. Southern Pacific Co.*, 157 Cal. 333, 338, 107 P. 611; *Perry v. Washington National Ins. Co.*, 14 Cal.App. 2d 609, 617 [7], 58 P.2d 701, 59 P.2d 158; *Haydel v. Morton*, 19 Cal.App.2d 697, 700 [4], 66 P.2d 204; *United States v. Homestake Min. Co.*, 8 Cir., 117 F. 481, 488; 25 C.J.S. (1941) Damages § 123e, p. 727.)

Section 3306 of the Civil Code reads: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; *but adding thereto, in case of bad faith*, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses prop-

erly incurred in preparing to enter upon the land." (Italics added.)

The record discloses that for a number of weeks prior to July 2, 1954, the parties had been attempting through a mutual realtor to agree upon an exchange agreement that was satisfactory to all parties concerned.

The building on defendants' industrial property was constructed for them by Carlay Co. for the specific use of the tenant. As a result of the construction, there existed at the time the exchange agreement was entered into two liens of record, as well as a dispute between defendants and Carlay Co. concerning the non-completion of the building in accordance with plans and specifications.

Plaintiffs on July 2, 1954, were aware of the existence of the two liens of record, as well as the controversy between defendants and Carlay Co. It was because of these factors that the exchange agreement contained this provision: "In the event either First Party or Second Party is unable to deliver his property within ninety (90) days from the date of this contract, upon the terms specified, then this contract shall be null and void and each party, in that event, shall hereby release the other of and from all liability hereunder."

During the 90-day period referred to, defendant James P. Aced made repeated efforts to have the building completed, all without success. On September 15, 1954, plaintiffs deposited their money and deed with the title company. Defendants did not succeed in obtaining the completion of the building, and they did not, within said 90-day period or at any time thereafter, deliver their property to plaintiffs or deposit a deed thereto with the title company.

On numerous occasions during the foregoing transactions defendant James P. Aced consulted with an attorney, and when it became evident to him that the building would not be completed by the builder within the 90-day period, he sought his attorney's advice relative to his rights and obligations under his agreement with plaintiffs.

He testified that "I was continually going to my attorney two or three times a week asking, 'How can I complete this deal,' and I was following his advice right down the line." The record also discloses that his attorney told him: "It is very clear to me that the second wire revokes the first wire giving you additional time, that Mr. Fox does not want to give you additional time and the 90-day period having expired the entire deal under the terms of the exchange agreement, by which it states that either party may withdraw after 90 days, has terminated and there is no further deal."

The evidence likewise discloses that James P. Aced relied and acted upon advice of counsel. Since the evidence discloses that defendants acted in good faith in relying upon the advice of counsel in refusing to perform their contract, the trial court's finding that they acted in bad faith within the meaning of section 3306 of the Civil Code is not sustained. Hence, to predicate damages upon the bad faith of defendants was erroneous.

The judgment is reversed.

SHENK, SCHAUER and SPENCE,
JJ., concur.

CARTER, Justice.

I dissent.

I agree with the first point in the majority opinion that it was not necessary to complete the building before defendant was obligated to transfer the property, but cannot agree that there was insufficient evidence to show bad faith on the part of defendant as used in section 3306 of the Civil Code quoted in the majority opinion. The trial court found that there was bad faith on defendant's part in refusing to perform as pointed out in the majority opinion and, in my opinion, the evidence was sufficient to support that finding.

Assuming that advice of counsel, which is followed, shows good faith and there is evidence that such advice was given and followed, there is evidence in the record here which clearly shows bad faith. Mr. Ross, the real estate broker handling the

deal for both parties, testified that during the 90-day period defendant refused to complete the deal unless plaintiffs paid for a rock fill in connection with the building which plaintiffs were not obligated to do; that plaintiffs would waive completion of the building; that defendant was not "particularly interested" in having a conference with his counsel and Ross; that he wanted a release from the tenant of his property under the lease and was told that the tenant was willing to accept the buildings; that defendant said he "wouldn't close [the deal] in any event. He said, 'There is not only the question of the rock fill which hasn't been settled, but' he said that *he wasn't going to do business with Mr. Fox* [plaintiff]. I asked Mr. Aced, 'Well, is this just a grudge?' and he said, 'No, but *I just don't like Mr. Fox.*'"

"I asked Mr. Aced, '*Would you close this transaction with anybody else?*' He said, '*Anybody else but Mr. Fox.*'"

"We spoke on, and I asked Mr. Aced just what it was that he wanted at this time to close the deal with Mr. Fox, didn't he have any idea of what he wanted. *He thought for a minute, and he wrote down seven points which he wanted to close the deal with Mr. Fox, and it amounted to approximately \$5,000 or more.*" (Emphasis added.) The latter things plaintiff was not required to do. Defendant knew that the liens on the property could be removed by instructing the escrow agent to withhold them from the money deposited in escrow by plaintiff. The evidence is clear that defendant deliberately refused to carry out the agreement. This evidence was weighed by the trial court against the evidence that defendant acted on the advice of counsel. Hence the judgment is supported by the evidence. The evidence that defendant acted on the advice of counsel obviously could have been disbelieved by the trial court.

It must be remembered that the test of bad faith under section 3306 of the Civil Code, *supra*, is whether there is a deliberate refusal to perform without just cause or excuse (*Nelson v. Fernando Nelson & Sons*, 5 Cal.2d 511, 55 P.2d 859; *Engasser*

v. Jones, 88 Cal.App.2d 171, 198 P.2d 546; Pixley v. First Federal Sav. & Loan Ass'n, 110 Cal.App.2d 427, 243 P.2d 100; Johnson v. Goldberg, 130 Cal.App.2d 571, 279 P.2d 131; Rasmussen v. Moe, 138 Cal.App.2d 499, 292 P.2d 226) and whether there is good or bad faith is a question of fact (Rasmussen v. Moe, supra, 138 Cal.App.2d 499, 292 P.2d 226).

As stated, proof that a party acted on the advice of counsel may be a factor in establishing the defense of good faith. However, in situations where the advice of counsel is a defense against punitive damages, malicious prosecution, and some other torts, there must be a full and fair disclosure of all the facts to counsel. For illustration it is said: "Advice of counsel, to be admissible evidence in mitigation of damages in any case, must appear to have been given upon a full and fair statement of the facts or of such of them as were material to the question on which counsel was consulted." (15 Am.Jur., Damages, § 354.) And in regard to malicious prosecution: "The solicitation of advice of counsel and the fact that in instituting the action complained of one acted on the opinion and advice of counsel may constitute a complete defense to an action for malicious prosecution, provided the opinion was based *on a full and fair statement of the facts or on knowledge derived from independent investigation, and was sought and acted on in good faith.*" (Emphasis added; 32 Cal.Jur.2d, Malicious Prosecution, § 25.) "In order to establish the defense of advice of counsel, the defendant in an action for malicious prosecution must show that the advice relied on was given by counsel after a full and fair disclosure, without any suppression, evasion, or falsehood, of all the facts known to the

complainant, or which he should have known, tending to prove or disprove his claim or the crime charged." (Ibid., § 29.) "The rule that advice of counsel is a defense to an action of malicious prosecution is qualified by the requirement that the element of good faith be present throughout. Advice of counsel, accordingly, affords no defense unless it is sought in good faith and not as a mere cloak to protect oneself against such an action or to refute the theory of malice. Such advice must have been based on the entire good faith of the defendant in the presentation of his facts. It must further appear, affirmatively, that the defendant acted on the advice in good faith." (Ibid., § 30.) It is clear that under the evidence in the instant case the trial court could find, as it did, that there was not a fair or full disclosure of the facts by defendant to his counsel in good faith. It certainly cannot be said that the evidence on this issue was undisputed. Indeed defendant's main concern with his counsel was in connection with his dealings with his lessee rather than plaintiff. Moreover it should be observed that under section 3306 of the Civil Code, plaintiff is not being allowed punitive damages if there is bad faith; the damages recoverable are still *actual* damages suffered. Hence there is more reason why the advice of counsel factor in ascertaining good or bad faith should meet all the safeguards placed around it in other situations. Such is not the state of the record here.

I would, therefore, affirm the judgment.

GIBSON, C. J., and TRAYNOR, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

49 Cal.2d 210

**Annelen SPELLENS, Plaintiff, Appellant and
Cross-Respondent,**
v.

Sol Carl SPELLENS et al., Defendants.

**Sol Carl Spellens, Melvin Spellens, National
Paint & Varnish Company, a co-partnership,
E. W. Biscailuz, Sheriff of Los Angeles County,
and Roy L. Carter, Marshall of Los Angeles County,
Defendants, Respondents and Cross-Appellants, and five
other cases.**

**Sol Carl SPELLENS, Plaintiff and
Appellant,**
v.

**Annelen SPELLENS, Defendant and
Respondent.**

L. A. 23683-23685, 22553, 23135, 23180, 23717.
Supreme Court of California.
In Bank.
Oct. 30, 1957.

**As Modified on Denial of Rehearing
Nov. 26, 1957.**

Action for declaration that plaintiff was lawful wife of defendant, and for decree of separate maintenance, or, in the alternative, if court determined marriage to be invalid, for damages for alleged fraudulent misrepresentations leading to marriage ceremony and for award of quasi-community property of parties, and for other relief. Seven appeals were taken by the parties from judgments and orders of the Superior Court of Los Angeles County, Orlando H. Rhodes and Stanley Mosk, JJ. The Supreme Court, Carter, J., held, *inter alia*, that where defendant represented that upon plaintiff's being granted an interlocutory divorce decree from her present husband, defendant and plaintiff could be legally married in Mexico and the marriage would be valid anywhere, and took her to Mexico where he obtained an attorney who gave her the same advice, and as the result of such advice, plaintiff, after returning to Mexico with defendant was married in Mexico, and began living with defendant as husband and wife, for over a year, defendant, by reason of his conduct, was estopped from denying plaintiff's inter-

locutory decree of divorce had not terminated her previous marriage, and was estopped from questioning validity of plaintiff's Mexican marriage to defendant.

Order in accordance with opinion.

Schauer and McComb, JJ., dissented in part.

Opinion, 305 P.2d 628 vacated.

1. Marriage ⇨36

Public policy does not forbid the establishing of an estoppel against a party who has induced another to enter into a void marriage with him, to prevent him from asserting the invalidity of such marriage, the marriage not being made valid by reason of the estoppel, such estoppel merely precluding the estopped person from taking a position that the marriage was invalid. West's Ann.Civ.Code, § 61, and subd. 1.

2. Divorce ⇨172

Marriage ⇨36

Where defendant represented that upon plaintiff's being granted an interlocutory divorce decree from her present husband, defendant and plaintiff could be legally married in Mexico and the marriage would be valid anywhere, and took her to Mexico where he obtained an attorney who gave her the same advice, and as the result of such advice, plaintiff, after returning to Mexico with defendant was married in Mexico, and began living with defendant as husband and wife, for over a year, defendant, by reason of his conduct, was estopped from denying plaintiff's interlocutory decree of divorce had not terminated her previous marriage, and was estopped from questioning validity of plaintiff's Mexican marriage to defendant. West's Ann.Civ.Code, § 61, and subd. 1.

3. Husband and Wife ⇨295, 301

Where a defendant was estopped to deny validity of his marriage to plaintiff in an action by her for a decree of separate maintenance, plaintiff was entitled to attorney's fees, costs and support during trial and on appeal.

4. Marriage ⇨36

Where defendant was estopped from denying validity of his marriage to plaintiff, in plaintiff's action for a decree of separate maintenance, or, in the alternative, if court determined marriage to be invalid, for services rendered and for damages for fraud in inducing the marriage, plaintiff's action for fraud and services could not stand, in view of fact plaintiff, by the estoppel, received everything flowing from a valid marriage, and was required to rely on rights which flowed from a marital relationship.

5. Husband and Wife ⇨30

A husband and wife may agree with each other as to their property rights. West's Ann.Civ.Code, § 158.

6. Contracts ⇨141(3)

In action by plaintiff on defendant's alleged oral agreement that he would divide all his property with plaintiff and support her children if she would divorce her present husband and marry defendant evidence, presented a question of fact as to whether plaintiff's securing of a divorce was merely incidental to defendant's agreement, the objects of plaintiff's marriage with her husband having already been destroyed.

7. Contracts ⇨111

If an agreement by a defendant to divide his property with plaintiff and support her in the event she divorced her present husband and married defendant was made after objects of plaintiff's marriage with her present husband had been destroyed and at a time when such marriage was beyond saving, and at a time when there was little likelihood of plaintiff's reconciliation with her husband, and such agreement did not bar possibility of reconciliation, such agreement would not be considered void against public policy or promotive of divorce.

8. Husband and Wife ⇨298¾

Where, in action for separate maintenance, defendant was estopped from denying validity of the marriage, and evidence presented a question of fact as to validity of defendant's agreement to support plaintiff's children by a prior marriage, judgment

deducting sums used for support of plaintiff and her children during period plaintiff and defendant lived together, from award of community property to plaintiff, was improper.

9. Husband and Wife ⇨297

In action by plaintiff for separate maintenance, evidence sustained finding that plaintiff believed in good faith in the validity of her marriage to defendant up to date of their final separation.

10. Costs ⇨212

Where trial court previously ordered a daily transcript, action of court in later disallowing such item from plaintiff's cost bill was a mistake within meaning of section of Code of Civil Procedure authorizing a court to relieve a party from an order taken through mistake, and court should have made such correction. West's Ann.Code Civ.Proc. § 473.

11. Appeal and Error ⇨113(1)**Costs** ⇨212

Where appeal was taken from denial of relief under section of Civil Procedure dealing with relief from mistake, and relief sought was not an effort to extend time of appeal or obtain an appeal where none was available, but to have court consider that there was a mistake of fact made when it entered a cost order, appeal from order of denial of relief under such section was proper, and order denying such relief without court passing upon question of mistake would be reversed. West's Ann.Code Civ. Proc. § 473.

12. Process ⇨171

In action by plaintiff for separate maintenance, wherein defendant sued to recover possession of certain personal property, and plaintiff cross complained claiming damages for "abuse of process", evidence sustained findings that defendant's action for possession was maliciously commenced by him at a time when he knew issues of right to the property were involved in the main action, and that such action was commenced by defendant not really to obtain possession of the property but to coerce plaintiff to drop her main action.

13. Process ☞168

The gist of an action for abuse of process lies in the improper use of process after it is issued, and a showing that regularly issued process was perverted to accomplishment of an improper purpose is enough to maintain the action, and if malice is a necessary element of such tort, it may be inferred from the wilful abuse of the process.

14. Replevin ☞117

Attorney's fees were not recoverable for services in defending against a claim in a delivery proceeding and in obtaining a restraining order restraining seizure of property under claim and delivery writ.

Leonard Horwin and Richard I. M. Kelton, Beverly Hills, for appellant Annelen Spellens.

Reynolds, Painter & Cherniss, Pacht, Tannenbaum & Ross, Isaac Pacht, Stuart L. Kadison, Harvey M. Grossman, Los Angeles, and Ellis J. Horvitz, Beverly Hills, for appellant Sol Carl Spellens.

CARTER, Justice.

Plaintiff, married to Robert Seymon, had marital difficulties because of Robert's conduct; there were two children of the marriage. While this condition existed and she was considering divorce, defendant, Sol Spellens, told her he was in love with her and wanted to marry her. He was an old family friend of substantial wealth with extensive business experience and represented that he had had wide legal experience. He said he was aware of plaintiff's marital problems and that she was entitled to a divorce. He promised that when she divorced Robert he would marry her, take care of her and her children and make her a partner in all of his property. She still tried to save her marriage with Robert but was unsuccessful. In January, 1951, she decided to divorce Robert and defendant arranged for an attorney to represent her and provided funds therefor. She commenced an action for divorce the next month, based on extreme cruelty. After the commencement of the action, defendant conferred

with Robert about a property settlement and advised plaintiff to waive her rights to any community property and all but a nominal \$1.00 per month alimony. This she did, and defendant again made the same promises he had made before. Plaintiff obtained an interlocutory divorce decree on March 13, 1951, and defendant represented that upon the granting of the interlocutory decree he and plaintiff could be legally married in Mexico and the marriage would be valid anywhere. He took her to Mexico where he obtained an attorney who gave the same advice. Four days after the interlocutory decree, plaintiff and defendant returned to Mexico and saw the same attorney who was shown the decree and confirmed his former advice. As a result of this advice plaintiff and defendant were married in Mexico by the attorney, and they began living together as husband and wife with plaintiff's children as part of the family. Plaintiff became pregnant by defendant in 1951 and had a miscarriage. During the time they lived together defendant was extremely cruel to plaintiff, and in March, 1952, defendant suggested they separate, to which plaintiff objected, but defendant said he had been advised they were not legally married. Plaintiff consulted an attorney and was advised that the validity of her marriage lay in the field of unsettled law, but he thought defendant would be estopped to assert its invalidity. Plaintiff thereupon commenced her action (hereinafter called main action) on March 24, 1952. The parties separated for a brief period but then lived together until defendant left her in September, 1952.

In an amended complaint plaintiff asked that her marriage be declared valid, that defendant be estopped to question its validity, and for separate maintenance, or, in the alternative, if the marriage was found invalid, damages because of defendant's fraudulent representations and promises and an award of the "community property" (that property accumulated while they were purportedly married). Plaintiff filed amendments and supplements to her complaint, adding other causes of action, and

after an adverse determination by the court as to some of them, a second amended complaint for damages for fraud was filed. She sought a division of the community property and to be appointed guardian ad litem for her children and an allowance for their support on the theory of putative spouse. Defendant made general denials and asserted as an affirmative defense that the marriage was void as being after the entry of an interlocutory decree but before the entry of a final decree of divorce and asked that it be declared invalid.

The case was finally tried after various motions for support and attorney's fees hereinafter mentioned. The court in its findings recited that defendant raised the issue of the validity of the marriage and by stipulation plaintiff was to make an offer of proof thereon and on the pleadings and the offer the court should decide that issue and determine whether defendant was estopped to deny its validity, as though such issues had arisen through an objection by defendant to the introduction of any evidence by plaintiff; all facts pleaded and set forth in the offer of proof were to be taken as true on those issues, hence the question presented was one of law. Also involved was the question of whether plaintiff could recover on the agreement of defendant that he would validly marry plaintiff, share his property with her and care for plaintiff and her children if she married him. The court sustained the objection to the introduction of any evidence on those issues; the court then found the facts true on those issues; in its conclusion of law it determined that the marriage was invalid and no estoppel could exist. It also determined that the "agreement" was invalid as promotive of divorce. It granted plaintiff permission to file her second amended complaint. The trial proceeded, and the court granted a nonsuit as to the first and third causes of action in the second amended complaint which was for damages for defendant's fraudulent representations and plaintiff's reliance thereon to her injury and also for the reliance by herself and children on the misrepresentations of defendant as to their

support and maintenance, holding as a matter of law that there could be no recovery for such fraud. The court then found that plaintiff and defendant were well acquainted since 1947 and went through a marriage ceremony in Mexico and from March 17, 1951, to September 22, 1952, they resided together as husband and wife and plaintiff in good faith believed the marriage valid; that plaintiff would testify that her marriage with Robert had failed; that plaintiff was of limited business and no legal experience but defendant claimed much legal experience; that plaintiff trusted and had great confidence in defendant which was fostered by him; that defendant made the representations to plaintiff heretofore referred to in the statement of facts and intended that plaintiff rely thereon and plaintiff relied thereon, marrying defendant, living with him as a wife and having her children reside with them; that defendant represented to friends, relatives and others that they were married; that after the commencement of the action herein the same conditions continued to exist except that defendant represented to the court that the marriage was invalid; that during all of said time defendant knew the marriage was invalid and intended it that way which facts were known exclusively by him; that plaintiff and defendant was not legally married because of the lack of a final decree of divorce; that defendant treated plaintiff with extreme cruelty to her physical and mental prejudice; that during the time plaintiff rendered valuable services to defendant in the belief that she was his wife, and during said time defendant earned \$58,574 out of a total income of \$79,244; that "by analogy to the community property laws of the State * * * the residue of the sums earned by * * * defendant * * * as the result of his own efforts during the period commencing March 17, 1951, and ending September 22, 1952, after deducting money spent by way of quasi-community expense, is * * * \$10,052.00 * * * that included in said quasi-community expense and, therefore, deducted by the Court in arriving at the

balance of quasi-community income on hand, is * * * \$7,200.00 * * * which was expended by the defendant * * * during said period in the support of plaintiff's aforesaid minor children. * * *

Accordingly judgment was entered determining the marriage to be invalid; that no estoppel existed and no damages were recoverable¹ for defendant's fraud; that plaintiff was the putative wife of defendant from March 17, 1951, to September 22, 1952; that by reason of the latter fact and defendant's cruelty, plaintiff was entitled to all the "community" property (that earned during the mentioned period), plus \$10,052, the balance of the "quasi-community property after deduction of quasi-community expense"; that plaintiff may not recover her attorney's fees incurred in the action; that plaintiff should not recover on the other issues disposed of on stipulation and objection to her evidence. Both plaintiff and defendant appeal from the portions of the judgment unfavorable to each of them.

After commencing her action plaintiff had an order to show cause issued why she should not be allowed counsel fees, costs and support money pendente lite. The court denied any allowance on the ground that there was no valid marriage. She appeals from that order of denial. She also asked for the same allowances pending her appeal from that order and was allowed attorney's fees on appeal but no support. She appeals from the portion of that order denying her an allowance for support. Defendant's motion to set aside the order fixing counsel fees was denied and he appeals from that order.

Plaintiff contends that the defendant was estopped to deny the validity of the Mexican marriage or, stated another way, that he was estopped to deny that the California in-

terlocutory decree of divorce from Robert terminated that marriage and made the Mexican marriage valid as far as he was concerned; that thus the parties, as far as defendant and this litigation is concerned, must be treated as husband and wife. Defendant contends that the strong policy of this state forbids the establishing of an estoppel;² that no marriage contrary to statute may be created by estoppel.

[1] The rule on estoppel is stated in *Watson v. Watson*, 39 Cal.2d 305, 307, 246 P.2d 19, 20, "To maintain his action it is necessary for the plaintiff to deny the validity of the Nevada divorce decree which he secured from his first wife. * * * In *Rediker v. Rediker*, 35 Cal.2d 796, 805, 221 P.2d 1, 20 A.L.R.2d 1152, the court stated that '*the validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry.*' The decisions in this state and in other states are ample authority for the statement in the *Rediker* case.

"The fact that in the present case it had been determined in a prior action that no marriage existed at the time of the alleged tort does not benefit the plaintiff's position. Such an eventuality was taken into consideration in *Harlan v. Harlan*, 70 Cal. App.2d 657, 161 P.2d 490. Before their marriage the plaintiff husband in that case had been instrumental in securing a Mexican divorce for the defendant from her first husband. Thereafter the plaintiff sought an annulment of their marriage as bigamous, asserting that the Mexican divorce was invalid for want of jurisdiction of the court. That situation is analogous

1. Pursuant to Civil Code, § 43.5(d):

"No cause of action arises for: * * *
 "(d) Breach of promise of marriage."

2. "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

"1. The former marriage has been annulled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce." Civ.Code, § 61, subd. 1.

to the present case in that in bringing his action it is necessary for the plaintiff to assert the invalidity of a previous divorce obtained by him. In the Harlan case the trial court found that the Mexican divorce decree was invalid, as was the Nevada divorce in the present case, and granted the annulment. In reversing the judgment the court held that notwithstanding the fact that the Mexican decree was invalid, the plaintiff was estopped from asserting its invalidity because he had aided and counseled the defendant in procuring it. In the present case the plaintiff is likewise estopped from asserting the invalidity of the Nevada divorce obtained through his own machination. The fact that he obtained that divorce as the party participant states a stronger case against him than operated as an estoppel in the Harlan case.

"In a decision by the New York Court of Appeals, relied upon in the Rediker case, a defendant in a suit for separate maintenance asserted as a defense that the marriage was bigamous on the ground that a prior divorce he had obtained from a Nevada court was invalid for want of jurisdiction of that court. The New York court expressly assumed the invalidity of the divorce action but refused to let it be asserted, stating that 'to refuse to permit this defendant to escape his obligation to support plaintiff *does not mean that the courts of this State recognize as valid a judgment of divorce which necessarily is assumed to be invalid in the case at bar, but only that it is not open to defendant in these proceedings to avoid the responsibility which he voluntarily incurred.*' Krause v. Krause, 282 N.Y. 355, 359-360, 26 N.E. 2d 290." (Emphasis added.) It is said in Dietrich v. Dietrich, 41 Cal.2d 497, 505, 261 P.2d 269, 273, "On this record it is immediately obvious that the very evidence offered to show the *invalidity of the ceremonial marriage* was properly excluded because that same evidence shows that *Noah is estopped* to assert the claimed invalidity of the Nevada divorce [obtained by Carol from another man]. With full knowledge of the circumstances under which

that divorce was obtained, and in reliance on such divorce, Noah went through a marriage ceremony and lived with Carol as her husband for many years. The *public policy* of this state, in the circumstances of this case, as in those considered in Rediker v. Rediker (1950) 35 Cal.2d 796, 808, 221 P.2d 1, 20 A.L.R.2d 1152, requires recognition of the second marriage rather than the 'dubious attempt to resurrect the original' marriage." (Emphasis added.) (See, also, Rediker v. Rediker, 35 Cal.2d 796, 221 P.2d 1, 21 A.L.R.2d 1152; Bruguere v. Bruguere, 172 Cal. 199, 155 P. 988; Kelsey v. Miller, 203 Cal. 61, 263 P. 200; Harlan v. Harlan, 70 Cal.App.2d 657, 161 P.2d 490; In re Estate of Davis, 38 Cal.App.2d 579, 101 P.2d 761, 102 P.2d 545; Hensgen v. Silberman, 87 Cal.App.2d 668, 197 P.2d 356; In re Kyle, 77 Cal.App.2d 634, 176 P.2d 96; Adoption of D. S., 107 Cal.App.2d 211, 236 P.2d 821; In re Estate of Coleman, 132 Cal.App.2d 137, 281 P.2d 567; Union Bank & Trust Co. v. Gordon, 116 Cal.App.2d 681, 254 P.2d 644; Morrow v. Morrow, 40 Cal.App.2d 474, 105 P.2d 129; 175 A.L.R. 538; 153 A.L.R. 941; 140 A.L.R. 914; 122 A.L.R. 1324; 109 A.L.R. 1018; Rest. Conflicts, § 112.) Roberts v. Roberts, 81 Cal.App.2d 871, 185 P. 2d 381, insofar as it is to the contrary must be deemed as disapproved. The theory is that the marriage is not made valid by reason of the estoppel but that the estopped person may not take a position that the divorce or latter marriage was invalid. (Watson v. Watson, *supra*, 39 Cal.2d 305, 246 P.2d 19; Rediker v. Rediker, *supra*, 35 Cal.2d 796, 221 P.2d 1, 20 A.L.R.2d 1152.) And as to the public policy it is said: "To hold otherwise protects neither the welfare nor morals of society but, on the contrary, such holding is a flagrant invitation to others to attempt to circumvent the law, cohabit in unlawful state, and when tired of such situation, apply to the courts for a release from the indicia of the marriage status." Harlan v. Harlan, 70 Cal.App.2d 657, 663-664, 161 P.2d 490, 494). * * *

"Defendant contends, however, that the public policy of the state requires the annulment of bigamous marriages whenever their bigamous character is discovered. We find no basis for such a sweeping application of public policy. * * * Defendant does not indicate how any public purpose is served by the annulment of his marriage. * * *

"It can no longer be said that public policy requires non-recognition of all irregular foreign divorces. We have recognized that the interest of the state in many situations may lie with recognition of such divorces and preservation of remarriages rather than a dubious attempt to resurrect the original. From a pragmatic viewpoint, judicial invalidation of irregular foreign divorces and attendant remarriages, years after both events, is a less than effective sanction against an institution whose charm lies in its immediate respectability. We think it may now be stated that the *general* public policy in this jurisdiction, as judicially interpreted, no longer prevents application in annulment actions of the laches and estoppel doctrines in determining the effect to be given such divorce decrees.' Vinson J., in *Goodloe v. Hawk*, 72 App.D.C. 287, 113 F.2d 753, 757; *Harlan v. Harlan*, 70 Cal.App.2d 657, 663-664, 161 P.2d 490; *Krause v. Krause*, 282 N.Y. 355, 360, 26 N.E.2d 290. We conclude that the public policy of this state requires the preservation of the second marriage and the protection of the rights of the second spouse 'rather than a dubious attempt to resurrect the original' marriage." (*Rediker v. Rediker*, supra, 35 Cal.2d 796, 806, 221 P.2d 1, 7, 20 A.L.R.2d 1152.)

[2] The foregoing authorities involved an estoppel to deny the validity of a decree invalid because of lack of jurisdiction of the court which purported to grant it but we think the same policy requires the same result in the instant case where there was a marriage before a year after the entry of an interlocutory decree. The policy applies equally in one case as the other. The policy against a bigamous marriage expressed in the first sentence of section

61 of the Civil Code, supra, involved in the cited cases, is no stronger nor more compelling than that involved here which is that there may not be a valid marriage if contracted within less than a year after the entry of an interlocutory decree of divorce. Civ.Code, § 61, subd. 1, supra. We fail to see any difference in this case and one where defendant had participated in the obtaining of an invalid Nevada or Mexican divorce rather than a California interlocutory decree. It is not the marriage which is found valid as indicated by the above authorities and thus the policy of section 61, subd. 1, is not thwarted. Rather it is that defendant by reason of his conduct will not be permitted to question its validity or the divorce; so far as he is concerned, he and plaintiff are husband and wife. The interlocutory decree declared that the parties were entitled to a divorce and it was not unreasonable for plaintiff to have been led to believe that a marriage in Mexico would be valid. The circumstances here clearly show fraud and estoppel as far as the defendant is concerned; it would be difficult to imagine a stronger case in this field of law.

The statement in *Rediker v. Rediker*, supra, 35 Cal.2d 796, 808, 221 P.2d 1, 8, 20 A.L.R.2d 1152, that the doctrine of estoppel "presupposes the entry of a final decree" and for that reason certain cases are distinguishable, does not lay down a rule contrary to the foregoing conclusion; moreover if it seems to do so none is indicated in the other and later authorities heretofore cited. Such cases as *Sullivan v. Sullivan*, 219 Cal. 734, 28 P.2d 914; *In re Estate of Elliott*, 165 Cal. 339, 132 P. 439; *Dominguez v. Dominguez*, 136 Cal.App.2d 17, 288 P.2d 195, and *Parmann v. Parmann*, 56 Cal.App.2d 67, 132 P.2d 851, do not discuss the theory of estoppel and its essential policy and results as announced in the above discussed authorities; insofar as they may be contrary to the instant case they are overruled. The same might be said of *Anderson v. Anderson*, 7 Cal.2d 265, 60 P.2d 290, and *Brandt v. Brandt*, 32 Cal.App.2d 99, 89 P.2d 171, but in those cases there

were no divorce proceedings to terminate the first proceeding and hence they are distinguishable. The out-of-state cases are not persuasive. An interlocutory decree of divorce at least gives color as a judicial determination of divorce especially when we consider that the final decree ordinarily follows at the end of a year as a matter of course.³ It may be noted also that we are not recognizing a common law marriage which does not exist in this state for the theory is that the marriage is not validated; it is merely that defendant cannot contest it. Thus the judgment must be reversed.

[3] It follows from the estoppel that plaintiff was entitled to attorney's fees, costs and support during trial and on appeal (see *Dietrich v. Dietrich*, supra, 41 Cal.2d 497, 261 P.2d 269) as defendant is estopped to deny the validity of the marriage and the orders with respect thereto must be reversed. These matters will have to be determined by proceedings in the lower court.

[4] Plaintiff's action for damages for fraud in inducing the marriage (see, *Langley v. Schumacker*, 46 Cal.2d 601, 297 P.2d 977) should not stand as she, by the estoppel, is receiving everything flowing from a valid marriage and we apply the same law as if they were validly married; this is conceded by plaintiff as she states in her

brief: "On this appeal, the issue of whether California abolished the right of a woman who is fraudulently induced into a void marriage to sue for her injury is only reached if this Appellate Court holds that no valid marriage exists between the parties. If the Appellate Court agrees with *Annellen* that the parties are legally married, this question is moot." That includes the situation where estoppel may exist as we have indicated it does. The same comments are true with regard to plaintiff's claims of property rights by reason of a putative marriage and compensation for wifely services rendered; defendant is estopped to deny the existence of a valid marriage and hence plaintiff must rely on rights which flow from a marital relationship. Being in such a position she should not be entitled to anything for services as defendant's wife.

[5] Plaintiff's action on the alleged oral agreement that defendant promised plaintiff both before and after the commencement of the divorce action which resulted in the interlocutory decree from Robert that if she would divorce Robert and marry him he would divide all his property with her and support her children presents, however, a different question. A husband and wife may agree with each other as to their property rights⁴ and of course de-

3. "Unlike other preliminary or interlocutory orders, the statutory interlocutory decree in a divorce suit is final, except as against such attack as is authorized by statute for the modification or vacating of final judgments. Such a decree, unless vacated on motion for new trial, on motion under § 473 of the Code of Civil Procedure, or on appeal, is a final adjudication of all matters therein decided, the final dissolution of the marriage being the only question held in abeyance pending entry of the final decree. If the interlocutory decree is regularly made and correctly entered, it cannot be vacated on the bare application of the plaintiff without notice to or consent of the defendant, even though the defendant defaulted. Indeed, it is expressly provided that after entry of the interlocutory judgment, neither party has the right to dismiss the action without the other's consent.

"After the time to appeal or to move to vacate the decree has expired, the trial court is wholly without jurisdiction to alter or set aside the interlocutory judgment. While it has the inherent power to refuse to enter a final decree dissolving the marriage, where it is made to appear that on a condonation of the offense on which the interlocutory judgment was based the parties resumed the marital relation, it does not follow that the court, after the lapse of a year, has jurisdiction to vacate an interlocutory judgment, the integrity of which, insofar as it determines the facts properly involved therein, is unaffected by subsequent relations of the parties. The facts having been thus finally adjudicated, the judgment can be set aside only by a proceeding in the nature of a direct attack." (16 Cal.Jur.2d, Divorce and Separation, § 127.)

4. "Either husband or wife may enter into any engagement or transaction with the

fendant is not liable for the support of plaintiff's children by Robert in absence of an agreement, adoption or some other arrangement. She might under such an agreement obtain an interest in defendant's separate property as well as the community property as support for her children by Robert to which she would not otherwise be entitled. Here the court nonsuited plaintiff on her action on the agreement on the ground that it was promotive of divorce and hence void and unenforceable. The court stated, however, "May I point out here, to you, that the Plaintiff's testimony about the defendant's promises are clear? In cross examination they are perhaps whittled down somewhat, but it would be wholly improper for me to find he did not make such promises from this state of the evidence. * * * You may presume that the promises were made. My problem is, what is the effect of the promises? What is public policy in permitting recovery under such promises?" The court found that: "The parties stipulated that the plaintiff would testify that during all of the time * * * to and including the date of the decree of divorce between plaintiff and Robert Seymon, the ends of matrimony between plaintiff and Robert Seymon had been defeated and the Seymons were existing in a state of discordance and unhappiness." The evidence shows that defendant made his promises both before and after the divorce action was commenced. There is sufficient evidence from which it could be found that defendant made the promises repeatedly and in part so that if she would marry him he would divide his property with her and support her children; as a part of his promises she was induced to claim no alimony from Robert (except a nominal sum) and no community property.

Plaintiff contends that since the promise was made after plaintiff decided on a di-

vorce and had grounds therefor, the objects of that marriage had ceased and the agreement is enforceable; that in any case the agreement as to the support of the children is not void and is severable from the rest of the agreement. Defendant contends that part of the agreement was that plaintiff would obtain a divorce from Robert and the fact that an action for divorce from him had matured and been commenced makes no difference since before the interlocutory decree and even thereafter there was the chance plaintiff and Robert would be reconciled.

Regardless of what the authorities may have heretofore stated in regard to the validity of an agreement made in contemplation of a divorce, a recent statement by this court of the general policy on this subject, is pertinent here: "Public policy seeks to foster and protect marriage, to encourage parties to live together, and to prevent separation. [Citations.] But public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed. [Citation.] In the absence of fraud, collusion or imposition upon the court, public policy does not prevent parties who have separated from entering into a contract disposing of their property rights which shall become effective only in the event one of the parties obtains a divorce, even though such a contract may be a factor in persuading a party who has a good cause for divorce to proceed to establish it." (Hill v. Hill, 23 Cal.2d 82, 93, 142 P.2d 417, 422.) In Howard v. Adams, 16 Cal.2d 253, 255, 105 P.2d 971, 973, 130 A.L.R. 1003, the contract was by appellant aunt to support plaintiff, her niece (who was married) and was: "Her [appellant's] conversation with plaintiff at this time, according to the latter's testimony was as fol-

other, or with any other person, respecting property, which either might if unmarried * * *." Civ.Code, § 158.

"A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and

except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation." (Emphasis added; Civ.Code, § 159.)

lows: Plaintiff: 'I had driven over to my aunt's home with my three children; and I walked into her bedroom; and my aunt said, "My heavens, what has happened to your eyes?" I said, "Homer [plaintiff's husband] has blackened both my eyes; he has beat me up all over my body and threatened to kill the children; I am afraid of him; I cannot live with him any longer; I am going right down now to see an attorney and get a divorce." My aunt said, "You can't do that here; think of my banks; think of the Baldwin name having any scandal here"; and I said, "I have heard if I go to Reno, Nevada, to get a divorce, I can't get alimony." My aunt said, "Never mind about that; if you do that and go to Reno, Nevada, and get a divorce, I will support you the rest of your life; I will take care of the children and I will educate them." * * * I said that for her sake that I would do what she asked me to do.' The court held that since plaintiff had already decided on the divorce and had grounds therefor before agreement was made it was not invalid. (See, *Hill v. Hill*, supra, 23 Cal.2d 82, 90, 142 P.2d 417; see, *Bradbury v. Bradbury*, 52 Cal.App.2d 547, 126 P.2d 673; *Barham v. Barham*, 33 Cal.2d 416; *De Burgh v. De Burgh*, 39 Cal.2d 858, 250 P.2d 598.)

[6,7] We think the evidence was susceptible of an interpretation that the divorce from Robert was merely incidental to the agreement; that the main purpose of the agreement was for support of plaintiff and her children and division of property in return for her entering into a Mexican marriage ceremony with defendant which he led her to believe would be a valid marriage so that she as his wife and her children could live with defendant, and that the objects of the marriage with Robert had been destroyed and it was beyond saving when the promise by defendant was repeated; that there was little likelihood of reconciliation with Robert and the agreement did not bar such possibility.

As so construed the agreement would not be against public policy or promotive of divorce. Of course since a nonsuit was granted, we are only concerned with the sufficiency of the evidence to establish a prima facie case on behalf of plaintiff.⁵ While the foregoing authorities and those cited by defendant are not factually the same, we believe that reason and justice require the reversal of the judgment as to the oral agreement.

[8] Plaintiff also complains that there should not have been any deduction from the award of community property to her of the sums used for her and her children's support during the period she and defendant lived together. That portion of the judgment cannot stand because of our decision as to estoppel and the validity of the support agreement. This changes the entire theory of the case and those matters will have to be redetermined on retrial in the light of our holding here. What action the court may take with reference to the agreement we cannot know inasmuch as a nonsuit was incorrectly granted and the matter is open for further proceedings.

[9] Defendant claims that the evidence is insufficient to support the finding that plaintiff believed in good faith in the validity of her marriage to defendant between March 17, 1951, and September 22, 1952, at least after she consulted her attorney in this action on March 20, 1952. Her attorney told her, however, that the marriage lay in an "unsettled" field of law and he thought he could establish estoppel and plaintiff took his word for it. The court was justified in drawing the inference it did. Defendant further mentions that plaintiff could not so believe after the court declared they were not married at the hearing on the pendente lite support claim on May 29, 1952. She appealed from the order of denial and testified that she still believed she could establish the marriage as valid and the court later in August indicat-

5. It may be mentioned that defendant did not plead the statute of frauds or object to the introduction of evidence of an oral

agreement; what may be done on retrial we cannot foresee.

ed the order might be reversed on appeal and the appeal was in good faith. Plaintiff testified on cross examination: "Q. Nevertheless, despite the fact that you filed this lawsuit against Mr. Spellens, you continued to have sexual intercourse with Mr. Spellens? That is correct, is it not? A. Yes, because in my way of thinking, we were married. * * *

"Q. And that continued for some months, did it not? A. Yes." During the course of the trial on March 4, 1953, Annelen testified: "I am still sure I am married to Mr. Spellens." These facts and circumstances and this testimony amply support the finding that plaintiff believed in good faith that she and defendant were legally married up to the date of their final separation on September 22, 1952.

[10] Plaintiff appeals from a denial of her motion to vacate an order of the trial court striking or taxing the item of costs claimed in her cost bill of \$220.60 for a daily reporter's transcript of the proceedings.⁶ Plaintiff filed her cost memorandum including the item. Defendant moved to tax them. He objected to the item stating in his memorandum of points and authorities that reporter's fees for a daily transcript are not allowable unless ordered by the court and the court did not order them here. The court disallowed the item saying plaintiff was not entitled to it. However, a minute order had been previously made by the court during the trial which stated: "A daily transcript is ordered." Plaintiff moved to

vacate the order taxing the item on the ground of mistake as to the existence of the minute order. In the uncontradicted affidavit of plaintiff's counsel it is stated that he was mistaken as to the existence of the court order for the transcript and did not discover it until the clerk's transcript on appeal was prepared; that at the time of the argument on the motion to tax the court expressed its intention to allow the item if the law would permit it. The motion to vacate was denied and plaintiff appeals.

Plaintiff relies on section 473 of the Code of Civil Procedure⁷ and a claimed inherent power in the court to correct its orders. In *Ferry v. O'Brien*, 63 Cal.App. 620, 219 P. 467, the court held there was a case for relief for mistake under section 473 where there was a mistake as to the amount of the costs included by the one entitled thereto. It is said in *Lane v. Pacific Greyhound Lines*, 30 Cal.2d 914, 916, 187 P.2d 9, 11: "It is plaintiffs' position that the trial court had no power to grant defendants relief from default and permit them to file the second motion to tax costs. They argue, first that section 473 of the Code of Civil Procedure can have no application to a motion to tax costs because such a motion is not a pleading within the language of the section which provides that application for relief 'must be accompanied by a copy of the answer or other pleading proposed to be filed.' It is settled, however, that, under the provisions of section 473, the court may relieve a party from the effect of a delay in taking procedural steps which do

6. "In civil cases the fees for reporting and for all other transmissions ordered by the court to be made shall be paid by the parties in equal proportion, and either party at his option may pay the whole. In either case, all amounts so paid by the party to whom costs are awarded shall be taxed as costs in the case." Government Code, § 69953. There is thus no question that if the transcript was ordered by the court the cost could be recovered by the party entitled, plaintiff.

7. "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him

through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken.

"The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." Code Civ.Proc. § 473.

not involve pleadings. See *In re Estate of Simmons*, 168 Cal. 390, 394, 143 P. 697; *Pollitz v. Wickersham*, 150 Cal. 238, 243, 88 P. 911. Relief from default has been allowed under the provisions of section 473 where a party failed to file a cost bill within the times provided in sections 1033 and 1034 of the Code of Civil Procedure. *Soda v. Marriott*, 130 Cal.App. 589, 594, 20 P.2d 758; *Potter v. City of Compton*, 15 Cal. App.2d 238, 59 P.2d 540; *Kallmeyer v. Poore*, 52 Cal.App.2d 142, 153, 125 P.2d 924: Insofar as granting relief from default in filing is concerned, there appears to be no reason for making a distinction between a cost bill and a motion to tax costs." We see no reason why if the timeliness of filing costs proceedings may be reached by section 473, a mistake clearly one of fact as to what the court had done with reference to making the cost item allowable, should not likewise be covered by the first sentence of the quoted portion of that section. The action here in disallowing the item for the transcript was in the language of that portion in that it was an order taken against him through his mistake. The court had power to decide the question and should have done so. We do not have a case of judicial error but merely one of mistake of fact as to what the court had done.

[11] There has been some question whether an order denying relief under section 473 in a case where relief may be asked properly under that section is appealable. The correct rule is stated: "* * * when a judgment or order is not appealable, it cannot be made reviewable by the device of moving to set it aside and appealing from an order denying the motion. This proposition stems from the rule that forbids a party to do indirectly what he may not do directly. Even where there is a right of appeal from a judgment or order, a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of, under such circumstances that the motion merely calls upon the court to repeat or overrule the former ruling on the same facts. And if the grounds upon which the parties seek

to have a judgment vacated existed before the entry of the judgment and would have been available on an appeal from the judgment, an appeal will not lie from an order refusing the motion. The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. The reason for denying an appeal in the latter case is not because the order on the motion to vacate is not within the terms of the statute allowing appeals, for it may be. Indeed, an order refusing to vacate a final judgment is in its very nature a special order made after judgment. But the right of appeal from the order is denied because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appeal, contrary to the intent of the statute. A further reason is that the order on the motion is merely a negative action of the court declining to disturb its first decision. The first decision being reviewable, the refusal any number of times to alter it does not make it less so." (3 Cal.Jur.2d, Appeal and Error, § 57.) "* * * And since a statute [Code Civ.Proc. § 473] makes express provision for a motion to vacate, an appeal may be taken from an order denying such motion where the judgment has been obtained through mistake, inadvertence, surprise, or excusable neglect. In every case where this course has been allowed, the order from which the appeal was permitted was technically within the class of orders made directly appealable by statute, that is, a special order after final judgment. In permitting a direct appeal, therefore, the court was merely relieving the appellant from a rule of practice to the effect that an order refusing to vacate a prior appealable order, although described as appealable by the statute, could not be made to take the place of an appeal from the original order." (3 Cal.Jur.2d, Appeal and Error, § 58.) (See, also, *Witkin, California Procedure*, Vol. 3, pp. 2170-2173.) Here the relief sought is not to have the court reconsider exactly what it had considered before on

the cost bill; it is asked to consider that there was a mistake of fact when it made its cost order, and it considered the fact as contrary to what the record shows; that is not an effort to extend the time of appeal or obtain an appeal where none was available. The court must pass upon the question of the mistake and factors involved in relief under section 473. The appeal from the order of denial was therefore proper and the order must be reversed.

There may be some question whether the minute order for a daily transcript above referred to was the court's own order or because of a request by plaintiff; that is a matter that should be determined on reconsideration of the cost bill and order taxing costs.

[12] After the main action was commenced and was at issue in which the property rights of the parties were involved, defendant brought an action against plaintiff to recover possession of certain personal property;⁸ plaintiff cross complained claiming damages for "abuse of process" in the use of the provisional remedy of claim and delivery by defendant in that action for possession. The trial was consolidated with the main action heretofore discussed. The court found that defendant was the owner of the property, possession of which was sought to be recovered by him, with the exception of an automobile, which was a gift from defendant to plaintiff, but it was the quasi-community property of plaintiff and defendant (presumably on the putative marriage theory heretofore mentioned); that defendant maliciously commenced the action knowing the issues of the right to the property were involved in the main action and caused a claim and delivery writ to issue and be served; that he had the sheriff come to the house with his writ where plaintiff was living (defendant was also present) and served the writ and placed a "seal" on the automobile and took an inventory of the other property claimed in the action, all without plaintiff's consent. Plaintiff got in

touch with her attorney but the sheriff remained for several hours at the house and would not leave without the property until plaintiff's counsel obtained an order enjoining him from seizing the property. While the sheriff and defendant were there defendant said he would drop his proceeding for claim and delivery if plaintiff dropped the main action; that the action and claim and delivery proceedings caused plaintiff anguish and mental suffering to the damage of \$500, together with punitive damages of \$1,000 and \$1,500 attorney's fees incurred by plaintiff in stopping the furtherance of the claim and delivery writ. Judgment accordingly followed from which defendant appeals. Defendant had deposited a cash undertaking of \$16,000 in the claim and delivery proceeding and after entry of the judgment he moved to exonerate the undertaking. The court exonerated it to the extent of \$12,000.

Treating the action as one for abuse of process it appears that the evidence is sufficient to support the findings and malice may be inferred from defendant's conduct, if it is required, in such an action or to make a case for punitive damages. While the sheriff did not actually seize the property except the automobile, he served the writ and in effect seized it, and it may be inferred that he was interfering with plaintiff's property right. The automobile was seized. Plainly it was done for the ulterior purpose of making things difficult for plaintiff so she would drop her main action. It was like a threat, not really to obtain possession of the property which he claimed as his own, but to coerce her with regard to the main action.

[13] The rule with reference to the tort involved is stated in *Tranchina v. Arcinas*, 78 Cal.App.2d 522, 525, 178 P.2d 65, 67, "This tort is thus defined in 3 Restatement of Torts, section 682, p. 464:

"One who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed

8. The parties will still be referred to as plaintiff and defendant as they are in the discussion of the main action.

is liable to the other for the pecuniary loss caused thereby.

"*Comment:*

"a. The gravamen of the misconduct for which the liability stated in this section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for *any purpose other than that which it was designed to accomplish*. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this Section."

"So in 1 Cooley on Torts, 4th Ed., sec. 131, pp. 434-435, we read: 'If process, either civil or criminal, is wilfully made use of for a purpose not justified by the law, this is abuse for which an action will lie. The action will lie although the process was lawfully issued upon a valid judgment for a just cause and is valid in form. The grievance for which redress is sought arises in consequence of subsequent acts—the illegal and malicious abuse of the power conferred by the judgment and writ.'

"The rule is similarly stated in Dean v. Kochendorfer, 237 N.Y. 384, 143 N.E. 229, 231, by Mr. Judge Pound of the Court of Appeals: 'The gist of the action for abuse of process lies in the improper use of process after it is issued. *To show that regularly issued process was perverted to the accomplishment of an improper purpose is enough.*'

"To the same effect are 50 C.J. 612; 1 Am.Jur. 176; Prosser on Torts, sec. 98, p. 892 et seq.; Coplea v. Bybee, 290 Ill.App. 117, 8 N.E.2d 55; Ash v. Cohn, 119 N.J.L. 54, 194 A. 174; Salim v. Glovsky, 132 Me. 402, 172 A. 4; Defnall v. Schoen, 73 Ga. App. 25, 35 S.E.2d 564; Ellis v. Wellons,

224 N.C. 269, 29 S.E.2d 884; Nix v. Goodhill, 95 Iowa 282, 63 N.W. 701, 58 Am.St. Rep. 434; Kool v. Lee, 43 Utah 394, 134 P. 906; and cases collected in the notes in 80 A.L.R. 580 and 86 Am.St.Rep. 397; and cf. the dictum in Crews v. Mayo, 165 Cal. 493 at page 495, 132 P. 1032. * * * Whether malice is a necessary element of this tort has been questioned (50 C.J. 616-617; 1 Am. Jur. 179-180) but if malice is a necessary element it is settled that it may be inferred from the wilful abuse of the process 50 C.J. 616; 1 Am.Jur. 192; Prosser on Torts, 893, 894; Coplea v. Bybee, supra, 290 Ill. App. 117, 8 N.E.2d 55, 59; and cases collected in 80 A.L.R. 582." (Emphasis added.) Dean Prosser, University of California School of Law, has the following to say with the citation of many authorities: "The action for malicious prosecution, whether it be permitted for criminal or civil proceedings, has failed to provide a remedy for a group of cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed. In such cases a tort action has been developed for what is called abuse of process. * * *

"Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor, or that it was obtained without probable cause or in the course of a proceeding begun without probable cause. * * *

"The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not

authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose *usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself*, such as the *surrender of property or the payment of money, by the use of the process as a threat or a club*. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." (Emphasis added; Prosser on Torts, (2d ed.) p. 667.) This case falls squarely within these rules. The compensatory damages recoverable for abuse of process include mental suffering. (Adelman v. Rosenbaum, 133 Pa.Super. 386, 3 A.2d 15; Saliem v. Glovsky, 132 Me. 402, 172 A. 4; 1 Am.Jur., Abuse of Process, § 38.) Lamb v. National Surety Co., 108 Cal.App. 297, 291 P. 647, is clearly distinguishable in that it did not involve the facts here present.

[14] The award of attorney's fees presents another question however. Presumably the fees awarded included services for defending against the claim and delivery proceedings as well as obtaining the restraining order stopping the seizure of the property under the claim and delivery writ. The most recent discussion by this court with regard to the recovery of attorney's fees under various circumstances states the general rules: "Ordinarily, fees paid to attorneys are not recoverable from the opposing party as costs, damages or otherwise, in the absence of express statutory or contractual authority. [Citations.] Section 512 of the Code of Civil Procedure, which sets forth the requirements of the undertaking to be furnished in claim and delivery, provides for the payment to the defendant 'of such sum as may from any cause be recovered against the plaintiff.' Section 667 of the Code of Civil Procedure permits either the plaintiff or the defendant in a replevin

action to recover judgment for the possession of the property or its value and, in addition, damages for its taking and detention. [Citations.]

"It is clear that there is no express authority for the allowance of attorney's fees in claim and delivery, and the cases have uniformly refused to award such fees as damages in actions for the recovery of personal property." LeFave v. Dimond, 46 Cal.2d 868, 870, 299 P.2d 858, 859. What is there said is controlling although we are dealing with the tort of abuse of process rather than where an ultimately unsuccessful plaintiff uses claim and delivery. We find no statute or contract allowing attorney's fees for such torts and thus the judgment in that action must be reversed to that extent.

The orders denying costs, support and attorney's fees pendente lite during trial and on appeal except insofar as they allow attorney's fees to plaintiff on appeal are reversed; the judgment in the main action is reversed in the respects heretofore indicated; the order denying relief under section 473 of the Code of Civil Procedure from the order taxing costs is reversed; the portion of the judgment allowing attorney's fees in the action for claim and delivery involving the possession of property and abuse of process, is reversed. In all other respects it is affirmed. The appeal from the order denying defendant's motion to vacate the order awarding costs and attorney's fees on appeal is dismissed. Plaintiff shall recover her costs on all appeals.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (concurring and dissenting).

Estoppel to Deny the Validity of the Mexican Marriage. I agree that the extension of the doctrine of estoppel to the facts of this case is appropriate, but I would make it unmistakably clear that here the marriage in respect to which the doctrine is being applied is absolutely void *ab initio*.

The conclusion in this respect is reached through reasoning as follows: Where the parties go through a marriage ceremony in reliance upon a void decree of divorce their marriage is no more "valid" than the marriage of the parties here where there was no judgment of divorce.¹ Therefore, as the opinion of Justice Carter indicates, public policy against bigamous marriage is no more disserved by a holding that defendant is estopped to deny the "validity" of the marriage here than it is by the more familiar holding that "The validity of a divorce decree cannot be contested by a party who has procured the decree or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry." (*Rediker v. Rediker* (1950), 35 Cal.2d 796, 808[7], 221 P.2d 1, 20 A.L.R.2d 1152.) Note, however, that in the *Rediker* case, 35 Cal.2d at page 808, 221 P.2d at page 8, we stated, "Since the application of the doctrine of estoppel presupposes the entry of a final decree, cases involving remarriage after the entry of only an interlocutory decree (*Sullivan v. Sullivan*, 219 Cal. 734, 736 [28 P.2d 914]; *In re Estate of Elliott*, 165 Cal. 339 [132 P. 439]), or with the first marriage unaffected by any decree (*Anderson v. Anderson*, 7 Cal.2d 265 [60 P.2d 290]; *Brandt v. Brandt*, 32 Cal. App.2d 99 [89 P.2d 171]), are not in point."

Broad statements to the effect that public policy favors the declaration of nullity of a bigamous marriage, even at the suit of the guilty party (see, e.g., *Anderson v. Anderson* (1936), *supra*, 7 Cal.2d 265, 266 [2], 60 P.2d 290; *Sullivan v. Sullivan* (1934), *supra*, 219 Cal. 734, 736 [3], 28 P.2d 914), made without reference to the question of estoppel, should here yield to the apposite policy, stated as a conclusive presumption

in the Code of Civil Procedure (§ 1962, subd. 3) that "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Defendant with full knowledge of the facts led plaintiff to believe that by going through a bigamous marriage ceremony she was acquiring the status and incident rights of a lawful wife. He should not now be permitted to rely, to her injury, upon her innocent bigamy.

It appears pertinent to observe that caution should be exercised in applying the doctrine of estoppel in favor of one spouse who goes through a bigamous marriage ceremony during the interlocutory period, i.e. after entry of the interlocutory decree determining *rights* but before granting or entry of the judgment of *divorce*, which alone affects the marital status. Plaintiff's ignorance of the invalidity in California of the Mexican marriage is conceivable in the circumstances of her lack of experience, defendant's representations as to his wide experience, and the facts that she relied upon defendant to and defendant did arrange for her procuring the interlocutory decree establishing her right to obtain a judgment of divorce after the one year waiting period and the advice of the Mexican attorney as to the validity of a Mexican marriage. Although it is obvious that a court should scrutinize with caution a claimed belief that an interlocutory decree which is incompetent to affect status permitted a remarriage in another jurisdiction before expiration of the waiting period, until which time neither party was even entitled to apply for the judgment of divorce

1. Here there was an interlocutory decree but it is indisputable that, in this state, the interlocutory decree entered in a divorce action is in no sense a judgment of divorce. It neither purports to nor can affect the legal status of the parties as husband and wife. It is merely a determination, in so far as status is

concerned, that a divorce "ought to be granted" and that one party or the other or both, after the expiration of a year from entry of the interlocutory decree, shall be "entitled to a divorce." (Civ. Code, §§ 131, 132; *De Burgh v. De Burgh* (1952), 39 Cal.2d 858, 250 P.2d 598.)

in California, a plaintiff's knowledge of the facts concerning the invalidity of the void² marriage will not always preclude invocation of the doctrine of estoppel against defendant. (See, for example, *Dietrich v. Dietrich* (1953), 41 Cal.2d 497, 505 [13-15], 261 P.2d 269, where it was held that defendant was estopped to question the validity of an assumed-to-be void—but nevertheless granted and entered—divorce obtained by plaintiff.) Recognizing that here there can be no successful attempt to give validity to the absolutely void Mexican "marriage," we hold that defendant is estopped to assert its unquestionable invalidity.

Temporary Support and Counsel Fees and Costs Pendente Lite. Since the estoppel was shown and the husband's ability to pay was stipulated when the wife sought support *pendente lite*, attorney's fees and costs, I agree with the proposition, 317 P.2d 620, that such relief should have been granted.

Appealability of the Order Denying Defendant's Motion to Vacate the Allowance of Counsel Fees and Costs on Appeal. Defendant's appeal from the order denying his motion to vacate the order granting attorney's fees and costs on appeal is properly dismissed since the motion merely called upon the court to repeat or overrule its previous ruling on the same facts. (*Litvinuk v. Litvinuk* (1945), 27 Cal.2d 38, 44 [7], 162 P.2d 8.) As the majority opinion

points out, 317 P.2d 624, an appeal from an order denying a motion to vacate an appealable order does not lie where the grounds on which the moving party sought to have the order vacated existed before its entry and were available on appeal therefrom. (*Colbert v. Colbert* (1946), 28 Cal.2d 276, 281 [8], 169 P.2d 633.)

Disposition of Plaintiff's Cause of Action Based on Fraud and the Theory that she is a Putative Wife. I further agree with the holding, 317 P.2d 620, that since recovery is to be allowed on the view that defendant is estopped to deny the validity of the marriage, there can be no recovery for fraud inducing the marriage or as a putative wife. She cannot both eat her cake and have it too.

Defendant's Agreement to Divide his Property with Plaintiff and to Support Plaintiff and her Children. I dissent from the holding, 317 P.2d 620-622, that plaintiff can recover on defendant's alleged oral agreement to divide his property with plaintiff and to support plaintiff and plaintiff's children. In my view the agreement was invalid because it was promotive of divorce. At the inception of these proceedings plaintiff, by pleading, offer of proof, and testimony, took the position that defendant's promises induced the obtaining of the interlocutory decree and the terms which she sought and was granted by such decree, as well as the subsequent Mexican marriage ceremony. She took this position in her first amended complaint,³ at the first hear-

2. As already mentioned, it must be recognized that here the marriage is void, as distinguished from merely voidable. (See Civ.Code, § 61, 80; see also §§ 63, 82, 86, 87.)

3. The first amended complaint alleges:

Defendant Sol "insisted upon a divorce of plaintiff and her former husband, for which divorce Sol * * * paid, furnishing the attorney for plaintiff therein, and directing and advising plaintiff in the conduct thereof including the arrangements for property settlement, alimony and support therein.

"In the course of directing and advising plaintiff in the conduct of said divorce as aforesaid, Sol * * * directed and advised plaintiff to waive her interest in

the community property of her former marriage * * * and to waive all alimony and support for her minor children (excepting only nominal amounts * *) for the reason that, and Sol * * * expressly represented to plaintiff that, he would provide plaintiff as his wife and in consideration of her services to him as a wife, with an equal interest in his property and with support and maintenance for herself and her aforesaid minor children, following marriage to him.

"Said direction, advice and representation to plaintiff was intended by Sol * * to induce, and did in fact induce plaintiff to waive her aforesaid interest and rights of alimony and support for herself and her minor children, in connection with the

ing on the questions of temporary support and costs and attorney's fees *pendente lite*,⁴ and at the second hearing on the questions of temporary support and costs and attorney's fees *pendente lite*.⁵

Although the trial court found "that on a number of occasions prior to October, 1950, plaintiff threatened to divorce Robert Seymon," it is manifest that plaintiff's final decision to divorce Seymon was not made solely pursuant to these "threats" and independent of defendant's promises and "blandishments."

It ignores reality to say that it could properly be found that defendant made two

independent sets of promises to divide his property and support plaintiff's children and that plaintiff went through the marriage ceremony in reliance solely on the promises made after she had obtained her interlocutory decree of divorce and not upon the promises which induced her to obtain the interlocutory decree. In my estimation it cannot fairly be said, as the majority opinion says, 317 P.2d 622, that "the evidence was susceptible of an interpretation that the divorce from Robert was merely incidental to the agreement"; rather, the procuring of the interlocutory decree was an integral and essential part of the agreement. This case

divorce of plaintiff and Robert Seymon, thereafter occurring.

"Thereafter Sol * * * induced plaintiff to enter into her aforesaid marriage with him upon the basis of, and relying on, his express prior representation and promise to plaintiff that in consideration of marriage and plaintiff's services to Husband as a wife, he would provide plaintiff with an equal interest in his property, and with support and maintenance for herself and her aforesaid minor children."

4. At this hearing plaintiff made the following offer of proof:

Before plaintiff obtained her interlocutory decree of divorce from Seymon, defendant told plaintiff "That he could see that their [plaintiff's and Seymon's] marriage was an unhappy one * * *, that if she would marry him, that he would provide security for her and her children. That her husband was incompetent to support the family * * * [T]he plaintiff resisted his blandishments for a period of time * * * and that subsequently he asked her to tell her husband a false reason why she wanted a divorce from him and a false statement of the defendant's proposal * * * [F]inally, as a result of these various proposals, she told her husband, with the knowledge of the defendant, the proposal that had been made to her in its entirety and asked her husband whether he wouldn't reform so that they could continue the marriage * * * [I]nstead of taking the opportunity, her husband admitted his incompetence, that he didn't feel he would be an economic success * * *, and he frankly suggested that she take advantage of the offer made by the defendant and obtain a divorce from him.

"That she reported those facts to the defendant, who then instructed her with regard to the kind of property settlement agreement she should have, and the arrangements she should have with her husband.

"That he instructed her that she wouldn't need to retain her interest in her home * * * He told her she wouldn't need alimony. * * *

"He instructed her she wouldn't need support for the children because he would support the children * * *

"That thereafter he instructed her what attorney to go to and made prior arrangements with that attorney as to handling the divorce suit, gave her the money to pay for the divorce action, and that she reported back to him on every single stage of that divorce action. * * *

5. At the second hearing plaintiff testified as follows: About four months prior to plaintiff's obtaining a divorce defendant "told me * * * I had to divorce my husband and he would give me all security and everything what a woman wanted, and for the children an education. * * * [H]e would give me everything and would make me a full fledged partner if I would consider marriage to him. * * * Then he called me and called me and repeated his offer all the time for quite a while until I finally told him I would talk to my husband and tell him what he had suggested. * * * Plaintiff discussed the proposal with Seymon, and told defendant that she had given Seymon "three months time to improve our condition." She finally decided on a divorce from her husband, informed defendant, and defendant made arrangements for the divorce.

is not like *Howard v. Adams* (1940), 16 Cal.2d 253, 256-257 [2], 105 P.2d 971, 130 A.L.R. 1003. There plaintiff had already decided on a divorce when defendant, plaintiff's aunt, promised to support plaintiff and her children in consideration of plaintiff's obtaining the divorce in Nevada. Here it cannot fairly be said that there was any evidence that plaintiff had definitely decided to divorce Seymon before defendant's promises induced such decision. Nor is this case like *Hill v. Hill* (1943), 23 Cal.2d 82, 86-94, 142 P.2d 417 [property settlement between parties who had separated; before the making of the agreement the husband had sued for divorce and the wife had cross-complained for separate maintenance], or *Kreiger v. Bulpitt* (1953), 40 Cal.2d 97, 100-101 [2, 3], 251 P.2d 673 [contingent fee contract to defend in divorce proceeding which had been instituted before the making of the contract]. I would uphold the trial court in its ruling that plaintiff should be nonsuited as to her cause of action based on defendant's oral agreement.

As to the statement in the majority opinion, 317 P.2d 622, that "Defendant claims that the evidence is insufficient to support the finding that plaintiff believed in good faith in the validity of her marriage to defendant⁶ between March 17, 1951, and September 22, 1952, at least after she consulted her attorney in this action on March 20, 1952," I would note that defendant cannot effectively assert a lack of good faith belief of plaintiff in the validity of her marriage before March 23, 1952, because defendant in his notice of appeal in the main action stated that "Defendant specifically does not appeal from that portion of the Judgment herein adjudging that plaintiff was the putative wife of defendant * * * during the period March 17, 1951, to and including March 23, 1952." The fact that plaintiff was advised by her attorney on March 20, 1952, that the validity of her marriage "lay in the field of unsettled law"

does not preclude her from invoking the doctrine of estoppel.

Relief under Section 473 of the Code of Civil Procedure from the Order Taxing Cost of Transcript and Appealability of Order Denying Relief under Section 473. I concur in the holding, 317 P.2d 623, that the order taxing the cost of a daily reporter's transcript may be corrected under section 473 of the Code of Civil Procedure (unless it is shown on reconsideration of the order taxing costs that, as defendant argued in the trial court and suggests on appeal, the minute order, "A daily transcript is ordered," did not correctly reflect the order of the court). Further, I agree with the holding, 317 P.2d 624, that the order denying plaintiff relief under section 473 is appealable.

Maintenance of the Action for Abuse of Process. I agree in part with the reasons advanced in the majority opinion, 317 P.2d 625-627, for the holding that plaintiff can recover in her cross-action for abuse of process. Not discussed in the majority opinion (or by the parties) are the questions whether the action for abuse of process is for injury to property or for personal injury and whether, if it is for personal injury, it can be maintained by a wife (or one who by successfully asserting the doctrine of estoppel is in the position of a wife) against a husband (or one who is estopped to deny that he is a husband). It appears clear to me that plaintiff's action for abuse of process was intended by her to be and was for personal injury, that is, for mental suffering. Plaintiff in her cross-complaint did not allege any damage to property. She alleged that she "suffered mental anguish, nervous and emotional shock and strain and was humiliated, embarrassed and exposed to public shame." The trial court found that she "suffered mental anguish and nervous and emotional shock and strain, and was humiliated and embarrassed." It therefore appears that although the abuse of process

6. This fact could be a crucial one, at least as to some of the relief sought. (See Civ. Code, § 87.)

action grew out of the misuse of process in claim and delivery, an action relating to property, the abuse of process action was in essence for an injury to person, not property. (Cf. *Langley v. Schumacker* (1956), 46 Cal.2d 601, 603, 297 P.2d 977 [3], characterizing an action for fraud as one for injury to property although, as the dissenting opinion points out at page 607 of 46 Cal.2d, at page 981 of 297 P.2d, allegations that plaintiff suffered humiliation, disgrace, mental anguish and became ill show that the action was essentially for injuries to the person.)

It is currently the rule of this state that one spouse can sue the other for injury to property, but not for injury to person. (*Peters v. Peters* (1909), 156 Cal. 32, 36, 103 P. 219, 23 L.R.A.,N.S., 699 [action for battery not allowed]; *Paulus v. Bauder* (1951), 106 Cal.App.2d 589, 591-592, 235 P.2d 422 [1] [action for injury in automobile accident sustained during interlocutory period not allowed]; *Cubbison v. Cubbison* (1946), 73 Cal.App.2d 437, 438, 166 P.2d 387 [1] [action for injury in automobile accident not allowed].) The rule of interspousal immunity for personal torts was recently applied in *Watson v. Watson* (1952), 39 Cal.2d 305, 246 P.2d 19. It is there held that plaintiff was estopped to deny the validity of a Nevada divorce which he had procured and in reliance on which he had gone through a marriage ceremony with defendant (39 Cal.2d at page 307 [2, 3] 246 P.2d at page 20). Therefore, it is further held, plaintiff could not sue defendant for malicious prosecution even though the marriage of plaintiff and defendant was bigamous and void.

If interspousal disability to maintain an action for personal tort is to remain the rule of this state, then that rule should apply here. If plaintiff is allowed to invoke the doctrine of estoppel in order to pursue a separate maintenance action, it is proper that that doctrine should apply in her tort action. However, as herein-after explained, this court could well con-

sider overruling the holding of *Peters v. Peters* (1909), supra, 156 Cal. 32, 36, 103 P. 219, 23 L.R.A.,N.S., 699, and the cases which follow it.

The reasons given in the *Peters* case, supra (at pages 35-36 of 156 Cal., at pages 220, 221 of 103 P.), for not permitting suits between spouses for personal torts are that such suits would destroy "conjugal tranquility" and that if the rule of the common law (which did not permit such suits) is to be changed it should be by the clear language of a statute. The rule of interspousal immunity for torts has been tellingly criticized, and a minority of jurisdictions now permit tort actions between spouses for personal as well as property torts. (See Prosser, *Law of Torts* (2d ed.), pp. 674-675; McCurdy, *Torts Between Persons in Domestic Relation* (1930), 43 Harv.L.Rev. 1030, 1045, 1050-1053; 43 A.L.R.2d 632.)

I would prefer to reexamine the common law view of interspousal immunity and refuse to apply it to this case, rather than distort plaintiff's action for damages to her feelings into an action for damage to property. None of the reasons which have been suggested in support of the common law view apply to this action. As this litigation demonstrates, any conjugal harmony of this quasi-marriage has long since been disrupted. Certainly there can be no thought of collusion between these parties. The court should not decline to entertain a meritorious action against a spouse (or one who, like defendant here, is estopped to deny that he is a spouse) because of the dubious apprehension that in some future case trifling domestic difficulties may become the subject of litigation.

It has been suggested that because recovery by plaintiff "spouse" for personal injuries inflicted by defendant "spouse" would be community property (*Flores v. Brown* (1952), 39 Cal.2d 622, 630 [8], 248 P.2d 922; *Zaragosa v. Craven* (1949), 33 Cal.2d 315, 320 [2], 202 P.2d 73, 6 A.L.R. 2d 461) ⁷ "defendant spouse would then [if

7. A spouse's cause of action for personal injuries, it may be noted, is treated dif-

ferently from other community property in the event of the death of the other

recovery from him was permitted] in effect be taking the money out of one pocket and placing it in the other, resulting in unnecessary circuitry." (Comment, *Interfamily Tort Immunity in California* (1956), 3 U.C.L.A.L.Rev. 371, 373-374.) This suggestion should constitute no objection to the maintenance of plaintiff's action for abuse of process. Plaintiff acquired the judgment for abuse of process after she and defendant had finally separated. It was, therefore, her separate property under the rule that "The earnings and *accumulations* of the wife * * * while she is living separate from her husband, are the separate property of the wife" (italics added). (Civ.Code, § 169; see *Christiana v. Rose* (1950), 100 Cal.App.2d 46, 55-56 [7, 8], 222 P.2d 891.)

Suggestions that any change in the rule of the Peters case (1909), supra, 156 Cal. 32, 103 P.2d 219, 23 L.R.A.,N.S., 699, should come from the Legislature (*Paulus v. Bauder* (1951), supra, 106 Cal.App.2d 589, 592, 235 P.2d 422; *Cubbison v. Cubbison* (1946), supra, 73 Cal.App.2d 437, 438, 166 P.2d 387) are not persuasive. The rule was originally formulated by this court in reliance upon a now outmoded common law rule, and if this court becomes convinced that the rule is unwise it should see fit to change it. (See *Brown v. Gosser*, Ky., 1953, 262 S.W.2d 480, 484, 43 A.L.R.2d 626, 631.)

Recovery of Attorney's Fees incurred in the Claim and Delivery Action as Damages in the Cross-Action for Abuse of Process. I agree with the majority's refusal, 317 P.2d 627, to extend the normal rule that attorney's fees are not recoverable as costs, damages or otherwise in the absence of express authority or statute or contract.

In my view the appeals should be disposed of as follows:

spouse (*Kesler v. Pabst* (1954), 43 Cal. 2d 254, 258, 273 P.2d 257 [4], or of divorce (*Washington v. Washington* (1956), 47 Cal.2d 249, 252 [3], 302 P.2d 569.)

By statutory amendment in 1957 applicable to actions commenced and causes

317 P.2d—40½

In L.A. 22553, the order denying support, attorney's fees and costs pending trial should be reversed; plaintiff's appeal from "All orders * * * incident or leading to the aforesaid orders" should be dismissed.

In L.A. 23135, defendant's appeal from the order denying his motion to vacate the order that he pay attorney's fees and costs on appeal should be dismissed.

In L.A. 23180, the order that defendant pay counsel fees and costs should be affirmed; the order denying plaintiff's request for support pending appeal should be reversed.

In L.A. 23717, the order denying plaintiff's motion for relief (under Code Civ. Proc. § 473) from the order taxing costs should be reversed; plaintiff's appeal from "All orders * * * incident or leading to the aforesaid order" should be dismissed.

In L.A. 23683, the main action, I would reverse the judgment for further proceedings consistent with the views above expressed. Plaintiff's appeal from "All of the orders and rulings of the Court leading to, or incident to the * * * portions of the judgment" from which plaintiff appeals, except the appeal from the order "denying to the plaintiff her necessary support, attorney's fees and costs upon the trial" should be dismissed.

In L.A. 23684, the claim and delivery action and plaintiff's cross action for abuse of process, the judgment should be reversed in so far as it permits recovery of attorney's fees; in other respects it should be affirmed.

In L.A. 23685, so much of the order as denies plaintiff alimony, counsel fees, and costs on appeal should be reversed. Plaintiff also appeals from a portion of the order which denies injunctive relief, but since she has not prosecuted this appeal in

of action arising after effective date of the act, all damages awarded a married person in a civil action for personal injuries are the separate property of such married person. (Stat.1957, chap. 2334, adding Civ.Code, § 163.5 and amending Civ.Code, § 171c.)

her briefs this portion of the order should be affirmed.

McCOMB, J., concurs.

Rehearing denied: SCHAUER and McCOMB, JJ., dissented.



155 Cal.App.2d 230

Ernest HERRMANN, Plaintiff, Cross-Defendant and Respondent,

v.

Lena W. HERRMANN, Defendant, Cross-Complainant and Appellant.

Civ. 22244.

District Court of Appeal, Second District,
Division 3, California.

Nov. 14, 1957.

Husband brought action for divorce on ground of cruelty, and wife filed a cross-complaint seeking divorce on ground of cruelty. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment granting husband a divorce, denying wife a divorce, and holding that home of the parties, though purchased by husband with his separate funds, was owned in joint tenancy, and wife appealed, and husband cross-appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained findings that husband was entitled to a divorce on ground of cruelty, which caused him mental suffering, finding that wife was not entitled to a divorce on ground of cruelty, and finding that home was owned in joint tenancy.

Judgment affirmed.

1. Divorce ⇨130

Evidence sustained finding that husband was entitled to divorce on ground of

wife's cruelty, which caused husband extreme mental suffering.

2. Divorce ⇨151

On motion for new trial in divorce action, trial court was authorized to make new or different findings and to modify the judgment. West's Ann.Code Civ.Proc. § 662.

3. Husband and Wife ⇨14(3)

In action for divorce, evidence sustained finding that home, which had been purchased by husband with separate funds, was owned in joint tenancy.

4. Husband and Wife ⇨49½(7)

In action by husband for divorce, admission by husband that he purchased home with his separate funds and intentionally placed title in joint tenancy, with understanding that it would "take effect" after his death, constituted presumptive evidence that he intended to make a gift to wife of a joint tenancy interest.

5. Divorce ⇨130

Evidence sustained finding that wife was not entitled to divorce on ground of cruelty.

Sadler & Boerner, Duarte, for appellant.

Wilbur E. Quint, Los Angeles, for respondent.

SHINN, Presiding Justice.

We have for consideration an appeal of Lena Herrmann from a modified interlocutory decree awarding Ernest Herrmann a divorce upon the ground of cruelty and a cross appeal by Ernest from the modified decree. Upon the appeal of Lena it is contended that there was insufficient evidence to warrant a finding that she had been guilty of conduct which caused Ernest mental or physical suffering and that she should have been awarded a divorce upon her cross-complaint which accused Ernest of cruelty. Upon his appeal Ernest contends that the court committed error in declaring that the home of the parties was owned in joint tenancy and in making findings contrary to those made originally with respect

to money advanced by Lena. Neither appeal is meritorious.

[1] The briefs of Lena do not contain an adequate statement of the evidence pertaining to the finding that she had been guilty of cruelty. This is not an unusual practice in the preparation of briefs. The apparent reason for the omission is that a full and fair statement of the evidence would have refuted the argument that it was insufficient to support the finding. The principal argument on Lena's appeal is that if Ernest suffered mentally, lost weight, became nervous and ill, and so distraught that he found it impossible to live with her, it was due to his having lost a great deal of money which he had loaned his son and not to any conduct upon her part. At the same time she contends that if the court had accorded her evidence the same weight given to the evidence of Ernest, she would have been granted a divorce. A brief statement of the evidence will suffice to show that there was substantial evidence to prove that Lena's wrongful conduct caused Ernest extreme mental suffering.

The parties were in their sixties when they inter-married in 1951, after a brief acquaintance. Each had a grown son as issue of a former marriage. Ernest was from Wisconsin, where he had done well in the manufacture of cheese. He had an adequate income from securities and followed no occupation. Although conditions were tranquil for a time it was but a year and a half when Ernest left the nuptial bed. In another two years the parties were in court.

At the time of the marriage Ernest owned a fully furnished two-bedroom house with living room, bathroom and kitchen; Lena insisted on having a larger house which Ernest bought for \$21,500; title was placed in joint tenancy because Lena said that was necessary under California law. Ernest understood that the joint tenancy would "take effect" after his death. The furniture was purchased at a cost of between \$6,000 and \$7,000 of which Lena contributed a part.

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The complaint and the cross-complaint alleged cruelty in general terms. During the trial by far the greater part of the evidence related to the financial affairs of the parties. Upon the issue of cruelty Ernest undertook to prove that he had married a shrew and Lena countered with an effort to prove she had married a miser. Both appeals are ill advised.

In ruling upon Lena's motion for a new trial, presented by substituted counsel, the court stated: "I think your client moved in on him, and I felt, moved in on him with the deliberate intention of finding a soft place for herself, and getting all of the money or property that he had previously earned, or as much of it as she could, for herself, and her son. Now, that's the picture that, at least, I felt the evidence disclosed, and that was the basis on which the Court rendered its judgment." This was the dispassionate conclusion of a judge who had listened patiently throughout a prolonged trial and had weighed the evidence with great care and impartiality.

One incident, testified to by Ernest and his attorney, was illuminating. One morning, when Ernest left home early, Lena tried to find him at his broker's office; from there she went to the office of the attorney where Ernest was to sign a will. She burst into the private office, grabbed the will from Ernest, the attorney recovered it, adjourned to another office with Ernest and locked the door. After loudly demanding admission Lena fell to the floor, a physician was called and found nothing the matter with her. After a couple of hours when Lena refused to arise, an ambulance was called, the police came, Lena declared she would not leave until she had read the will and was led screaming to the elevator on the way to a hospital. At various times she endeavored to persuade the attorney and the brokers to influence Ernest to place his securities in joint tenancy. There was evidence which was ample to prove Lena married Ernest for his money and made every effort to acquire a joint tenancy interest in everything he owned. There was other evidence which fully warranted

the finding that Ernest was caused grievous mental suffering as a result of Lena's conduct.

[2] In the original findings the court found that Lena had advanced to Ernest the sum of \$500. Upon Lena's motion for a new trial the court found the amount of the advancement to be \$2,000. This was in accord with Lena's testimony. Her motion for a new trial was denied. In ruling on the motion for a new trial the court was authorized to make new or different findings and to modify the judgment. Code Civ.Proc. § 662.

[3,4] Upon Ernest's appeal it is contended that it was error for the court to declare that the home was owned in joint tenancy. The theory advanced is that Ernest alleged in his answer to Lena's cross-complaint that it was his separate property, Lena alleged it was community property, and both alleged it was placed in joint tenancy as a mere matter of convenience; wherefore, it is argued, the finding was contrary to the admissions of the pleadings. The point would have been available to Ernest were it not for the fact that he tried the case on the theory that the question whether the property was in fact owned in joint tenancy was in issue. Having done so he cannot complain now. The evidence supports the finding. Ernest purchased the property with separate funds and intentionally placed the title in joint tenancy, understanding that it would "take effect" after his death. This constituted presumptive evidence that he intended to make a gift to Lena of a joint tenancy interest. *Trimble v. Coffman*, 114 Cal.App.2d 618, 622, 251 P.2d 81. There was no agreement that it was to remain his separate property or that it would belong to the community.

[5] The evidence presented by Lena upon the cross-complaint for divorce related principally to Ernest's fondness for wine and beer in combination with strong smelling cheese, and to his unwillingness to spend his money as freely as she wished. But he maintained a "beautiful" vegetable

garden, was helpful with the housework, was on excellent terms with Lena's son and was shown to be a mild-mannered, patient, long-suffering man. Lena's contention that she should have been awarded a divorce may be answered by the statement that her evidence did not establish any ground for a decree in her favor.

The judgment is affirmed.

PARKER WOOD and VALLEE, JJ.,
concur.



155 Cal.App.2d 284

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Alvin Francis URBAN, Defendant and
Appellant.

Cr. 1323.

District Court of Appeal, Fourth District,
California.

Nov. 15, 1957.

Defendant was convicted of petit theft and of obtaining money by false and fraudulent representations and pretenses. The Superior Court of San Diego County, William A. Glen, J., entered judgment and order denying a new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held that testimony of defendant on cross-examination as to previous marriage and divorce allegedly obtained by former wife was admissible over his objections for limited purpose of showing intent of defendant to defraud complaining witness at time he purportedly married her, and that evidence was sufficient to support conviction.

Judgment and order affirmed.

1. False Pretenses ⇨42

In prosecution for obtaining money by false pretenses, testimony of defendant on cross-examination as to previous marriage and divorce allegedly obtained by former wife was admissible, over his objections for limited purpose of showing defendant's intent to defraud complaining witness at time he purportedly married her. West's Ann.Pen.Code, § 532.

2. Criminal Law ⇨683(1)

In prosecution for theft of personalty and for obtaining money by false pretenses, evidence offered by prosecution in rebuttal of defendant's evidence as to claimed family argument concerning alleged pregnancy of complaining witness' daughter and necessity and expense of abortion was admissible. West's Ann.Pen.Code, §§ 484, 532.

3. False Pretenses ⇨49(1)

Evidence supported conviction for obtaining by false and fraudulent representations and pretenses money in excess of \$200 from complaining witness whom defendant had purportedly married and for petit theft of her personalty. West's Ann.Pen.Code, §§ 484, 532.

4. Criminal Law ⇨1172(1), 1173(1)

In prosecution for obtaining money by false pretenses and for theft of personalty, neither instructions given nor refusal to give other instructions was prejudicial to defendant. West's Ann.Pen.Code, §§ 484, 532.

William Bruner, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Morris Schachter, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged in one count of an information with obtaining money (\$800), property of the complaining witness, Alice (Skeetz) Herrell, on September 20, 1956, by false and fraudulent representations and pretenses, in violation of section 532 of the Penal Code. In a second

count it was charged that on October 9th, 1956, he took her personal property valued at about \$580, in violation of section 484 of the Penal Code. A third count charges, and he admitted, he had been previously convicted of the crime of assault with intent to rob, and served a term of imprisonment therefor in the Oregon State prison. A jury trial resulted in a conviction on count one and guilty of petit theft, an offense included in count two. Defendant appealed from the judgment and order denying a new trial.

It appears that the complaining witness was a waitress and was divorced in 1950. She had two children. Defendant, a cook, was divorced in 1946. They met about September 16, 1956, and within a few days defendant asked her to marry him. The following evening he suggested they go to Mexico to get married. He assured her of the legality of a Mexican marriage. En route they stopped at some office in Tijuana, a paper was signed, they kissed, and were told they were married. They remained in Mexico that night. On September 19, en route to her home in San Diego, the question of money arose. Apparently defendant had knowledge of a bank account the complaining witness had in one of the branch banks. Defendant told her he had about \$900 in a bank in San Diego and suggested that the complaining witness place her \$800 or \$900 in a joint savings account with his money. The complaining witness agreed. The next day she withdrew \$820 from her account which she had earned as a waitress. She handed it to defendant and he said he would go and deposit it to a joint account and that "together we have \$1800". He bought her a wrist watch and gave it to her. It appears defendant had only \$170.27 deposited in his bank account. Although there is some evidence that defendant obtained a blank form of joint account it was never left with the bank and no such an account was opened. The complaining witness believed defendant had opened such an account. A few days thereafter defendant left for Las Vegas, Nevada. The next

day he telephoned "Skeetz" and said he had had an automobile accident there and asked her to wire him \$50. She did so and took an airplane to meet him. He met her and there was no apparent damage to the car. They proceeded to see the sights at Las Vegas. Defendant gambled and lost. He had the complaining witness cash checks and give him the proceeds. He promised when they returned to San Diego he would withdraw the money from the joint account in San Diego and cover the checks. He was unable to do so. He told her he had already withdrawn it and lost it before she arrived. On October 1st, the complaining witness borrowed money and deposited it to cover the checks drawn by her. Defendant remained in her home until October 9th. On that day he took her to work and agreed to pick her up. He failed to do so. When she returned home that night her High Fidelity Player, portable typewriter, \$50 in cash, and her wrist watch, all being her property obtained before her purported marriage, were missing. She never gave defendant permission to take them. He immediately pawned them and left for Denver, Colorado, where he was later apprehended.

Defendant testified about the claimed marriage and said the next day the complaining witness went to the bank and came out with \$600; that she gave him \$300; that prior to this he told her he was going to open a joint account with her; that the next day he did apply to the bank for a form to open such an account and put the signature card and blank form in the glove compartment of the car; that that same night the complaining witness signed the card; that some family disagreement arose and he withdrew the money on September 27th, gave the complaining witness all but \$75, and left for Las Vegas, where he lost it in gambling; and that the complaining witness suggested he sell the personal property mentioned so he could go to Denver to find work.

There was considerable evidence that defendant, on September 22nd, had a large roll of bills exhibiting it to a former girl

friend who requested payment of \$200 which he owed her, and that he informed her he was being backed financially by a friend to go into some business.

In contrast to the prosecution's claim that defendant married the complaining witness for the purpose of defrauding her of her money and personal property, it is defendant's argument that she gave it to him to be used for a purpose for which they both consented; that the marriage was entered into on his part with a bona fide intention to live with the complaining witness and that he left for Colorado for the express purpose of finding a new home for himself and her, and to remove himself from living conditions which they both found intolerable. He did produce evidence that he sent the complaining witness a railway ticket to go to Denver but she refused it. Objections made on this appeal are numerous and do not go directly to the question of the sufficiency of the evidence. Defendant argues that the prosecution "overtried" the case, inflamed the minds of the jurors against the defendant on immaterial points, particularly relating to the possible illegal marriage; that the trial judge allowed unrestricted cross-examination of defendant in the form of a "fishing expedition", and that he actively assisted the prosecutor in the advocacy of defendant's guilt; that he refused to give certain requested instructions in reference to defendant's present marital status; and claims that the motion for a new trial should have been granted.

[1] The main complaint involves the cross-examination of defendant after he testified he was divorced from his former wife at the time he claims he married the complaining witness in Mexico. He was asked if he did not later marry a woman by the name of Naomi in Arkansas in 1952. He admitted he did but said she told him she obtained a Mexican divorce and remarried, although no papers were ever served on him. He admitted that he was living with her in San Diego in January, 1956, and that she was afraid her previous divorce was illegal because she married

defendant before the final decree was entered. This evidence was admitted over strenuous objections and the trial court allowed it to remain, principally upon the ground that it bore on the intent of defendant to defraud the complaining witness of her money at the time he purportedly married her. Out of the presence of the jury the prosecution informed the court it had telephoned to Naomi in Kansas and she told him she never had obtained a divorce from defendant. The testimony of defendant on cross-examination was admissible for the limited purpose indicated by the trial court and no prejudicial error appears (People v. Zerillo, 36 Cal.2d 222, 228, 223 P.2d 223; People v. Tarantino, 45 Cal.2d 590, 599, 290 P.2d 505.)

[2] Other such evidence involved a claimed family argument concerning the alleged pregnancy of the daughter of the complaining witness and the necessity and expense of an abortion. It does show some financial transactions which might have involved some of the funds of the complaining witness. Defendant presented evidence on the subject-matter and it was competent for the prosecution to rebut that evidence.

[3,4] The ultimate question here involved was whether the complaining witness's money, in excess of \$200, was turned over to defendant by reason of false representations and pretenses of the defendant. Although conflicting, the evidence fully supports the finding of the jury. It was fully and fairly instructed on the subject matter and we find no instructions, given or refused, which would prejudice defendant's rights in this respect. This same conclusion must be reached as to the evidence pertaining to the second count. It therefore becomes unnecessary to answer, in detail, all the claimed errors argued in the brief and raised on the motion for new trial.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

The COUNTY OF PLACER, a Political Subdivision of the State of California,
Plaintiff and Respondent,
v.

AETNA CASUALTY AND SURETY COMPANY, United Pacific Insurance Company, Leonard M. Layton and Sherlie A. Bennett, Defendants,

Aetna Casualty and Surety Company, United Pacific Insurance Company and Leonard M. Layton, Defendants and Appellants. *
 Civ. 9183.

District Court of Appeal, Third District,
 California.

Nov. 8, 1957.

Hearing Granted Dec. 30, 1957.

Action by county against judge and his sureties and judge's clerk based on clerk's alleged embezzlement of county funds. The Superior Court, Placer County, James Snell, J., entered judgment for county and defendants, with exception of clerk who defaulted, appealed. The District Court of Appeal, Schottky, J., held that under Government Code, judge was subject to standard of absolute liability without fault for clerk's embezzlement since Government Code section to effect that no officer of city or judicial district is liable for moneys stolen from his official custody unless the loss was sustained because officer failed to exercise due care is applicable to only money stolen.

Judgment affirmed.

1. Estoppel ⇨62(3)

Where district court judge employed clerk and was assured by district supervisor that clerk would be properly bonded but clerk was not bonded until county later placed her under a blanket employees' bond, county was not estopped from asserting liability against judge and his sureties under statute creating absolute liability without fault on judge for clerk's embezzlement. West's Ann.Gov.Code, § 1504.

2. Judges ⇨37

Where district court judge's clerk embezzled from court, judge and his sureties

* Opinion vacated 323 P.2d 753.

were absolutely liable to county for amount of embezzlement since Government Code provision to effect that no officer of judicial district is liable for moneys stolen from his official custody unless loss was sustained because officer failed to exercise due care was applicable only to moneys stolen. West's Ann.Gov.Code, §§ 1504, 1504(a, b), 1953.5; West's Ann.Pen.Code, §§ 484, 490a.

Robinson & Robinson, Auburn, for appellants.

Al. B. Broyer, Dist. Atty., Robert J. Cook, Deputy Dist. Atty., Auburn, for respondents.

SCHOTTKY, Justice.

While serving as clerk of the Roseville Judicial District Court in Placer County, of which court defendant Layton was Judge, defendant Sherlie Bennett appropriated funds belonging to the court. The county of Placer commenced suit against the clerk and also against Judge Layton and the sureties on his official bond for the amount of the unrecovered balance of the funds appropriated by the clerk.

Defendant Leonard Layton had been judge of the Roseville Justice Court for many years, when, on January 1, 1952, that court was consolidated with the Roseville City Court and became the Roseville Judicial District Court. Employment of a clerk having been authorized by the Placer County Board of Supervisors, the defendant Sherlie Bennett was hired by Layton to fill that position. She served until her arrest in early November, 1954. Although Judge Layton was assured by the supervisor from his district that Sherlie Bennett would be properly bonded, she was not so bonded until the County of Placer purchased a blanket employees' bond effective February 1, 1954.

Defendant Aetna undertook to bond Layton as principal in the sum of \$1,000 beginning January 8, 1951, for four years. Defendant United Pacific executed a similar suretyship \$5,000 bond for the term

of Judge Layton commencing January 5, 1953.

When Straine & Son, the county's auditors, commenced their fiscal year audit of the books in the Roseville Judicial District Court on July 1, 1953, shortages appeared. A shortage of \$1,647.25 was called at that time to the attention of William Stevens, the Placer County auditor, and he called it to the attention of the chairman of the Board of Supervisors, who was also the supervisor from the Roseville District. It was formally called to the attention of the board itself on November 16, 1953. Sherlie Bennett substantially made up this \$1,647.25 deficit by deposits which she made to the account of the Roseville Judicial District Court in July, August and September of 1953. Judge Layton testified that he was not told of the defalcation of his clerk at that time and that he did not see the audit report, nor did he know of these deposits by Sherlie Bennett. At that time Judge Layton was ill in a hospital and for some time during September and October, he did not sit on the bench while he was recuperating. Supervisor Paolini testified, however, that he called the attention of Judge Layton to the \$1,647.25 shortage indicated in the audit report dated November 16, 1953, sometime in December.

When Straine & Son began their fiscal year audit in July, 1954, they began to pick up more shortages in the accounts of the Roseville Court, which led to a request by them to the Board of Supervisors for a special audit, and ultimately to the arrest of Mrs. Bennett in early November. Judge Layton testified that the first notice that he had of the defalcation of his clerk was a few days prior to her arrest in late October or early November, 1954. At that time he called at the office of the Placer County Clerk, who stated that Mrs. Bennett had been short before, that she had made it up and that the supervisors decided to say nothing about it. The auditors placed the total amount of money appropriated at \$11,807.75. The blanket employees' bond held by the Board of Supervisors paid off all but \$4,548.50. The prayer of the complaint

was amended downward to that figure at the time of trial.

At the conclusion of the evidence the court granted the motion of plaintiff for a directed verdict and defendants (with the exception of defendant Sherlie Bennett whose default was entered) have appealed from the judgment entered upon said directed verdict.

Appellants contend that the court erred in applying to Judge Layton the standard of absolute liability without fault set forth in Government Code, section 1504, and in excluding from the case the questions of (a) negligence as set forth in section 1953.5 of the Government Code, and (b) the defense of estoppel.

Government Code, section 1504 prior to the 1955 amendment read:

"Every official bond executed by an officer pursuant to law is in force and obligatory upon the principal and sureties therein for:

"(a) Any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the principal officer, his deputy, or clerk.

"(b) The faithful discharge of all duties which may be required of such officer by any law enacted subsequently to the execution of the bond."

Government Code, section 1953.5 provides as follows:

"No officer of the State, or of any district, county, city and county, city, or judicial district, is liable for moneys stolen from his official custody unless the loss was sustained because the officer failed to exercise due care."

[1,2] Appellants contend that the trial court should not have taken from the jury the question of estoppel and of whether or not Judge Layton failed to exercise due care. It is appellants' contention that the word "stolen" as used in Government Code, section 1953.5 includes the acts of Sherlie

Bennett in taking the money in question, and that therefore the plaintiff must prove lack of due care.

Respondent argues that the term "stolen" as used in Government Code, section 1953.5, implies the offense of larceny, which is defined as "feloniously stealing, taking, leading, or driving away the personal property of another." Respondent contends that since it was embezzlement that Sherlie Bennett committed and not larceny, Government Code, section 1953.5 is not applicable to this case and thus the absolute liability imposed by Government Code, section 1504 is controlling.

Respondent relies strongly on the case of Union Trust Co. v. County of Los Angeles, 11 Cal.2d 675, 81 P.2d 919, in which it was held that the county clerk, as the principal officer, was personally liable for the acts of his deputies because of the liability which he assumed in signing his official bond. There the deputy county clerk embezzled moneys received in evidence in a criminal case in the superior court and delivered to such deputy county clerk by the deputy clerk of said court.

Respondent points out that section 1504 of the Government Code specifically makes the principal as well as his sureties liable on the official bond for "Any and all breaches of the conditions thereof committed during the time such officer continues to discharge any of the duties of or hold the office, and whether such breaches are committed or suffered by the principal officer, his deputy, or clerk."

Appellants argue that the Union Trust Company case, supra, should no longer be followed because when the Legislature in 1949 enacted Government Code, section 1953.5, hereinbefore quoted, it commenced recognition of the modern trend away from an officer's liability for acts of his subordinate. Appellants point out that section 1953.5 refers to "money stolen" from the official custody of a public officer and that Penal Code, section 490a provides that wherever any law or statute mentions larceny, embezzlement or stealing, that statute shall be "interpreted as if the word

'theft' were substituted therefor." Appellants also point out that Penal Code, section 484 includes embezzlement in the definition of theft and argue that, therefore, we should read the Government Code section as if the word "theft" were substituted for the word "stolen" and that this would include the embezzlement by Sherlie Bennett.

We are unable to agree with appellants that section 1953.5 should be interpreted as covering the acts of Sherlie Bennett in the instant case. The evidence is undisputed that she misappropriated funds that had been entrusted to her care as clerk of the Roseville Judicial District Court. We agree with respondent that the term "stolen" as used in Government Code, section 1953.5 implies the offense of larceny which is defined as "feloniously stealing, taking, leading, or driving away the personal property of another" and that the crime that Sherlie Bennett committed was embezzlement, not larceny. For as stated in *People v. Tullos*, 57 Cal.App.2d 233 at page 237, 134 P.2d 280, at page 282 (decided in 1943).

"Any one of the acts denounced in the disjunctive in Penal Code section 484 constitutes the crime of theft, which offense has been substituted for the former separate offenses of larceny, embezzlement, and obtaining money or property under false pretenses. Pen.Code, sec. 490a. Although the offense of theft has been substituted for the offenses of larceny, embezzlement and obtaining money or property by false pretenses, no elements of the former crimes have been changed. The elements of the former offenses of embezzlement and larceny and the distinction between them are clearly stated in *People v. Bojorquez*, 35 Cal. App. 350, 354, 169 P. 922."

We believe that the trial court correctly concluded that Government Code section 1953.5 did not apply to the instant case, and also that defense of estoppel was not available to appellants. Appellant Layton was the judge of the court and Sherlie Bennett was his clerk, employed by him and under

his supervision and control. It was his duty and responsibility to manage and control his court and to know what was occurring in his department. If some outside person had broken into his office and stolen some of the funds of his court, then Government Code, section 1953.5 would permit him to set up the defense that the loss was not sustained because he failed to exercise due care. But when funds of his court were misappropriated by his clerk then we believe that he and his sureties on his bond became absolutely liable to respondent County of Placer for the amount of the shortage and that the trial court correctly granted respondent's motion for a directed verdict.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



154 Cal.App.2d 535

Klara ADAM, Plaintiff and Respondent,
v.

LOS ANGELES TRANSIT LINES, a corporation, Defendant and Appellant.

Civ. 22452.

**District Court of Appeal, Second District,
Division 1, California.**

Oct. 21, 1957.

Streetcar passenger's action for personal injuries. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered judgment for passenger and order vacating order granting motion for new trial and streetcar company appealed. The District Court of Appeal, Fourt, J., held, *inter alia*, that where portion of seat in front of streetcar passenger fell on the passenger's leg without any unusual movements or occurrences on part of streetcar or person

sitting in such seat, doctrine of *res ipsa loquitur* was properly applied.

Affirmed.

1. Negligence ⇨121(2)

Conditions for application of doctrine of *res ipsa loquitur* are generally that accident be of a kind which usually does not happen in absence of some negligence, that agency or instrumentality causing it must have been within the exclusive control of the defendant and that it must not have been due to any voluntary action or neglect on part of plaintiff.

2. Negligence ⇨62(3)

Intervening act of a third person does not relieve a party of negligent conduct if at the time of such conduct he should have realized that the third person might so act.

3. Negligence ⇨121(2)

In order that a plaintiff be entitled to benefit of doctrine of *res ipsa loquitur*, he need not exclude every possibility that the injury was caused other than by defendant's negligence.

4. Carriers ⇨316(7)

Where portion of seat in front of seated streetcar passenger fell on passenger's leg without any unusual movements or occurrences in motion of streetcar or person sitting on seat, doctrine of *res ipsa loquitur* was properly applied. West's Ann.Civ.Code, § 2101.

5. New Trial ⇨163(1)

Where trial court after verdict in personal injury suit made oral order denying motion for new trial on condition that plaintiff remit balance of judgment over a certain amount but order was never reduced to writing, court had jurisdiction to make subsequent written order denying motion for new trial unconditionally. West's Ann. Code Civ.Proc. § 1003.

6. Appeal and Error ⇨1060(1)

In streetcar passenger's action for personal injuries, the receiving of testimony with allusions to insurance did not, under circumstances which included court's ad-

monition that insurance was not an issue in the case, constitute prejudicial error.

7. Trial ⇨29(1)

In personal injury action where counsel for plaintiff had indicated that he would drop any claim for loss of earnings, judge's inquiry before the jury, as to whether counsel wished to have an instruction on loss of earnings, was not improper.

8. Carriers ⇨318(3)

In streetcar passenger's action for personal injuries received when portion of seat in front of her fell on her leg without any unusual movements or occurrences, evidence sustained finding of negligence by streetcar company.

David S. Smith, Los Angeles, for appellant.

Larwill & Wolfe, Los Angeles, for respondent.

FOUR, Justice.

This is an appeal by defendant Los Angeles Transit Lines, hereinafter referred to as the "Transit Lines", from a judgment arising out of the negligence of the railroad in the maintenance of a seat in one of its streetcars "and from that certain Order vacating" an order upon a motion for a new trial.

The facts established by the testimony and the evidence are substantially as follows: Plaintiff Klara Adam was a passenger on one of the Transit Lines' streetcars. She was seated in one of the regular seats when the bench part of the seat immediately in front of her fell from its proper and accustomed position or place and struck her on the leg, thereby causing injuries to that limb. The testimony was contradictory with reference to the falling of the seat or bench, some evidence being to the effect that a lady passenger ahead of the plaintiff in the streetcar caused the seat to fall by moving it, and some evidence being to the effect that the seat fell as a result of the railroad's carelessness in failing to maintain a proper and safe seat. At the

time the bench so fell, the streetcar was not engaged in any unusual movement and the motions thereof were normal to a Los Angeles streetcar. A Mrs. Pustau had been seated on the seat which fell, and just before the accident she had arisen therefrom.

The respondent requested instructions on the doctrine of *res ipsa loquitur*, which were given. The jury returned a verdict for \$3,882.50, on November 9, 1956.

On Monday, December 17, 1956, the defendant made a motion for a judgment notwithstanding the verdict, and in the alternative, in the event such motion were denied, made a motion for a new trial. The trial court made the following statements from the bench at the conclusion of the first hearings on the motion:

"The Court: The motion for judgment notwithstanding the verdict is denied. I am satisfied that the verdict of the jury was supported by substantial evidence, even though there was a conflict. The motion for new trial is denied conditionally, the condition being that the plaintiff remit the balance over and above \$2,000, the remittitur to be filed on or before Friday of this week, December 21; judgment without costs. Otherwise, the motion is granted. I think the amount of the verdict was substantially excessive, sufficient to warrant a conditional denial."

The record before us discloses no document or instrument which was signed by the judge at that time, nor at any other time, with reference to what was said from the bench on December 17, 1956. Apparently, a short time after the announcement by the judge of the rulings, "Mr. Wolfe, of counsel for the plaintiff, requested the Court to vacate his order and set the matter down for further hearing." That was done and the matter was set for a hearing on Friday, December 21, 1956. There was a minute entry made as of December 17, 1956, and entered December 19, 1956, as follows: "Larwill and Wolfe by Thomas S Bunn, Jr, appearing as attorney for the plaintiff and Ronald A Burford appearing for the

defendant. Motions are argued. Motion for judgment notwithstanding the verdict is denied. Motion for new trial is granted on condition that the plaintiff remit the balance of judgment over \$2,000.00, without costs, by December 21, 1956; otherwise, motion for new trial is granted. Later: order re Motion for new trial is vacated. Motion is continued to December 21, 1956, at 9:45 AM for further argument. Counsel for plaintiff will give notice of hearing."

At the hearing on December 21, 1956, Wolfe, one of counsel for the plaintiff, pointed out that he was not present at the former hearing, and that he was of the impression that the amount of the special damages had been overlooked, and further pointed out that such special damages totalled exactly \$882.50, which seemed to indicate that the jury had allowed \$3,000.00 general damages and \$882.50 as special damages. It was argued that under the circumstances the total amount, considering the pain and suffering of the plaintiff, was not excessive. The court then stated as follows:

"The Court: On the 17th I entered a conditional order, in effect reducing the amount of the verdict to \$2,000. On reexamination of the record, I don't believe I gave the matter proper evaluation at that time. The record does show that both sides asked for a jury, on the one hand. The matter of past and future medical care of course was uncontradicted. I may have had the feeling that the general damages were somewhat too high in view of the history of the plaintiff, work history, following the accident. In reconsideration of the matter, I am going to let the verdict of the jury stand.

"The motion for new trial is denied. Notice waived, gentlemen?"

The ruling above set forth was put into a minute entry of December 21, 1956, and entered December 26, 1956, and read as follows:

"Hearing on Defendant's Motion for New Trial resumed from December 17;

Larwill & Wolfe by Charles W. Wolfe and Thomas S. Bunn, Jr., appearing for the plaintiff and Ronald A. Burford appearing for the defendant. Motion is argued further. Motion for New Trial is denied. Notice Waived. 30 Day Stay of Execution is granted to the defendant."

The appellant contends that: (1) the *res ipsa loquitur* doctrine should not have been applied to this case; (2) the court had no jurisdiction to make its order on December 21, 1956; (3) the matter of insurance was improperly injected into the trial, and (4) the judge made a statement from the bench which was prejudicial to the appellant.

[1] The conditions for the application of the doctrine of *res ipsa loquitur* are, generally, that the accident be of a kind which usually does not happen in the absence of some negligence, that the agency or instrumentality causing it must have been within the exclusive control of the defendant and that it must not have been due to any voluntary action or neglect on the part of the plaintiff. *Cavero v. Franklin General Benevolent Society*, 36 Cal.2d 301, 309, 223 P.2d 471; *Raber v. Tumin*, 36 Cal.2d 654, 659, 226 P.2d 574; *Seneris v. Haas*, 45 Cal.2d 811, 823, 291 P.2d 915, 53 A.L.R.2d 124; *Billeter v. Rhodes & Jamieson, Ltd.*, 104 Cal.App.2d 137, 147, 231 P.2d 93; see, also, *Prosser, Res Ipsa Loquitur in California*, 37 Cal.L.Rev. 183; *Shain, Res Ipsa Loquitur*, 17 S.Cal.L.Rev. 187; *McCormick on Evidence*, § 309, p. 643.

There apparently is no contention in the instant case that the plaintiff did anything other than that which she was supposed to do, nor that there was a voluntary act on her part which in anywise had to do with the accident. It is certainly not customary nor usual for streetcar seats to fall apart with only normal usage. Without question, such things do not happen in the absence of negligence upon the part of someone. It was stipulated that the streetcar was "under the sole care, custody and control of the Los Angeles Transit Lines at the time of the accident." There is no apparent doubt

that the seat in question did fall onto and against the leg of Mrs. Adam, causing the injuries complained of. Appellant asserts that the lady sitting ahead of Mrs. Adam in the streetcar caused the seat to fall upon her leg. There was testimony and evidence which the jury could, and undoubtedly did, accept as true which led them to the conclusion that the lady in the forward seat did not lift, push, raise nor have anything whatsoever to do with the seat which fell, excepting to sit down upon it in a normal fashion and later to get up from it as people ordinarily get up from a streetcar seat. The witness stated that she heard the noise of the seat falling, and that she had no other sensory perceptions of the seat falling.

The appellant brought into court a seat which was supposed to be similar to the seat in question, and apparently put on a demonstration to show the construction of the seat. During the demonstration the jury had an opportunity to observe the defendant's witness attempt, with difficulty, to remove the horizontal or bench part of the seat. It must be assumed, of course, that for the purposes of its demonstration, the Transit Lines brought into court a seat which was in proper working order. The difficulty with which defendant's witness removed the bench part of the seat could well have convinced the jury that a seat in like condition would not have fallen apart and onto the leg of plaintiff; that the seat in the streetcar was defective, broken, or dangerously worn, and that the appellant had not met the degree of care required of it.

Section 2101 of the Civil Code provides as follows: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

Appellant must have anticipated that passengers would be getting up and down and in and out of the seats in the streetcar, and it would have been a most unsafe practice to maintain a seat in such a fashion that the simple arising of a person therefrom

would cause the seat to collapse and fall upon the person sitting to the rear thereof.

[2] An intervening act of a third person does not relieve a person of negligent conduct if at the time of such conduct he should have realized that the third person might so act. *McEvoy v. American Pool Corporation*, 32 Cal.2d 295, 299, 195 P.2d 783; *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 218, 157 P.2d 372, 158 A.L.R. 872; *Rest., Torts*, §§ 447-449.

[3,4] In order that a plaintiff be entitled to the benefit of the doctrine of *res ipsa loquitur*, he need not exclude every possibility that the injury was caused other than by defendant's negligence. *Seneris v. Haas*, supra; *Nungaray v. Pleasant Valley Lima Bean Growers and Warehouse Ass'n*, 142 Cal.App.2d 653, 300 P.2d 285; *Prosser, Res Ipsa Loquitur in California*, 37 Cal.L. Rev. 183, 197-198.

The research of counsel and our own independent search have produced no cases in California having to do with the application of the doctrine to seats on common carriers. There are, however, numerous cases in other jurisdictions which so apply the doctrine. *Rosenbaum v. Union Ry. Co.*, Sup., 169 N.Y.S. 456; *Smith v. Blue Ridge Transportation Co.*, 172 Md. 42, 191 A. 66; *Hall v. Redifer*, Ohio Mun.Ct., 79 N.E.2d 237; *Southeastern Greyhound Lines v. Callahan*, 244 Ala. 449, 13 So.2d 660; *Colton v. Rhode Island Co.*, 40 R.I. 264, 100 A. 498.

[5] Appellant's next contention is that the court had no jurisdiction to make the order it did make on December 21, 1956, because the order of the 17th of December, 1956, had been entered, and therefore the judge could do nothing thereafter about the matter. As pointed out heretofore, the oral statement of the 17th of December was never reduced to writing and was never entered in the minutes as such. We have heretofore quoted what the minute entry did contain and what the judge said from the bench with reference thereto.

Section 1003 of the Code of Civil Procedure provides as follows:

"Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion."

In *Kindig v. Palos Verdes Homes Ass'n*, 33 Cal.App.2d 349, at page 355, 91 P.2d 645, at page 648, the court held "An order is the direction of a court or Judge made or entered in writing and not included in a judgment." In *Miller v. Stein*, 145 Cal.App.2d 381, pages 383-385, 302 P.2d 403, at page 405, wherein the trial judge was involved in a situation similar to that in the instant case, the court said:

"The basic question presented is whether, upon its own motion and without notice, the court could make a second order vacating its prior oral order before the entry of the first order in the official minutes.

"* * * Unless otherwise required by statute, an order in writing becomes legally effective at the time it is signed and filed by the judge. *Maxwell v. Perkins*, 116 Cal.App.2d 752, 756, 255 P.2d 10. Although there exists authority to the contrary, the rule has been developed in the most recent cases that an oral order of the court is subject to change prior to its written entry in the official minutes of the court. (Citing cases.)

"In *Ex parte Monckros Von Vetsera*, supra [7 Cal.App. 136, 93 P. 1036], the petitioner was before the court on a writ of habeas corpus. On October 15 the judge announced in open court that the prisoner was illegally detained and ordered his discharge. This verbal order was not reduced to writing nor entered in the minutes. On October 17, the court, in the absence of the petitioner, made and signed a written order vacating the prior order. The petitioner asserted before the reviewing court that the order of October 15 was a final adjudication and that the court below lost jurisdiction to subsequently enter any different order. In rejecting

the contention that the oral order of the court was irrevocable, the court stated 7 Cal.App. at page 138, 93 P. at page 1036: 'Until the judgment had been entered in the minutes of the court, or had been in some authentic manner reduced to writing, as by the judge signing a written order, it must be held that the judgment lay in the breast of the judge, and that the court had plenary power thereover.'

"In *People v. McAllister*, 15 Cal.2d 519, 524, 102 P.2d 1072, 1074, the Supreme Court reaffirmed this rule, and quoted as follows from the case last cited: 'In the case at bar the order relied on by petitioner for his discharge, never having been entered in the minutes of the court, was subject to be vacated and revised by the court and, having been thus vacated affords no warrant for his release from the imprisonment * * *' In the *McAllister* case, the court sentenced defendant to pay a fine in its morning session. Later that day, the judge ordered defendant to return, and revised his order by pronouncing the alternative sentence of time in jail upon failure to pay the fine levied. In *uphold* the court's action, the Supreme Court stated that, 'if the sentence pronounced has not been entered by the clerk in the minutes * * * then it is proper for the court to change the sentence originally pronounced.' 15 Cal.2d at pages 526-527, 102 P.2d at page 1075. At page 527, of 15 Cal.2d, at page 1075 of 102 P.2d, the court, in pointing out that the clerk must enter his minutes within a reasonable time after orders are made, observed: 'It is not necessary for us to pass upon the question as to what is a reasonable time for the clerk to perform this duty as we are satisfied that in this case when the two acts of the court occurred on the same day, no duty was imposed upon its clerk to enter the first sentence of the court before adjournment of the court for that day.'"

The judge in the case before us, on the same day apparently, namely on the 17th of December, 1956, before anything had been entered in the minutes, superseded his oral pronouncement by another oral direction to continue the matter to a date certain for further hearing, namely, to the 21st of December, 1956.

In *Pacific Home v. County of Los Angeles*, 41 Cal.2d 855, 264 P.2d 544, 546, the judge stated from the bench, "I will deny all motions." Afterwards, the judge entered a written order in the minutes vacating the findings of fact and conclusions of law and judgment ordering judgment for the defendants, directing the preparation of new findings, conclusions and judgment, and denying the motion for a new trial. It was contended that the judge had no jurisdiction to make the subsequent orders changing the terms of his original statements from the bench. The Supreme Court said, among other things (41 Cal.2d at page 857, 264 P.2d at page 546): "There is no merit to this contention. The court's oral pronouncement was in the future tense and was never entered in the minutes. The formal written order which the court later signed was the only order entered in the minutes. An order ruling on a motion for a new trial is ineffective unless filed with the clerk or entered in the minutes. (Code Civ.Proc. § 1003; *Jablon v. Henneberger*, 33 Cal.2d 773, 775, 205 P.2d 1; *Jackson v. Thompson*, 43 Cal.App.2d 150, 152, 110 P.2d 470. The effective date of an order denying a motion for a new trial is the date of the minute entry. (*Millsap v. Hooper*, 34 Cal.2d 192, 193, 208 P.2d 982.) The minute entry here was made while the court still retained jurisdiction."

The California Law Revision Commission has considered some of the problems involved in this matter and has made a study and recommendation concerning them, which was submitted February 1, 1957. See, titles "New Trial Orders" and "Possible Changes in the Law" of the study made at the direction of said Commission by Professor Edward L. Barrett, Jr., of the School of Law, University of California,

Berkeley; see, also, *Diaz v. Schultz*, 81 Cal. App.2d 328, 183 P.2d 717; *Cox v. Tyrone Power Enterprises*, 49 Cal.App.2d 383, 121 P.2d 829; *People v. Driggs*, 111 Cal.App. 42, 295 P. 51; *Brownell v. Superior Court*, 157 Cal. 703, 109 P. 91.

The next contention of the appellant is that the matter of insurance was improperly injected into the case. At the time of the selection of the jury the following occurred in the questioning of a prospective juror:

"Mr. Bunn: What is your occupation?"

"Mrs. Lind: Retired teacher, Los Angeles Schools.

"Mr. Bunn: Have you ever been in any other occupation?"

"Mrs. Lind: No.

"Mr. Bunn: What is your husband's occupation?"

"Mrs. Lind: Retired lumber salesman.

"Mr. Bunn: Has any member of your immediate family ever worked in the claims adjusting business?"

"Mrs. Lind: No.

"Mr. Bunn: Has any member of your immediate family ever worked for the Los Angeles Transit Lines or any other public carrier?"

"Mrs. Lind: No.

"Mr. Bunn: Pass for cause.

"Mr. Burford: No questions from the defendant. No peremptory challenge. At this time, may I ask the Court to explain to the jury that there is no insurance involved? I believe this continued questioning carries innuendo to that effect.

"The Court: There is no insurance involved in this case."

Later on, when a doctor was being examined by plaintiff's counsel, the following occurred:

"Q. Now, Doctor, let's go back again to the examination that you made of Mrs. Adam's leg. Will you describe the size as near as you can of this injured area. A. I have a report here

that at that time—I mean a copy of the report that I made to the insurance company, and at that time I recall that it was described as approximately 5 x 7½ centimeters, which would be equal to approximately 3 x 4 inches in diameter, all the way around.

"Mr. Burford: Your Honor, I hate to interrupt. It may not be too important. I should like to have that portion struck that he mailed the report to the insurance company. Here the defendant is the Los Angeles Transit Lines, and I am the attorney for the Los Angeles Transit Lines, and there is no insurance company involved whatsoever.

"The Court: The jury has been advised that there is no insurance company. Go ahead."

[6] We do not believe that the receiving of any such testimony, under the circumstances, constituted prejudicial error. The court told the jury in substance, in the first instance, that there was no insurance involved; counsel for the appellant stated at the time of the question that there was no insurance company involved, and the court again called attention to the fact that he had advised the jury that there was no insurance company involved.

[7] The last contention of the appellant is that during the latter part of the giving of the instructions to the jury, the judge improperly stopped and made the inquiry, "Do you wish me to give the instruction on loss of earnings?" Counsel for the respondent answered, "No." The respondent had, in her complaint, alleged loss of earnings and some evidence had been offered on the question. In the judge's chambers, during a discussion thereof, respondent's counsel indicated that the respondent would drop any claim therefor. A jury instruction had been requested on loss of earnings before the respondent had waived that portion of her claim. The judge simply asked the question, at the time of the giving of the instructions, whether that particular instruction should or should not be given. We fail to see how the situation before us.

is anything like the facts in *Sanguinetti v. Moore Dry Dock Co.*, 36 Cal.2d 812, 228 P.2d 557, cited by appellant. It would appear that if there was any prejudice in the matter, it was against the respondent, because she, in the presence of the jury, in answer to a general question put by the court, had, for all intents and purposes, waived a part of her original claim. Furthermore, the jury was fully instructed to disregard any comments of the judge. B.A.J.I. No. 5—Jury not to take a cue from judge.

[8] We conclude that there was ample evidence to support the verdict of the jury and that the instructions on *res ipsa loquitur* were properly given.

We conclude further that the oral order, so to speak, of December 17, 1956, was not a final order, and therefore was subject to change by the court, and that the court had jurisdiction to make the order of December 21, 1956, denying appellant's motion for a new trial without conditions.

Finally, we conclude that there is no prejudicial error in the record.

The judgment and order vacating order granting motion for new trial are, and each is affirmed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.



155 Cal.App.2d 46

The ALHAMBRA-SHUMWAY MINES, Inc.,
a corporation, and B. F. Parsons,
Plaintiffs and Appellants,

v.

ALHAMBRA GOLD MINE CORPORATION,
a corporation, Defendant and
Respondent.

Civ. 9000.

District Court of Appeal, Third District,
California.

Nov. 7, 1957.

Rehearing Denied Nov. 27, 1957.

Hearing Denied Dec. 30, 1957.

Action to cancel mining lease. The
Superior Court, El Dorado County, Robert

317 P.2d—41½

E. Roberts, J., rendered judgments for lessee, and lessor appealed. The District Court of Appeal, Schottky, J., held that where mining lease was substantially all of the assets of lessor corporation, lease should have been approved by vote or written consent of majority of shareholders as required by statutes.

Reversed.

1. Mines and Minerals ⇨108

Where foreign corporation was lessee of mining lease and such corporation had not paid its franchise tax for a number of years and secretary of state had forfeited corporation's right to transact intrastate business, the statute depriving foreign corporation of all powers, rights and privileges in event of certain tax delinquencies deprived corporation of right to defend action against it to declare lease invalid. West's Ann.Rev. & Tax.Code, § 23301.

2. Appeal and Error ⇨230

In lessor's action to cancel mining lease to foreign corporation, foreign corporation could not complain on appeal that lessee did not raise the point until final day of trial long after commencement of action that foreign corporation could not defend the action because of forfeiture of right to transact intrastate business due to failure to pay franchise taxes, where corporation's powers, rights and privileges were not revived and restored before entry of judgment appealed from. West's Ann.Rev. & Tax Code, § 23301.

3. Mines and Minerals ⇨108

In landlord's action to cancel mining lease to foreign corporation, the trial court should not have considered special defenses of laches, estoppel and the statute of limitations, when it became apparent that corporation had forfeited its right to defend action because of nonpayment of franchise taxes. West's Ann.Rev. & Tax.Code, § 23301.

4. Mines and Minerals ⇨105(1)

Where mining lease was substantially all of the assets of lessor corporation, lease should have been approved by vote or writ-

ten consent of majority of shareholders as required by statutes. West's Ann.Corp. Code, §§ 3901, 3902.

Rowell, Lamberson & Thomas, Fresno, for appellants.

Entenza & Gramer, Beverly Hills, Jerome Weber, and Jesse Whitehill, Los Angeles, for respondent.

SCHOTTKY, Justice.

Plaintiff The Alhambra-Shumway Mines, Inc., a California corporation, on February 17, 1951, commenced an action against defendant, a Nevada corporation, to declare cancelled a lease of mining property and equipment known as "The Alhambra Mine." By an amended complaint filed on February 17, 1953, plaintiff B. F. Parsons, as a stockholder, and in behalf of all the stockholders of the plaintiff corporation and of the corporation itself, joined as a plaintiff in the action. Plaintiffs have appealed from a judgment that plaintiffs are not entitled to any relief upon their complaint to cancel the lease and that the lease is valid and subsisting.

Appellant corporation had operated and mined the Alhambra Mine for several years until it closed in 1942 because of the war-time order of the Federal government to divert manpower to other industries more necessary for the war effort. During the war years no shareholders' meetings were held.

About January 1, 1947, the then officers and directors of appellant corporation executed a lease of the mine and its equipment to the assignor of the respondent corporation for ten years. About March 31, 1948, the lease was amended to extend the term to 20 years from January 1, 1947, and to recite an assignment to respondent corporation. In its findings of fact the trial court found that the mining property and equipment covered by the lease constituted substantially all of the assets of appellant corporation, and that the officers and directors did not advise the shareholders of the lease

until May, 1950. However, the trial court concluded that by reason of a discovery in the mine in August, 1949, and the attendant newspaper publicity, an undetermined number of the shareholders obtained knowledge of the lease. As soon as the existence of the lease was officially reported to the shareholders, attempts were commenced to have a shareholders' meeting at which the lease could be discussed, approved or rejected. The then directors and officers of appellant corporation, who were the ones that executed the leases, attempted to and were successful for a time in preventing a vote upon the lease; however, on July 12, 1950, a shareholders' meeting finally occurred at which a contested election of directors resulted. Following the contested election an action was filed which eventually resulted in a court supervised election about January 17, 1951, and a new board of directors. The new board called a meeting of shareholders on February 8, 1951, at which the lease was expressly disapproved. Notice of the results of this meeting was given to respondent on February 10, 1951, and following the claim by respondent that the lease was valid, this action was filed on February 17, 1951, by appellant corporation.

By an amended complaint filed February 17, 1953, appellant B. F. Parsons, as a shareholder and in behalf of all of the shareholders of the corporation and of the corporation itself, joined as a plaintiff in the action.

In its original complaint appellant corporation offered to cancel the lease on such terms and conditions as the court might deem just and reasonable. In succeeding amended complaints the offer was repeated, including the complaint in which appellant Parsons joined. The basis of the action is that the real and personal property leased constituted substantially all of the assets of appellant corporation and, therefore, required the approval of the shareholders pursuant to Sections 3901 and 3902 of the Corporations Code.

The court found: (1) That both appellants had been guilty of laches; (2) that

both appellants had failed to comply with Civil Code section 1691 relating to restitution; (3) that appellant corporation was estopped but that appellant Parsons was not estopped to prosecute the action; (4) that appellant corporation was barred by the statute of limitations but that appellant Parsons was not barred by the statute of limitations; (5) that both appellants had legal capacity to sue; (6) that the lease in question is within the ambit of Corporations Code section 3901; (7) that the amended complaint does not state facts sufficient to constitute a cause of action in so far as appellant corporation is concerned but does state facts sufficient to constitute a cause of action in so far as appellant Parsons is concerned.

One further fact upon which the trial court failed to make a finding involves the corporate status of respondent. During the course of the trial it was discovered that respondent, a foreign corporation, had not paid its franchise taxes for a number of years. Appellant thereupon moved to strike all pleadings and evidence of respondent and to enter the default of respondent upon the ground that as a foreign corporation it had forfeited its right to transact business in California, including the right to defend this action. This motion was denied by the trial court upon the submission of the case. The parties stipulated that a certificate of suspension or forfeiture as of August 1, 1950, from the Secretary of State might be received in evidence. (Plaintiffs' Exhibit 19.) Judgment in favor of respondent was entered on August 23, 1955. On September 19, 1955, appellant filed a notice of intention to move for a new trial and also filed a corrected certificate of the Secretary of State reciting that the rights of respondent corporation to transact intrastate business were forfeited on August 1, 1950, and had not been reinstated. At the hearing of the motion for a new trial on October 28, 1955, respondent produced a certificate of revivor, showing that respondent's right to do intrastate business in California was revived and restored to full force and ef-

fect on October 28, 1955. The motion for a new trial was denied and this appeal followed.

[1] Appellants contend first that a corporation suspended or which has forfeited its rights under Revenue and Taxation Code, section 23301, may not defend an action against it to declare a lease invalid. In the recent case of *Reed v. Norman*, 48 Cal.2d 338, at page 343, 309 P.2d 809, at page 812, the court said:

"On the issue of suspension of the corporation for failure to pay franchise tax, it is true that under the corporation law, Rev. & Tax. Code, §§ 23301, 23302, supra, the corporation may not prosecute or defend an action, nor appeal from an adverse judgment in an action while its corporate rights are suspended for failure to pay taxes; *Boyle v. Lakeview Creamery Co.*, 9 Cal. 2d 16, 68 P.2d 968; *Ocean Park etc. Co. v. Pacific Auto Park Co.*, 37 Cal.App.2d 158, 98 P.2d 1068; *Baker v. Ferrel*, 78 Cal.App.2d 578, 177 P.2d 973; *Fidelity Metals Corp. v. Risley*, 77 Cal.App.2d 377, 175 P.2d 592, * * *."

Respondent in reply relies on section 5700 of the Corporations Code which provides:

"Except as provided in this section, the corporate rights, privileges, and powers of every corporation, which have been suspended for nonpayment of taxes and penalties under former Sections 3664a, 3664c, and 3664d of the Political Code as those sections existed prior to September 15, 1935, are incapable of being exercised for any purpose or in any manner until they are restored. The corporate rights, privileges, and powers may be exercised to defend any action brought in any court against the corporation."

However, as pointed out by appellants, the statutory history of section 5700 shows that this section is based upon the Political Code section 3669c as it existed prior to June 12, 1939. In *Boyle v. Lakeview Creamery*, 9 Cal.2d 16, 68 P.2d 968, the dis-

inction between the penalties under section 3669c and penalties for failure to pay taxes levied under the Franchise Tax Act are clearly set forth. There, the court said, 9 Cal.2d at page 19, 68 P.2d at page 969:

"From a consideration of these statutes, the policy is clearly to prohibit the delinquent corporation from enjoying the ordinary privileges of a going concern, in order that some pressure will be brought to bear to force the payment of taxes. Under the Political Code, § 3669c, which covers certain state taxes other than those specified in the Franchise Tax Act, the penalty is not made too drastic; the corporation may not sue, but it may defend. The theory is, doubtless, that the result of failure to pay state taxes should not be to offer an opportunity for the filing and successful prosecution of fraudulent or groundless suits against a corporation which has assets subject to execution, and which, if prevented from defending actions, would be a prey to sharpers. But the exception covering the defense of actions is omitted from the Franchise Tax Act, which prescribes the entire procedure of levy and collection of the taxes imposed thereunder as well as the penalties for delinquency. The omission seems deliberate, and indicates the legislative intention that such corporations shall be deprived of the power to defend suits. The statute expressly deprives the corporation of all 'corporate powers, rights and privileges', subject to one exception, which is specifically set forth, the right to amend the articles to change the name. As the court declared in *Ransome-Crummey Co. v. Superior Court*, supra, 188 Cal. 393, 397, 205 P. 446, 448: 'During the time its taxes were unpaid, petitioner was shorn of all rights save those expressly reserved by the statutes.' The conclusion which we are forced to draw is that the appellant corporation has lost the right to defend the suit in question, and since it has

no right to defend, it has no right to appeal from an adverse decision."

To the same effect are *Graceland v. Peebler*, 50 Cal.App.2d 545, 123 P.2d 527, and 2 Witkin California Procedure 1013, as well as the cases cited in *Reed v. Norman*, supra. Although the *Boyle* case, supra, concerned a domestic rather than a foreign corporation, since a domestic corporation is merely suspended while a foreign corporation forfeits, the law applicable to the lesser situation of suspension should also apply to the more drastic penalty of forfeiture.

In reply to respondent's contention that the objection should have been in the pleadings, appellants state that in the cited cases the issue was presented to the court after the commencement of proceedings by motion to dismiss just as it was in the present case, and this appears to be an appropriate method in which to present the matter at any time it is brought to the attention of the court.

[2] In view of the provisions of section 23301 of the Revenue and Taxation Code, and the authorities hereinbefore cited, we believe that there is no escape from the conclusion that respondent corporation had no right to defend in the instant action, or even to participate therein during the time that its corporate rights were suspended. Therefore the trial court should have granted appellants' motion to strike the pleadings of respondent and certainly the trial court had no right to consider the defenses of the statute of limitations, laches, and estoppel which respondent set up in its answers. Section 23301 expressly deprived respondent corporation of all "corporate powers, rights and privileges", and the right to defend against an action is included in such powers, rights and privileges. It is true that in the instant case the point was not raised by appellants until the final day of the trial and long after the action was commenced, but that does not aid respondent because the fact remains that the powers, rights and privileges of respondent corporation were not revived and restored

before the entry of the judgment appealed from.

[3, 4] The record shows without dispute that the lease in controversy was a lease of substantially all of the assets of appellant corporation and the court found that it was within the ambit of section 3901 of the Corporations Code. The record also shows without dispute that the lease was never approved by the "vote or written consent" of a majority of the shareholders, as required by the section. The respondent corporation having forfeited its right to defend against the action or to file any pleadings therein, the court erred in considering the special defenses of laches, estoppel and the statute of limitations raised by respondent. Since the judgment was based upon the court's findings in favor of respondent upon said special defenses, the judgment in favor of respondent corporation is clearly without support and must be reversed.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.



154 Cal.App.2d 825

CITY OF DUNSMUIR, a municipal corporation, Reno R. Cesaratto, Eleanora Cesaratto, George McLaughlin, Ed Cripps, Mr. and Mrs. Guay, Mr. and Mrs. Herbert Bland, Mr. and Mrs. Perry Cooper and Lydia H. Brown, Plaintiffs and Respondents,

v.

**Carlos L. SILVA and Bertha Silva,
Defendants and Appellants.**

Civ. 9087.

**District Court of Appeal, Third District,
California.**

Oct. 31, 1957.

Action to enjoin defendants from maintaining a building on a certain strip of land

over which plaintiffs had an easement for travel. The Superior Court, Siskiyou County, James M. Allen, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that where defendants, notwithstanding protests by plaintiffs built their garage in such a manner that it encroached upon driveway easement rights of plaintiffs, defendants were not entitled to maintain their garage in such location, even though the reduced driveway would still permit an automobile to pass, and even though there had been no monetary damage.

Judgment affirmed.

1. Easements — 61(3)

Where defendants, notwithstanding protests by plaintiffs built their garage in such a manner that it encroached upon driveway easement rights of plaintiffs, defendants were not entitled to maintain their garage in such location, even though the reduced passageway would still permit an automobile to pass, and even though there had been no monetary damage.

2. Easements — 61(10)

Where an encroachment of defendant's garage on plaintiffs' driveway easement rights could be rectified at a cost of about \$800, in view of number of persons whose rights were being invaded by continuance of garage, trial court did not abuse its discretion in ordering its removal, on any theory of balancing conveniences, notwithstanding fact that despite encroachment, a passageway remained which would permit automobiles to pass.

Burton, Lee & Hennessy, Yreka, by Lawrence J. Lee, for appellants.

L. N. Lorenzen, Mount Shasta, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment ordering that appellants be perpetually enjoined from maintaining any building or obstruction on or impediment to traffic along

a certain strip of land over which the court decreed that respondents had an easement for travel. The strip is referred to as an alley, although it is not shown upon any city map. In 1953 the respondent city, over the objections of other respondents, issued a building permit to appellants which authorized construction of a garage on appellants' premises. When completed, the garage encroached upon the claimed easement area and thereby reduced the usable part of that area to a point where, instead of being approximately 12 feet in width, it was only 9½ feet.

Appellants do not contend that the evidence is insufficient to uphold the court's findings as follows: That there is a certain unnamed street or alley running parallel to Florence Avenue and Rose Avenue within the City of Dunsmuir and lying between the said two avenues in Block D of Brandstetter's Addition to the city; that the alley, by dedication, belongs to the city; that all of the plaintiffs, save the city, own property abutting upon said alley; that for more than twenty years past there has been a common method of ingress and egress to and from said alley and Florence Avenue, lying across Lot 6, Block A and Lot 1 of Block D of Brandstetter's Addition to the city; that the said common method of ingress and egress to and from the alley is described as beginning at the northwest corner of Lot 1, Block D of Brandstetter's Addition to the City of Dunsmuir, thence north 11° 45' east, 12 feet along Florence Avenue, thence south 86° 17' east 68.25 feet, thence south 11° 45' west 12 feet, thence north 86° 17' west 68.25 feet to the place of beginning; that defendants caused a garage to be erected which partly lies across and prohibits free passage along and over the said described parcel.

Pursuant to said findings the court declared that respondents were the owners of an easement over and across said described strip of land as a means of travel between Florence Avenue and said unnamed alley and that because of the encroachment of appellants' garage injunctive relief ought to be granted.

[1] Appellants contend that the encroachment of appellants' garage upon the easement area is slight, that no damage is shown to have resulted therefrom, and that consequently under the rule de minimus the court ought not to have granted a mandatory injunction, which to be obeyed will necessitate removal of at least that part of the garage which encroaches upon the easement. They support this claim by reference to the court's finding that "any damage suffered by the plaintiffs herein is not ascertainable and is nominal," and that "it would be difficult for the Court to fix exact damages." The evidence disclosed an encroachment which reduced the usable width of the easement from 12 to 9½ feet. Appellants argue that, since there still remains a 9 foot 6 inch passageway which will permit automobiles to pass, the court abused its discretion in granting the remedy of injunction. These contentions cannot be sustained. The findings concerning the difficulty of measuring money damages, including the finding that to the date of the judgment the money damage had been nominal, afford no reason why the appellants should be allowed to maintain their encroachment on the easement area. An injunction will issue to prevent a wrongful act if the continuance of such act will, in time, ripen into an easement which will deprive a plaintiff of the use of his property or some part thereof or take from him the existence of his estate although the immediate damage is inappreciable. *Felsenthal v. Warring*, 40 Cal.App. 119, 180 P. 67, 71; *Allen v. Stowell*, 145 Cal. 666, 79 P. 371, 68 A.L.R. 223. In *Felsenthal v. Warring*, supra, the rule relied upon by appellants is stated thus:

"* * * [I]t has been held that a court of equity may decline to issue a *mandatory* injunction where the defendant is engaged in a business that serves the public; or where, by innocent mistake, erections have been placed a little upon the plaintiff's land and the damage caused to defendant by their removal would be greatly disproportionate to the injury of which

P. W. RYAN, Plaintiff and Respondent,

v.

Ruth A. SOUZA, Defendant and Appellant.

Civ. 9224.

District Court of Appeal, Third District,
California.

Nov. 13, 1957.

Rehearing Denied Dec. 5, 1957.

Hearing Denied Jan. 6, 1958.

the plaintiff complains, and the defendant has proceeded with the erection while laboring under an innocent mistake of fact or a bona fide claim of right, and the plaintiff has been guilty of laches."

The facts in this case afford no room for the application of the rule relied upon by appellants. In this case there were constant protests by the individual respondents from the very moment when appellants began to construct their garage and it became apparent by the lines of their foundation work that they were encroaching upon the easement area that had been for so long commonly used. When appellants applied for their building permit the individual respondents protested to the city council that the appellants were intending, if they received their permit, to so build their garage as to encroach upon the easement rights of the respondents. The permit granted gave no authority to appellants to interfere with the easement rights of the respondents, and, as we have said, when it appeared that such encroachments would result from the building as contemplated the protests of the individual respondents were prompt and continuous. Notwithstanding, the appellants defiantly continued to build their garage and erected it in such manner that it did encroach upon the rights of the respondents. Under such circumstances it is obvious that the rule relied upon has no application.

[2] Appellants next contend that the court should have "balanced the conveniences", and refused to require the removal of the obstruction to respondents' easement rights. But from the evidence it appears that the encroachment could be rectified at a cost of about \$800 and, in view of the number of persons whose rights were being invaded by the continuance of the structure, it cannot be said that the court abused its discretion in ordering its removal.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Action to declare a lien on property of the defendant wife in the amount of a judgment recovered against the former husband after entry of a final decree of divorce. Judgment for plaintiff in the Superior Court, Sacramento County, Grover W. Bedeau, J., and the wife appeals. The District Court of Appeal, Warne, J. pro tem., held the judgment was unenforceable where there was no evidence that it arose out of a debt incurred during marriage and where it was not limited to the amount of equity the wife and her former husband had in the property while it was community.

Judgment reversed.

1. Husband and Wife ⇨268(2)

Proof that the judgment arose out of a debt incurred during marriage must be shown before a judgment creditor may have his judgment satisfied from property which was the community property of the wife and her former husband.

2. Husband and Wife ⇨270(8)

Evidence that plaintiff brought an action against defendant's former husband for exact amount of his indebtedness to creditor and entitled that action as plaintiff against former husband and obtained a default judgment did not necessarily prove that it was one and the same claim, where judgment roll in former case was not offered in evidence and judgment made no mention of any assignment of claim, so that there was no proof that judgment arose out of a debt incurred during marriage which was necessary before judgment

could be satisfied from community property of defendant and her former husband.

3. Husband and Wife $\S$ 268(2)

A judgment creditor was not entitled to have his judgment satisfied from property which was the community property of the defendant wife and her former husband, where the judgment impressed a lien on the wife's property for the full amount of the judgment and was not limited to the equity the wife and her former husband had in the property while it was community or at least what that equity was, at the date of the entry of the final decree of divorce.

Carl C. Kuchman, and Roy B. Hibbitt,
Sacramento, for appellant.

Francis P. Walsh and Henry Gross,
San Francisco, for respondent.

WARNE, Justice, pro tem.

This is an appeal from a judgment declaring a lien on certain property of appellant in the amount of a judgment recovered against her former husband after the entry of the final decree of divorce.

On February 13, 1951, appellant was granted an interlocutory decree of divorce which approved a property settlement agreement pursuant to the terms of which her husband had deeded to her his interest in the property herein involved. The final decree of divorce was entered on March 11, 1952. Thereafter, on November 7, 1952, judgment in favor of respondent in the amount of \$6,381.99 was rendered against appellant's former husband in an action in which he was served by publication and the subject property attached. Thereafter, a writ of execution which was issued was returned nulla bona. Respondent brought the present action to have a lien declared on the subject property in the amount of the unpaid judgment. From the judgment granting the relief sought appellant has appealed.

It appears from the record that, during the marriage of appellant and her former husband, he owned and operated a store in

Carmichael, California, known as Frank's Feed Store. The evidence shows that at the time of the interlocutory decree of divorce appellant's former husband owed the Ralston Purina Company \$6,381.99 for merchandise purchased for the store. The amount of the obligation is the same as the amount of the judgment respondent recovered in the prior action. After that judgment was rendered Ralston Purina Company received \$765.84 on the account and respondent's counsel stipulated in open court that respondent's judgment could be reduced by that amount. Counsel for appellant did not join in the stipulation. So far as the record shows he remained silent. In the instant case plaintiff alleges in his complaint that on April 6, 1951, the Ralston Purina Company, for a valuable consideration, assigned to him the indebtedness of Frank Souza, doing business as Frank's Feed Store, and that he is now the owner and holder thereof. The answer denies this allegation. The trial court found, among other things, that the allegation is true.

[1,2] We have searched the record and fail to find any evidence to support the trial court's finding that respondent is the assignee of Ralston Purina Company's claim against appellant's former husband. Respondent did not appear at the trial and although two witnesses of the Ralston Purina Company were called and testified for respondent, neither said a word about an assignment of the Ralston Purina Company's claim to respondent. The fact that respondent brought action against appellant's former husband for the exact amount of his indebtedness to the Ralston Purina Company and entitled that action *P. W. Ryan, Plaintiff, v. Frank Souza, doing business as Frank's Feed Store, Defendant*, and obtained a default judgment for said amount does not necessarily prove that it is one and the same claim. The judgment roll in the former case was not offered in evidence, although a certified copy of the default judgment is in evidence. The judgment makes no mention of any assignment

Glenn Riley PRESCOTT, Plaintiff and Respondent,

v.

Frank M. CHRISTIANSEN and Thelma C. Christiansen, Defendants and Appellants.

Civ. 5571.

District Court of Appeal, Fourth District, California.

Nov. 19, 1957.

of the claim. Therefore, so far as the record shows in the instant case, there is no evidence that the judgment arose out of a debt incurred during marriage, a fact which must be proved before a judgment creditor may have his judgment satisfied from property which was community property of appellant and her former husband. Frankel v. Boyd, 106 Cal. 608, 615, 39 P. 939; Bank of America etc. Assoc. v. Mantz, 4 Cal.2d 322, 49 P.2d 279; Vest v. Superior Court, 140 Cal.App.2d 91, 95, 294 P.2d 988.

[3] Even if it could be reasonably inferred that respondent's judgment was based on a community debt, the judgment in the instant case could not be sustained, as it impresses a lien on appellant's property for the full amount of the judgment, whereas it should be limited to the amount of the equity appellant and her former husband had in the property while it was community, or at least what that equity was as of the date of the entry of the final decree of divorce. The rentals and the amount paid on the principal since the community nature of the property ceased cannot be subject to the lien. As of March 11, 1952, the date of the final decree of divorce, there was due and owing on this property, together with a piece of property referred to as the Carmichael property, the sum of \$12,000, and those properties were subject to a deed of trust to secure said indebtedness. There is some evidence to show that the purchase price of the subject property was \$12,000. There is no evidence to show that the property increased in value after appellant and her husband acquired it. To the contrary, there is evidence that appellant was unable to sell the property for the price of \$12,000. The trial court should have found the value of appellant's equitable interest in the property as of the date of the final decree of divorce. Since the judgment must be reversed for the reasons heretofore stated, we do not deem it necessary to discuss the other points raised in the briefs.

The judgment is reversed.

PEEK and SCHOTTKY, JJ., concur.

Suit for specific performance of an agreement for exchange of properties. From a judgment for plaintiff in the Superior Court of Orange County, Robert Gardner, J., the defendants appealed. The District Court of Appeal, Barnard, P. J., held that specific performance would not be granted where the plaintiff by conveying her property had placed herself in the position where she could not comply with the agreement.

Judgment reversed with instructions.

Specific Performance ⇄88

Where parties entered into an escrow agreement by which plaintiff agreed to exchange real property for real property owned by the defendant and the agreement called for deposit in escrow of various conveyances plaintiff was not entitled to specific performance of the agreement where she had disposed of her property thus putting herself in the position where she could not comply with the agreement.

Richmon & Bradley, Santa Ana, for appellants.

W. E. Starke, San Diego, for respondent.

BARNARD, Presiding Justice.

The parties to this action entered into an escrow agreement at a title company by which the plaintiff agreed to exchange certain real property owned by her for certain real property owned by the defendants. The escrow agreement called for the deposit in escrow of various instruments, in-

cluding conveyances of the respective properties. The plaintiff later brought this action for specific performance of this agreement. Judgment was entered in favor of the plaintiff on May 22, 1956, decreeing such specific performance and ordering each party to carry out the terms of the escrow agreement. The defendants appealed from that judgment.

Some two months later the plaintiff deeded her property, which she had agreed to convey to the defendants, to a third party and that deed was recorded. Shortly thereafter, this third party recorded a mortgage covering that property to still another party securing a note for \$20,000. Thereafter, the defendants applied to this court for leave to produce additional evidence, and in connection therewith submitted certified copies of the deed and mortgage just referred to. No objection was made by the plaintiff and that application was granted.

Subsequently, the defendants filed their opening brief stating that the plaintiff had put it out of her power to comply with the agreement and with the court order, and asking that the judgment be reversed with appropriate directions for the entry of a judgment rescinding or cancelling the exchange agreement, and ordering that all instruments and other things deposited by each of the parties in the escrow be returned. The attorney for the plaintiff filed a letter saying that the plaintiff would not file an answering brief as she had disposed of the property, this putting herself in a position where she could not comply with the agreement, and consenting to the relief asked for by the defendants. When the matter came on regularly for hearing both parties waived oral argument.

The judgment is reversed with instructions to the trial court to enter a judgment rescinding or cancelling the exchange agreement, and ordering that anything deposited in escrow by the respective parties be returned to them, upon the payment by each of his proper share of the escrow fees.

GRIFFIN and MUSSELL, JJ., concur.

Edward J. HAMMOND, Plaintiff and Appellant,

v.

**BALBOA BAY CLUB, a corporation, et al.,
Defendants and Respondents.**

Civ. 5547.

**District Court of Appeal, Fourth District,
California.**

Nov. 13, 1957.

Rehearings Denied Dec. 11, 1957.

Hearing Granted Jan. 6, 1958.

Action against club, a corporation, for injuries to diver occurring in club's swimming pool when diver's body struck swimmer in water. The Superior Court, Orange County, John Shea, J., entered judgment notwithstanding verdict of jury, and diver appealed. The District Court of Appeal, Griffin, J., held that question of club's claimed negligence in failing to maintain lifeguard on duty and issue of contributory negligence of diver in not looking to see whether there was swimmer beneath him before he made dive, were for jury.

Reversed and new trial granted.

1. Clubs ⇨12

In action against club, a corporation, for injuries to diver occurring in club's swimming pool when his body struck a swimmer in water, question as to club's claimed negligence in failing to maintain lifeguard on duty and issue of diver's contributory negligence in allegedly failing to look and take necessary precaution to see swimmer beneath him before he took dive into water were for jury. West's Ann. Code Civ.Proc. § 629.

2. New Trial ⇨72

A trial court should weigh the evidence and grant a new trial where it believes that preponderance of evidence is opposed to jury's findings. West's Ann. Code Civ.Proc. § 629.

3. New Trial ⇨163(2)

Where defendant moved for judgment notwithstanding verdict, and, before hearing on motion, defendant filed notice of

intention to move for new trial and to set aside verdict on stated grounds, including insufficiency of evidence, court granted motion for judgment notwithstanding verdict with notation, "on ground of contributory negligence as matter of law", and denied motion for new trial, but in its denial ordered prior verdict vacated, without indicating grounds, and that plaintiff was to take nothing, court in effect granted a new trial. West's Ann.Code Civ.Proc. §§ 629, 657.

James D. Garibaldi and Warren J. Lane, Los Angeles, for appellant.

Chase, Rotchford, Downen & Drukker, Donn B. Downen, Jr., and Otto M. Kaus, Los Angeles for respondent Balboa Bay Club.

GRIFFIN, Justice.

Plaintiff and appellant, as guest of one of the members of defendant and respondent Balboa Bay Club, a corporation, suffered a permanent injury as a result of a dive from the diving board in defendant's pool when his body struck a swimmer in the water. It is plaintiff's claim that defendant was negligent in failing to maintain a life-guard on duty and as a proximate result of said negligence he was injured. Defendant denied these allegations and alleged contributory negligence on the part of plaintiff and assumption of risk.

At the conclusion of plaintiff's case, a motion for nonsuit was denied. Later, a motion for a directed verdict for defendant was likewise denied. A jury verdict for \$100,000 was returned against defendant. Defendant moved for judgment notwithstanding the verdict, reserving the right to move for a new trial if the motion was denied. Before the hearing on the motion defendant filed a notice of intention to move for a new trial and to set aside the verdict on all stated grounds, including insufficiency of the evidence. This motion was made and set for hearing at the same time as the motion for judgment notwithstanding the verdict. The court granted the motion

for judgment notwithstanding the verdict with a minute notation: "On the ground of contributory negligence as a matter of law". Then it considered the motion for new trial which was denied, but in such denial it ordered the "prior verdict vacated" without indicating the grounds, and "plaintiff to take nothing by his action". The judgment from which this appeal was taken recited that the judgment for defendant notwithstanding the verdict was granted, plaintiff should take nothing by reason of his complaint, and that defendant have judgment against the plaintiff.

Had the trial court believed plaintiff was guilty of contributory negligence barring a recovery it should have granted the motion for new trial on the grounds of insufficiency of the evidence to support the judgment, and no complex problem as is now presented would then have arisen, since a wide discretion is allowed trial courts in such determinations. The reasons for the rulings made are not apparent. It may well be that the trial judge was so convinced of the contributory negligence of the plaintiff, as a matter of law, that a judgment for defendant notwithstanding the verdict could not be reversed and that accordingly it would be unnecessary to grant a new trial on that same ground. It is argued, on the other hand, that although the trial judge may have believed that the evidence showed contributory negligence as a matter of law, still if it be found on appeal that he was in error, plaintiff should recover. The first claim appears to be more tenable, as reflected by the record. The reason assigned in the minutes by the trial judge for granting the judgment notwithstanding the verdict was not carried into the judgment. It does affirmatively appear he did not believe defendant should recover by reason of his contributory negligence. There was a great amount of evidence that plaintiff failed to look and take the necessary precaution to see the swimmer who was beneath him before he took the high dive into the water below. On the other hand, plaintiff testified he did go to the end of

the diving board, made an observation, and then returned and proceeded to run and dive and then, for the first time, noticed the swimmer beneath him. Plaintiff's only claim of negligence of defendant is the absence of the regularly employed lifeguard, who had momentarily been called from the pool to set up some beach umbrellas near there for some other guests, and had he been present he could have notified plaintiff of the presence of this swimmer.

The guard testified he saw plaintiff and his party at the pool "acting loud" and "splashing a lot", and one was trying to be funnier than the other; that he had no fear for them because they appeared to be good swimmers and experienced divers; that he returned after the accident and heard plaintiff say several times: "It was my fault—I should not have been fooling around". These statements were corroborated by other witnesses. A picture taken a little over an hour before the accident showed plaintiff and the others "with drinks in their hands". There was testimony of expert divers and lifeguards that it is the duty of a diver to clear himself before he dives because a swimmer cannot see up but the diver can see down, and that divers are told to look for swimmers before leaping, and there is no duty on a lifeguard to warn a diver when a swimmer is in the water under the board and plainly visible to the diver.

Plaintiff testified he did not remember saying it was his fault but he may possibly have said it was an unfortunate thing and no one was to blame; that he never looked to see whether there was a lifeguard near the pool at the time and he was not concerned with his presence or absence.

[1] While the evidence may well justify the trial judge's belief that plaintiff was guilty of contributory negligence, it cannot be said that he was guilty of contributory negligence as a matter of law or that it was conclusively shown that plaintiff assumed the risk. The instant

case was decided by the trial court before the decision in the case of *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48. Under somewhat similar circumstances the court there said that there was nothing in the evidence which would justify the conclusion that the plaintiff was guilty of contributory negligence as a matter of law, and that the issue of contributory negligence was properly submitted to the jury for its determination. It also stated that the defense of assumption of risk as a matter of law was likewise unavailing. See, also, *Anthony v. Hobbie*, 25 Cal.2d 814, 155 P.2d 826; *Murphy v. Atchison T. & S. F. Ry. Co.*, 139 Cal.App.2d 792, 294 P.2d 458; *Prescott v. Ralph's Grocery Co.*, 42 Cal.2d 158, 265 P.2d 904; 19 Cal.Jur. pp. 697-699, sec. 119. It therefore appears that the evidence as to defendant's claimed negligence and the claimed contributory negligence of plaintiff was sufficient to go to the jury. Accordingly the judgment notwithstanding the verdict must be reversed. *Lindsey v. De Vaux*, 50 Cal.App.2d 445, 123 P.2d 144.

[2] It is true that section 629 of the Code of Civil Procedure provides for the making of a motion for judgment notwithstanding the verdict or in lieu thereof a motion for new trial and, if made, the court shall pass upon both of them. It rather appears that the trial judge did not fully consider the merits of the motion for new trial and the effect of his denial of that motion in case the judgment notwithstanding the verdict was reversed. In this connection this feature of the motion for new trial must be considered. In addition to a request for a new trial defendant specifically requested that the court "vacate and set aside the verdict of the jury and the judgment rendered thereon". The ruling on that motion, as noted by the minutes, and in sequence, was that the judgment notwithstanding the verdict was granted. The court then proceeded to hear the motion for new trial and denied the new trial but in doing so ordered "the prior verdict vacated * * * and plaintiff take nothing by his action". As the

record now stands, the court, on the motion for new trial, in effect set aside the verdict and judgment based thereon, and no appeal has been taken from that order. It therefore would most conclusively appear that the court did not intend that the jury's finding in respect to the absence of contributory negligence on the part of the plaintiff should stand, where the court, sitting as a thirteenth juror, believed that he was guilty of negligence as a matter of law. It has been repeatedly held that a trial court should weigh the evidence and grant a new trial where it believes that the preponderance of the evidence is opposed to the jury's findings. *Conwell v. Varian*, 20 Cal.App. 521, 130 P. 23; 34 West's Cal. Dig., New Trial, §71, p. 429 et seq. It affirmatively appears that on the motion for new trial the trial judge did not intend that the jury's verdict against defendant should stand. It was specifically ordered vacated and set aside and it was ordered that plaintiff take nothing against the defendant. Even though it may have wrongfully granted a judgment for defendant notwithstanding the verdict, if the judge believed, from the evidence, that plaintiff was guilty of contributory negligence as a matter of law, barring recovery, as indicated, most certainly he did intend that the verdict should be set aside even though the question of plaintiff's contributory negligence was a matter of fact.

Under section 657 of the Code of Civil Procedure, on a hearing on a motion for new trial the "verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party

aggrieved." The aggrieved party made the motion for new trial. The trial court set aside the verdict and judgment based thereon and directed that plaintiff do not recover. No appeal was taken from this order made on the hearing of the motion. Assuming that the verdict and judgment were therefore properly set aside on said motion, the remaining portion of the order denying a new trial had no force or effect on the verdict or judgment and did not restore the verdict or judgment to its former status. *Etchas v. Orena*, 121 Cal. 270, 272, 53 P. 798; 36 Cal.Jur.2d p. 378, sec. 168.

[3] In *Eades v. Trowbridge*, 143 Cal. 25, 76 P. 714, the court, on a motion for new trial, made an order setting aside the verdict but without expressly granting a new trial. The Supreme Court held that the trial court, by its action, impliedly granted a new trial and held that an appeal from such an order may be taken. The dilemma here presented by the trial court's ruling is difficult of solution. We prefer to conclude that by its ruling on the motion for new trial it did, by setting aside the judgment, in effect grant a new trial. There is sufficient justification in the record to warrant the action of the trial court even though insufficiency of the evidence may not have been directly stated as one of the grounds for granting it, where it was granted on the grounds stated in the notice of motion, which in themselves might indicate a new trial should be had.

Judgment for defendant notwithstanding the verdict is reversed. A new trial on the merits is authorized and should be had.

BARNARD, P. J., and MUSSELL, J., concur.

155 Cal.App.2d 8

**James R. COLE and Eulalie Cole, Plaintiffs
and Respondents,**

v.

**Ernest AMES and Eveline Ames,
Defendants and Appellants.**

Civ. 22245.

**District Court of Appeal, Second District,
Division 1, California.**

Nov. 6, 1957.

Rehearing Denied Dec. 3, 1957.

Action to cancel a note and trust deed given to secure the same, to remove the cloud created by such deed and note, and for other relief. The Superior Court, Los Angeles County, William P. Haughton, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, White, P. J., held that where the note and trust deed were secured from purchasers of certain realty for an excess over and above purchase price represented to Veterans Administration in order to procure a federal guaranty of a portion of a loan, even though holders of note and mortgage did not actively participate in procuring veteran's loan, and such loan was entirely separate from note and trust deed of holders, and even though neither holders nor purchasers were cognizant of violation of federal law due to execution of such note and mortgage, such note and trust deed were not enforceable.

Judgment affirmed.

1. Estoppel ⇨70(1)

A party is not required to take action against a hostile claim which is not of a nature to ripen into a valid adverse title.

2. Quieting Title ⇨29

An action to remove or cancel an adverse claim is not barred by lapse of time until the illegal or voidable claim is asserted in some manner.

3. Limitation of Actions ⇨60(10)

Where plaintiffs brought an action to cancel a note and deed of trust given to secure same and to remove or cancel such deed of trust and note from title of plain-

tiffs, such action was not barred by statute of limitations, notwithstanding the fact that the note and trust deed were executed in 1948, and the action to cancel same was not filed until 1955. West's Ann.Code Civ.Proc. §§ 318, 338, subd. 4, 343.

4. Quieting Title ⇨29

Lapse of time alone does not bar a suit to quiet title.

5. Appeal and Error ⇨1039(13)

Where facts found and proved in an action to cancel a note and trust deed were related to issues framed by pleadings, and were not in direct conflict with allegations of the complaint, judgment for plaintiff would not be reversed on theory that there was a fatal and material variance between allegations of the complaint and the proof, which misled defendants to their prejudice. West's Ann.Code Civ.Proc. § 469.

6. Armed Services ⇨109

Where a note and trust deed were secured from purchasers of certain realty for an excess over and above purchase price represented to Veterans Administration in order to procure a federal guaranty of a portion of a loan, even though holders of note and mortgage did not actively participate in procuring veteran's loan, and such loan was entirely separate from note and trust deed of holders, and even though neither holders nor purchasers were cognizant of violation of federal law due to execution of such note and mortgage, such note and trust deed were not enforceable. Servicemen's Readjustment Act of 1944, § 500(a) as amended 38 U.S.C.A. § 694(a).

7. Armed Services ⇨109

Where a veteran and his wife took title to a home in joint tenancy, and secured a loan upon the property guaranteed in part by the Veterans Administration, wife could not be held bound to pay an amount in excess of appraised value fixed by Administration and therefore, note and trust deed executed by veteran and his wife for an amount in excess of such appraisal by the Veterans Administration were invalid in toto. Servicemen's Readjustment Act of

1944, § 500(a) as amended 38 U.S.C.A. § 694(a).

8. Armed Services ☞109

When a federal guaranty of a loan to a veteran is procured on his purchase of a home, an agreement to pay an amount in excess of appraisal by Veterans Administration is illegal and unenforceable. Servicemen's Readjustment Act of 1944, § 500(a) as amended 38 U.S.C.A. § 694(a).

9. Appeal and Error ☞970(2)

Where there is any basis for exercise of trial court's discretion in determining that a proper foundation has been proved for admission of business records, an appellate court will not disturb such decision. West's Ann.Code Civ.Proc. § 1953f.

10. Appeal and Error ☞1051(1)

Evidence ☞373(6)

In action to cancel a note and trust deed, in view of testimony that copy of veteran's loan appraisal was kept by mortgagee in regular course of its business, proper foundation was laid for admission of such record as one kept in regular course of business, and even if trial court erred in admitting such record in evidence, such error was not prejudicial in view of testimony received without objection that note and trust deed in question were executed for an amount in excess of appraisal of Veterans Administration. Servicemen's Readjustment Act of 1944, § 500(a) as amended 38 U.S.C.A. § 694(a); West's Ann.Code Civ. Proc. § 1953f.

A. James Ayers and Benjamin D. Brown, Los Angeles, for appellants.

Miller & Maddox, Loren Miller, Los Angeles, for respondents.

WHITE, Presiding Justice.

The defendants, Ernest Ames and his wife, appeal from a judgment that "the defendant Ernest Ames surrender to the plaintiffs the note dated February 12, 1948, for \$3,000.00, secured by deed of trust, signed and executed at Los Angeles, California, by James R. Cole and Eulalie Cole, and payable

to Ernest Ames, and that the deed of trust given to secure the same, * * * be, and the same hereby is, cancelled and annulled, and rendered wholly void and of no force and effect, and that the cloud created by the said deed of trust and note upon the title of the plaintiffs' be, and the same hereby is, removed * * *; and defendant Ernest Ames is hereby ordered and directed to execute a reconveyance of the said deed of trust."

Respondent James R. Cole, a veteran of World War II, and his wife, purchased a home from one Arnold in 1948. The Bank of America agreed to and did make a "G. I. Loan" of \$10,000 evidenced by respondents' note secured by a first deed of trust. The purchase was "financed under the G. I. Bill," a "G. I. Loan" secured by Fairchild, the real estate agent of the owner. Respondents agreed to and did pay \$1,600 plus escrow charges in cash. The purchase price shown in the Escrow File is \$11,600. The \$3,000 note and second deed of trust referred to in the above quoted judgment (although dated and delivered to appellants by the realtor after the close and outside of the escrow) were signed at the same time as the \$10,000 note and trust deed in favor of the bank, both were then left by appellants with Fairchild, and they were "a part of the purchase price of the property."

The deal was managed by Fairchild, representing Arnold, under whose instructions the \$3,000 note and trust deed were made in favor of defendant Ames in payment of Arnold's debt to Ames. Respondents had never owned real property and knew nothing about the law. Appellants and respondents had no dealings with each other. Fairchild represented to respondents that the deal had been approved by the Veterans Administration. On cross-examination, respondent James R. Cole was asked, "Now, when did you first become familiar with the fact that there was some law governing the placing of a second trust deed on property in which a Government loan had been obtained?" He replied that when respondents had missed a payment and appellants had threatened foreclosure about January

or February, 1949, a "real estate friend" had advised him to see the Veterans Administration, and the Veterans Administration had sent him to see the U. S. Attorney. He was then asked, "And did the U. S. Attorney advise you at that time as to whether this transaction was proper or legal or not?" His answer was that "Mr. Steel told me that that was strictly illegal and to stop payment on it, and I did."

The instant action was filed in February, 1955. By their answer, appellants pleaded that the action was barred by the limitations of the following sections of the Code of Civil Procedure: Sec. 338(4), providing that an action for relief on the ground of fraud must be brought within three years after the discovery of the facts constituting the fraud; Sec. 343, providing that an action seeking "relief not hereinbefore provided for"—cancellation of the note and trust deed because of illegality—is barred in four years; and Sec. 318, providing that an action to adjudicate ownership of real property is barred in five years after knowledge of the adverse claims.

[1-3] Appellants rely upon the cited sections of the Code of Civil Procedure, *supra*, and the decision in *Moss v. Moss*, 20 Cal.2d 640, 645, 128 P.2d 526, 141 A.L.R. 1422. The *Moss* decision does not determine the issue in the instant action. Whether the statute of limitations has run, depends upon the nature of the action. A scrutiny of the allegations of the complaint and the character of the relief sought discloses that the gravamen of the instant action is to remove a cloud and quiet respondents' title to real property. The alleged fraud and illegality of the transaction are merely incidental and not determinative of the nature of the action. A party is not required to take action against a hostile claim which is not of a nature to ripen into a valid adverse title. An action to remove or cancel an adverse claim such as that of appellants in the instant action is not barred by lapse of time until the illegal or voidable claim is asserted in some manner. *Secret Valley Land Co. v. Perry*, 187 Cal. 420, 425-426, 202 P. 449; *Newport v. Hatton*, 195 Cal. 132, 145-146, 231 P. 987.

The trial court correctly held that the instant action was not barred by the statute of limitations.

[4] No claim of laches is made by appellants and no showing is made of any disadvantage to appellants resulting from respondents' delay in bringing the instant action. Lapse of time alone does not bar a suit to quiet title. *Carlson v. Lindauer*, 119 Cal.App.2d 292, 310, 259 P.2d 925; *Kirkpatrick v. Tapo Oil Co.*, 144 Cal.App.2d 404, 412, 301 P.2d 274. Respondents, who live upon the property and have made no payments on the trust deed note since learning of its alleged invalidity, have a continuing right to the aid of a court of equity to determine the nature and effect of the adverse claim in an action brought by or against them. 44 Am.Jur. 47; 74 C.J.S. Quietening Title § 48, p. 69; 22 Cal.Jur. 123, and cases there cited.

[5] Appellants contend that "[i]t is a fatal and material variance where fraud is alleged but something else is proven," and on oral argument state that, the action was not tried as one to quiet title and that quieting respondents' title was a mere afterthought included in the judgment.

We are persuaded however, that the action was tried and decided as a quiet title action and that, as in *Colbert v. Colbert*, 28 Cal.2d 276, 281, 169 P.2d 633, 635, "there is no variance between the allegations in the pleading and the proof of which misled the appellant to his prejudice; thus the court was justified in finding according to the evidence in spite of the alleged limited scope of the pleading." Unlike the case of *Schirmer v. Drexler*, 134 Cal. 134, 139, 66 P. 180, and other cases relied upon by appellant, the facts proved and found in the instant action are related to the issues framed by the pleadings and none are in direct conflict with the allegations of the complaint.

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (Code Civ.Proc., Sec. 469.) Where a mat-

ter has been treated as in issue at the trial and a finding made upon that issue, the complaint becomes immaterial. *Boro v. Ruzich*, 58 Cal.App.2d 535, 137 P.2d 51." *Thompson v. Hickman*, 89 Cal.App.2d 356, 358, 200 P.2d 893, 894. Appellants claim no misunderstanding of the issues to be tried in the instant action. Also, "the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory." *Sears v. Rule*, 27 Cal.2d 131, 140-141, 163 P.2d 443, 448.

[6] It is appellants' claim that since they did not actively participate in procuring a veteran's loan in violation of federal law, and the federal guarantee of a portion of the loan made by the bank was entirely separate from and covered no part of the note and trust deed in their favor, any illegality of such procurement should not taint their note and trust deed, or prevent their collection of the balance due them as shown by their cross-complaint.

While, in *Young v. Hampton*, supra, both parties, the plaintiff contractor and the defendant buyers, were fully aware of the illegality of the transaction, and in the instant action neither the respondents nor the appellants were cognizant of such violation, we are of the opinion that such distinction is not sufficient reason for enforcing the note and trust deed for such illegal excess over and above the purchase price represented to the Veterans Administration in order to procure federal guarantee of a portion of the loan and to the bank in order to procure the loan.

In *Lewis v. Wainscott*, 124 Cal.App.2d 345, 268 P.2d 835, relied upon by appellants, the innocent parties were the bank, the Veterans Administration and the holder of the questioned note and trust deed, who had been induced by the real estate agent for the veteran to transfer his real property to the veteran without other consideration. In the instant action there is an important difference. Here the appellants gave up and respondents received from them nothing of value in consideration for the note and trust deed. Neither had ever seen or heard

of the other before. The seller who received the illegal excessive price (represented by the note and second trust deed in favor of appellants) had it so made in performance of his agreement with appellants for the sharing of his profits on several deals including the one with respondents.

"The statute was intended solely to aid the veteran in the establishment of a home. Any benefit to a contractor was incidental. However, if a secret contract for an amount in excess of the appraised value may be exacted from a veteran, the purpose of the act is defeated." *Young v. Hampton*, 36 Cal.2d 799, 805-806, 228 P.2d 1, 5, 19 A.L.R.2d 830.

The facts of the instant action do not justify the enforcement of a note and trust deed for the illegal excess of the purchase price over the appraisal by the Veterans Administration.

[7] Appellants urge that the obligation of the wife is "several and divisible from the husband and nothing was illegal as to her interest; hence, her promise is enforceable." To that argument, respondents reply that since the property is held in joint tenancy "with its essential unity of title," the veteran alone had the right to lift the lien from the property; and that "to permit the wife to be held under circumstances such as these would nullify the statute." In support of their respective positions in this regard the parties cite no authorities and our research has found no case in point. The veterans' wives were parties to the cases of *Young v. Hampton*, supra; *Lewis v. Wainscott*, supra; *Rosenblum v. Corodas*, 119 Cal.App.2d 802, 260 P.2d 151; and *Sattler v. Van Natta*, 120 Cal.App.2d 349, 260 P.2d 982, but no issue was raised concerning them.

The question is whether a second trust deed for an amount in excess of a "proper appraisal", executed by a veteran and his wife who are joint tenants, is illegal and unenforceable as to all, or half only, of the amount of such excess.

The facts of the *Young*, *Lewis*, *Rosenblum* and *Sattler* cases, supra, as well as the facts now engaging our attention, indicate

that the federal guaranties were made in the permitted proportions of the full amount of the loan, not the prescribed portion of half of the loan. 38 U.S.C.A. § 694 provides that such guaranty shall not exceed 50% of the amount of the loan or \$4,000, whichever is smaller. In the instant action the loan procured from the bank was \$10,000 and the guaranty \$4,000. If the guaranty was to apply to one-half only of the property and one-half only of the loan, it should not have exceeded \$2,500.

"A joint tenancy is one estate and in it the rights of the spouses are identical and coextensive." *Siberell v. Siberell*, 214 Cal. 767, 773, 7 P.2d 1003, 1005. As expressed by Lord Coke, "It appeareth, * * * that joyntenants have the lands by one joint title and in one right * * *; which is the reason, that joyntenants have one joint freehold * * *." In *Reina v. Erassarret*, 90 Cal.App.2d 418, 422, 203 P.2d 72, 75, 7 A.L.R.2d 1309, the court discusses the nature of joint tenancy and says "that title does not vest in the survivor upon the death of the cotenant nor does it descend to him from such cotenant because it has already vested in him by, and at the time of, the original grant; and that the interest of two joint tenants is not only equal or similar but also one and the same."

While, as urged by appellants, the statement in section 694(a) that the term "veteran" shall include "the unmarried widow" of a veteran might be construed as excluding from the protection of the act the wife of a veteran, we are persuaded that the correct construction is the practical construction acted upon by the Veterans Administration and the Banks in granting and accepting federal guaranties of loans made upon properties owned in joint tenancy by a veteran and his wife as though the title stood in the name of the veteran alone. To hold the obligation of the veteran's wife to pay an amount in excess of the fair value or "proper appraisal" legal and enforceable by foreclosure of a trust deed upon the home of the veteran and his family would not give to the veteran the assistance in procuring and protection in maintaining a home

as intended by the act. Therefore, the whole note and trust deed for an amount in excess of a "proper appraisal" is invalid.

[8] In the instant action, it was adjudged that the \$3,000 note and trust deed securing payment thereof, executed by respondents as part of the purchase price for their home, are invalid and unenforceable under the provisions of 38 U.S.C.A. § 694 (a) (as it was prior to the amendment thereof in 1956), that a loan made to a veteran to be used for purchasing a dwelling to be occupied as his home is guaranteed upon certain conditions, including the condition that "the price paid or to be paid * * * does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator," and the decision in *Young v. Hampton*, 36 Cal.2d 799, 805-806, 228 P.2d 1, 19 A.L.R.2d 830, that, when such federal guarantee of a loan to a veteran is procured, an agreement to pay an amount in excess of such appraisal is illegal and unenforceable.

Appellants contend that the judgment cannot be sustained for the reason that no evidence properly before the court tends to prove any "proper appraisal" in the instant action to which said section 694(a) is applicable.

In this regard appellants urge as reversible error the admission, over their objection, of Exhibit 4, which consists of four documents from the home loan file of the Bank of America, to wit:

(1) A printed form entitled "Veterans Administration Appraisal Report," bearing a penciled map and plan, photographs of a house, and typewritten insertions showing the lender to be the Bank of America; the veteran to be a stranger to this action; the property to be the same as that described in the complaint and cross-complaint in the instant action; bearing the purported signature of Ernest Adams under the printed words "Appraiser's Signature," the printed statement that the appraiser estimates the "Reasonable Value" "as is", and the typewritten figure \$11,600; and showing the date to be November 7, 1947.

(2) A printed form entitled "Home Loan Report" which bears a carbon copy of type-written insertions therein showing veteran's name to be James R. Cole; amount of loan \$10,000; title to the property described in the purported appraisal to be fee simple in respondents as joint tenants; the total to be paid to the contractor \$11,600; other expenses \$220; that the price to be paid by the veteran does not exceed the value thereof as determined by proper appraisal dated November 7, 1947, made by appraiser Ernest Adams; and that the veteran, James R. Cole, over his signature and over the date February 14, 1948, requests "the Administrator to endorse my honorable discharge or certificate of eligibility for \$4,000.00 of the guarantee benefit available to me," said form also bearing the purported signature of Harry Christensen, as manager of the 25th and Central Branch #354 of the Bank of America, and having the portion thereof "For Use by Veterans Administration" left entirely blank.

(3) Title Insurance & Trust Company's Policy No. 2769195 dated February 5, 1948, insuring James R. Cole, Eulalie Cole and Bank of America National Trust & Savings Association, a corporation, in the sum of \$11,600, showing title to the same property vested in James R. Cole and Eulalie Cole, his wife, as joint tenants, and showing said property to be subject to only one trust deed dated January 23, 1948, as security for indebtedness of \$10,000 in favor of the Bank of America National Trust & Savings Association, a corporation.

(4) Photostatic copy (which appellants stipulated should have the same force and effect, if any, as would the original) of a deed of trust note for \$10,000, dated January 23, 1948, signed by James R. and Eulalie Cole, in favor of the Bank of America National Trust & Savings Association, a national banking corporation; to which is appended "Loan Guaranty Certificate" dated March 12, 1948, for Veterans Administration Loan No. L-HG 72463 Calif LA, to lending institution Bank of America, for loan of \$10,000 dated January 23, 1948, to veteran James R. Cole, Serial No. 37 369 105

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Army "Subject to the Servicemen's Readjustment Act of 1944, as amended, Public Law 268, 79th Congress, and the regulations issued thereunder to the date of this certificate, 40 percent of the indebtedness outstanding from time to time under the loan identified above is hereby guaranteed," over the printed words "Administrator of Veterans Affairs by" and the purported signature of Jesse E. * * * (illegible and not mentioned in the record).

The portion of the record referred to by appellants in support of their contention reveals that one John T. Mack, assistant cashier of the Bank of America's 25th and Central Branch, produced the file of the bank from which said documents were taken; that they were the records of his bank, kept in the usual course of business, indicating that the transaction was "a Veterans' guaranteed loan," and a "Federal guaranteed loan." Objection was made to each of these documents "as no foundation laid." The witness then testified that these documents are kept in the regular course of business at the bank; that he is custodian of the file and an officer at the 25th and Central Branch of the Bank; that he was not working at that branch when the loan was made; and that these "are regular documents." Appellants' counsel was asked to and did look at the documents, particularly at the legal description, after which he said, "Apparently it relates to this property, I guess." Respondents again offered the documents in evidence. Appellants again objected "as no foundation having been laid properly" and the objection was overruled.

In support of their claim that the admission of that evidence constituted prejudicial error, appellants cite and rely upon section 1953f of the Code of Civil Procedure; *Pruett v. Burr*, 118 Cal.App.2d 188, 257 P.2d 690; and *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1.

Said section 1953f provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its prepara-

tion, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

The purpose of this act is to enlarge the exception to the hearsay rule, to eliminate the necessity of calling as a witness each person who had personal knowledge of the facts recorded, and to substitute the record of the transaction or event. *Loper v. Morrison*, 23 Cal.2d 600, 608, 145 P.2d 1.

[9] We do not regard the cases of *Pruett v. Burr*, supra, and *Luthringer v. Moore*, supra, as authority for appellants' contention herein. In the *Pruett* case the questioned documents were produced from the files of an Agricultural Commissioner who was a witness at the trial. They consisted of a copy of a letter and memo received by the witness from the Bureau of Chemistry of the State Department of Agriculture. The court there held that the placing of correspondence in a business file did not necessarily make it admissible in evidence under the business records act; and that the copies of the letter and memo there in question were not business records of the commissioner who received and filed them, although similar copies might have been admissible if properly introduced from the file of the Department of Agriculture. Where there is any basis for the exercise of the trial court's discretion in determining that a proper foundation has been proved for admission of such evidence, an appellate court will not disturb such decision, but under the circumstances there shown the court held that "the question was not debatable."

Luthringer v. Moore, supra, holds that it was not error to exclude hospital records where the sole foundation laid was the testimony of the custodian that they were day to day records of the patients in the hospital, including plaintiff while he was confined after his accident, and there was no evidence as to the mode of preparation.

[10] In the instant action, appellants assert that the federal law relating to vet-

erans' loans is based on an appraisal being made by a duly appointed appraiser; and that the only evidence of these facts is contained in certain of the above mentioned documents.

The foundation for receipt into evidence of the Veterans Administration appraisal of the property was laid as follows: John T. Mack, as heretofore indicated, testified that he was manager of the branch bank involved. Then the following ensued:

"Q. [By Mr. Maddox, attorney for respondents] Do you have in your possession records of a loan made about January of 1948 to Mr. James Cole and Eulalie Cole and secured by a deed of trust? A. I believe you have the note there in the file. I have the other documents, however, yes.

"Q. We have here a photostatic copy. Are those records the official records of your bank? A. Yes, they are.

"Q. Kept in the usual course of business? A. Yes.

"Q. What is your position with the bank? A. Assistant cashier.

"Q. Do your records indicate as to what type of loan this was? A. Yes, it's a Veterans' guaranteed loan.

"Q. A Federal guaranteed loan? A. Yes.

"Q. In connection with that was there, do the records indicate whether or not there was a Veterans Administration appraisal of the property on which this loan was made? A. Yes, I have the Veterans Administration appraisal here.

"Q. What does the appraisal show as the appraised value of the property?

"Mr. Brown [Attorney for appellants]: I object to that as not being the best evidence.

"The Court: Do you wish to introduce the appraisal? Is that all you want out of that file, Mr. Maddox?

"Mr. Maddox: I want the appraisal, the home loan report, and the deed of trust—I think I want all of these documents. In fact I went over this with Mr. Mack and picked out the documents that we needed.

"The Court: Well, may I suggest you tell Mr. Brown the documents that you want to use, and then you can just offer those documents, and we will save time.

"Mr. Maddox: These documents may be left under the same arrangement as the other?

"The Court: Yes.

"Mr. Maddox: I'd like to have these documents marked as Plaintiffs' next in order.

"The Court: Marked or offered?

"Mr. Maddox: I'd like to have them offered.

"Mr. Brown: Objected to as no proper foundation, except I have no objection as to the form of one, being a photostat—one of them is a photostat of the original document—but I object to all of them as no foundation laid.

"The Court: Well, lay the foundation then, Mr. Maddox.

"Mr. Maddox: Your Honor, I am inclined to think that these have been authenticated as documents kept in the regular course of business at the bank, he is an officer of the bank—

"The Court: Well, to make sure ask him.

"Q. By Mr. Maddox: Are these documents kept in the regular course of business at the bank? A. Yes, they are.

"Q. And you are an officer at the 25th and Central branch, are you not? A. Yes.

"Q. These are regular documents, are they not? A. Yes, they are regular documents.

"The Court: No question about their being the documents that pertain to the property in this case, is there, Mr. Brown?

"Mr. Brown: Was your Honor talking to me?

"The Court: Yes.

"Mr. Brown: I don't know.

"The Court: Well, you can look at them.

"Mr. Brown: I assume that they perhaps do relate to it.

"The Court: Well, that's why I asked Mr. Maddox to show them to you.

"Mr. Maddox: Look at the legal description.

(Mr. Maddox hands the documents to Mr. Brown who examines them.)

"Mr. Brown: Apparently it relates to this property, I guess.

"Mr. Maddox: I again offer them, your Honor.

"Mr. Brown: I again object as no foundation having been laid properly.

"The Court: They may be received and marked as Plaintiffs' 4."

We are satisfied that the copy of the Veterans Loan appraisal contained in the file and kept in the regular course of business by Bank of America was sufficient to give rise to an opinion by the court that, in the language of section 1953f of the Code of Civil Procedure, "the sources of information, method and time of preparation were such as to justify its admission." In any event, in the case at bar, the question was debatable. *Pruett v. Burr*, supra, 118 Cal. App.2d 203, 257 P.2d 699. Furthermore, the error, if any, becomes immaterial as to the matter of the so-called G. I. appraisal in the light of the inferences to be drawn from testimony of the witness, Wesley J. Fairchild, the real estate broker, who testified, without objection and on cross-examination by appellants' counsel, as follows:

"Q. Well, was there any conversation as to why they were having to sign two different trust deeds? A. Yes.

"Q. All right, what was said? What did you tell them? A. I can't quote what I said. I might say in essence what was said.

"Q. Well, now, what in essence did you tell them? A. I told them that the seller refused to sell the property for the appraisal that had been given by the Veterans Administration's appraiser, and that they would have to pay, if they got the property, over and above it, which the seller was agreeable to taking a second trust deed for.

"Q. And did you tell them that they weren't to let the bank or the Veterans Administration know about this? A. I don't recall telling them that, no, but I do

know that it was brought out that they were explained that we were not supposed to pay more than the Veterans Administration appraisal."

The witness further testified:

"Q. [By Mr. Brown]: Do you remember anything else that you might have told them at that time about having to get around the Veterans Administration requirements and the laws connected with it?

A. Nothing more than the fact that this trust deed could not be handled through the escrow. As far as the escrow was concerned the property would have to show as being sold for the amount that the Veterans' appraiser appraised it for."

There is no showing that the admission into evidence of the 3rd and 4th parts of Exhibit 4, the policy of title insurance and the loan guaranty certificate (attached to the deed of trust note signed by respondents in favor of the bank) was at all prejudicial.

We find no reversible error in the ruling of the trial court. The evidence supports the findings and the latter support the judgment which must therefore be affirmed.

It is so ordered.

FOURT, J., and DRAPEAU, J. pro tem., concur.



155 Cal.App.2d 152

Joseph B. ENOS, Jr., Plaintiff and Respondent,

v.

C. Louis FOSTER, Executor of the Estate of Louise S. Pheby, Defendant and Appellant.
No. 17414.

District Court of Appeal, First District,
Division 1, California.

Nov. 12, 1957.

Hearing Denied Jan. 6, 1958.

Tenant's action against landlord. The Superior Court, Alameda County, Allen G. Norris, J., rendered summary judgment for

plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that properly construed, lease evinced no intent to make compliance with covenant to build a condition precedent to tenant's right to have any condemnation award apportioned in accordance with provisions of lease.

Affirmed.

1. Landlord and Tenant ⇨44(1)

Covenants in lease will be held to be mutually independent unless lease expressly or impliedly makes them conditional.

2. Landlord and Tenant ⇨44(1)

Contractual features of lease are to be interpreted according to contract law and basic principle that intention of parties should be given effect as far as possible; so that covenants in lease are to be construed as independent or dependent according to intention of parties and good sense of case.

3. Eminent Domain ⇨155

Properly construed, lease evinced no intent to make compliance with covenant to build a condition precedent to tenant's right to have any condemnation award apportioned in accordance with provisions of lease.

4. Judgment ⇨181(2)

In considering a motion for summary judgment, province of court is "issue finding" rather than "issue determination," and if court finds a triable issue, it is powerless to continue, and must allow issue to be tried by a jury, unless jury trial is waived.

5. Judgment ⇨185.2(2)

Existence of issues of fact precluding summary judgment must be determined from affidavits of parties. West's Ann Code Civ.Proc. § 437c.

6. Landlord and Tenant ⇨37

Where there was no conflict in facts and no showing of extrinsic factors, interpretation of lease was a matter of law for court.

7. Judgment ⇨181(3)

Where, on motion for summary judgment, issues are of law only, it is duty of trial court to determine those issues.

Donahue, Richards, Rowell & Gallagher, Oakland, for appellant.

Kessler & Kessler, Oakland, for respondent.

BRAY, Justice.

Plaintiff's motions to strike defendant's answer, for summary judgment and judgment on the pleadings, were granted. Defendant appeals from the judgment entered thereon.

Questions Presented.

Was Plaintiff lessee entitled to apportionment of damages as provided in the lease or merely to the amount awarded him by the condemning power? The solution of this question depends upon whether or not paragraphs 17 and 26 of the lease are interdependent.

Record.

February 2, 1947, Louise S. Pheby, defendant's testate, leased to plaintiff certain real property in Berkeley for a period beyond the date of the events causing this action. February 21, 1955, Mrs. Pheby, to avoid an action in eminent domain and for the sum of \$52,500, transferred to the city of Berkeley all her right, title and interest in this property. Later, the city filed an action to condemn plaintiff's leasehold interest therein, as a result of which plaintiff received \$12,200. Thus the total received by both parties was \$64,700. Plaintiff then brought this suit claiming that by reason of paragraph 17 of his lease (hereafter set forth) he was entitled to $\frac{15}{40}$ ths of the \$64,700, or \$24,262.50, upon which sum he credited the \$12,200 received from

the city of Berkeley, leaving a balance due of \$12,062.50.

Defendant's amended answer denied that plaintiff was entitled to $\frac{15}{40}$ ths of the entire recovery and as a separate defense set up a failure of plaintiff to comply with paragraph 26 of the lease, requiring the construction of a certain building. Plaintiff then filed motions to strike out defendant's answer, for summary judgment and/or judgment on the pleadings on the ground that no defense was stated or could be stated.¹

Paragraph 17 reads: "Eminent Domain. That in the event the leasehold interest of the Tenant, or any possession thereof, or the whole or any part of said premises, or the property of which said premises form a part, shall be taken or lessened in value by right of eminent domain, or transferred in avoidance thereof, any damages for such taking shall be apportioned between the parties hereto as follows: $\frac{25}{40}$ thereof to Landlord, and $\frac{15}{40}$ thereof to Tenant. * * *"

Defendant concedes that this paragraph would apply to the circumstances of this case, were it not that defendant claims that plaintiff was in default under paragraph 26, and that compliance with paragraph 26 was a condition precedent to plaintiff's right to apportionment under paragraph 17.

Paragraph 26 provides: "Tenant covenants and agrees that he will erect on the property herein demised a building having not less than 1768 sq. ft. of floor space, which said building is to be built in accordance with all building requirements, laws, ordinances and regulations. * * *" It further provides that the tenant will commence construction when materials, labor and plans are available and that upon the termination of the lease the building will become the property of the lessor.

1. Defendant in turn filed a motion for summary judgment on the ground that the complaint did not and could not state a cause of action. This motion defendant later dismissed. Accompanying plain-

tiff's motion for summary judgment were two affidavits purporting to show that plaintiff was not in default of paragraph 26 of the lease.

In June, 1947, plaintiff was granted an extension of time to June 1, 1948, in which to commence construction. The extension stated: "All other terms and conditions contained in said lease are to remain in full force and effect, and granting of this concession is not to be construed to, nor does it alter or change any of the other terms or conditions contained in said lease."

February 24, 1948, a further modification of the lease was made providing that the building might contain only 600 square feet of floor space with the right of the tenant to enlarge the building at a future date. The clause continuing in effect all other terms and conditions of the lease was identical with the one above quoted. Plaintiff has never commenced construction of the building.

Are Paragraphs 17 and 26 interdependent?

[1-3] There is no expression in the lease making them so. Because of historical development, covenants in leases are held to be mutually independent unless the lease expressly or impliedly makes them conditional. 3 Williston on Contracts, p. 2520; Restatement, Contracts, § 290; Kulawitz v. Pacific Woodenware Paper Co., 1944, 25 Cal.2d 664, 669, 155 P.2d 24; Arnold v. Krigbaum, 1915, 169 Cal. 143, 145, 146 P. 423; Exchange Securities Co. v. Rossini, 1919, 44 Cal.App. 583, 585, 186 P. 828. However, in Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse, 1942, 21 Cal.2d 411, 132 P.2d 457, it is stated that a lease has a dual character with two sets of rights and obligations. One set grows out of the relation of landlord and tenant and the other out of the " * * * express stipulations of the lease * * * " 21 Cal.2d at page 418, 132 P.2d at page 462. The contractual features are to be interpreted according to contract law and the basic principle that the intention of the parties should be given effect as far as possible, so that covenants in a lease are to be construed as independent or dependent according to the intention of the parties and

the good sense of the case. The Medico-Dental case distinguishes factually both the Arnold and Exchange Securities cases, supra, but goes on to say that those cases are compatible with a conclusion that covenants in a lease may be dependent. In the Medico-Dental case, the question was whether a covenant against leasing to a competitor was a condition precedent to the obligation to pay rent or for renovating after vacating the premises. As in the later Kulawitz case, supra, the decision in the Medico-Dental case was based upon the fact that the breach of a covenant against leasing to the tenant's competitor went to the whole of the consideration for the lease and hence was necessarily a condition to the lessee's obligation to pay rent. Thus, the covenants were impliedly made interdependent in the lease. In our case it cannot be said that the obligation to build the building went to the whole of the consideration for the lease. That the covenants were not interdependent is shown by: (1) The failure to expressly make them so. (2) No connection in time between the performance of either covenant. (3) The subsequent modification of the size of the building without a corresponding change in the apportionment ratio. Under this, the building was to be only one-third of the size originally provided. Not only was no change made in the proportionate shares to be received under paragraph 17, but the modification expressly stated that all other terms and conditions of the lease were to remain unchanged. (4) No provision for insurance for reconstruction of the building in the event of fire or other destruction, or for change of rate of apportionment in such event. (5) The value of the lease to the tenant even without a building on the property. The lease was a long term ground lease, for 15 years plus an option for an additional 10 years. The rent was only \$100 per month for the first 15 years and not to exceed \$150 per month for the additional 10 years if the option were exercised. There was no restriction on the use of the premises. The tenant had the privilege of first offer and refusal in the event

of sale by the lessor. There was no restriction on the right of lessee to sublet or assign the lease. Other buildings could be constructed and alterations made by tenant in any building without consent of landlord. (6) The fact that at no time did the lessor ever complain of the failure of plaintiff to construct the building.

Propriety of Granting Summary Judgment

[4,5] In considering a motion for summary judgment the province of the court is issue finding rather than issue determination. If the court finds a triable issue, then it is powerless to continue but must allow the issue to be tried by a jury, unless a jury trial is waived. *Walsh v. Walsh*, 1941, 18 Cal.2d 439, 441, 116 P.2d 62; *Schulze v. Schulze*, 1953, 121 Cal.App.2d 75, 81, 262 P.2d 646; *Eagle Oil & Ref. Co. v. Prentice*, 1942, 19 Cal.2d 553, 555, 122 P.2d 264. And the question of issue finding is to be determined by the sufficiency of the affidavits of the parties. Code Civ. Proc. § 437c; *Dorsey v. City of Los Angeles*, 1955, 132 Cal.App.2d 716, 719, 282 P.2d 997.

[6,7] Defendant concedes that his affidavits did not raise any triable issue of fact, but insists that they did raise an issue of law as to the intention of the parties in regard to the pertinent provisions of the lease.² Since there was no conflict in the facts and no showing of extrinsic factors the interpretation of the lease was a matter of law for the court. Where on a motion for summary judgment the issues are of law only it is the duty of the trial court to determine those issues. *Bank of America Nat. Trust & Savings Ass'n v. Casady*, 1936, 15 Cal.App.2d 163, 168, 59 P.2d 444; see, also, *Bromberg v. Bank of America Nat. Trust & Savings Ass'n*, 1943, 58 Cal.App.2d 1, 135 P.2d 689, affirming summary judgment where only issues of law were presented. Defendant practically

concedes this rule of law by asking this court to interpret the lease as containing interdependent covenants, citing *In re Estate of Platt*, 1942, 21 Cal.2d 343, 352, 131 P.2d 825. We believe that the trial court properly interpreted the covenants as not interdependent.

Here the lease not being ambiguous, there was no triable issue of fact, and the court having properly interpreted the lease the summary judgment was proper.

In view of our determination that the summary judgment was proper, the question of the propriety of the judgment on the pleadings and the order striking the answer becomes moot, and the appeals from the order and the said last mentioned judgment are dismissed. The summary judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.



155 Cal.App.2d 87

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Norman W. SCHMITT and R. Evelyn
Alvord, Defendants,

Norman W. Schmitt, Defendant and
Appellant.

Cr. 5726.

District Court of Appeal, Second District,
Division 3, California.

Nov. 8, 1957.

Rehearing Denied Dec. 2, 1957.

Hearing Denied Dec. 30, 1957.

Prosecution of chiropractor for theft in treatment of patients for cancer, tuberculosis, and other illness with oscilloclast. From adverse judgment of the Superior

2. If paragraphs 17 and 26 were interdependent, which they are not, the affidavits would have raised an issue of fact as to whether the defendant waived com-

pliance with paragraph 26. This issue under the decision of the trial court and of this court is immaterial.

Court, Los Angeles County, Louis H. Burke, J., and from order denying motion for new trial, the chiropractor appealed. The District Court of Appeal, Shinn, P. J., held that it was not error to refuse defendant's requested instructions on issue of good faith when court had already instructed that jurors could not convict defendant unless they found that he had intended to defraud his patients and when proposed instructions merely restated instructions given by court on specific intent.

Judgment and order affirmed.

1. Criminal Law ⚖️395

In prosecution of chiropractor for theft in treatment of patients for cancer and other illnesses with oscilloclast, medical reports, papers and equipment, which were removed from chiropractor's office without search warrant by police and investigator for state medical board at time of arrest of chiropractor at his office on complaint charging violation of statute prohibiting advertisement of a device represented to have effect on cancer, were properly admitted. West's Ann.Pen.Code, §§ 182, subd. 1, 484; West's Ann.Bus. & Prof. Code, §§ 1000-15, 17500; West's Ann. Health & Safety Code, § 26286.5.

2. Arrest ⚖️71

Arresting officers have right to make reasonable search of premises under accused's immediate control and to seize evidence related to offense for which accused is arrested.

3. Druggists ⚖️2

The term "advertisement", as used in statute prohibiting advertisement of any drug or device represented to have any effect on cancer, means, among other things, oral representations disseminated in any manner or by any means, for purpose of inducing, or which are likely to induce, directly or indirectly, purchase or sale of drugs or devices, and includes oral representations. West's Ann.Health & Safety Code, §§ 26209, 26286.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Advertisement".

4. Indictment and Information ⚖️71

Indictment, which alleged 13 overt acts committed by chiropractor and another in pursuit of their methods in examining patients, making blood tests and reporting results thereof to patients, representing treatments to be administered would cure illnesses and in use of radioscope and oscilloclast in administration of treatments together with charge of conspiracy to commit theft, was sufficient to advise chiropractor of nature of charges he would be required to meet. West's Ann.Pen.Code, §§ 182, subd. 1, 484; West's Ann.Bus. & Prof. Code, § 17500; West's Ann.Pen.Code, §§ 950-952.

5. Criminal Law ⚖️1170(1)

In prosecution of chiropractor for theft arising out of chiropractor's treatment of persons for cancer and other illnesses, denial of proposed line of questioning by defendant to show that two expert witnesses for state were interested in cancer society and relationship between society, a certain television program, and chiropractor's nurse, was not prejudicial when witnesses denied knowing nurse or having any control over funds of cancer society.

6. Witnesses ⚖️270(1), 372(1)

Great latitude should be allowed in cross-examination for purpose of showing state of mind of a witness, his interest in case, and his bias and prejudice, but court should limit cross-examination of witnesses in order to confine it within reasonable bounds and curtail digressions which serve no purpose as proof of any disputed material fact in the case.

7. Witnesses ⚖️278

In prosecution of chiropractor for theft in treatment of patients, sustaining of objections to questions asked on cross-examination of chiropractor's nurse, who was named as a co-conspirator, as to whether she believed she was violating law while working for defendant, whether she believed she was guilty of conspiracy, whether she helped to "case" defendant's office, whether she helped organize a raid, and whether she knew that officers had descend-

ed on premises, was not error. West's Ann. Pen.Code, §§ 182, subd. 1, 484; West's Ann. Bus. & Prof.Code, § 17500.

8. Criminal Law ⇨627½

In prosecution of chiropractor for theft in treatment of patients, subpoena duces tecum addressed to television station, which allegedly broadcast an exposé of chiropractor's methods of treatment, in which chiropractor sought production of station's financial records, charges, reports, correspondence and memorandum relating to broadcast, was properly quashed when affidavit in support of subpoena failed to show what material facts, if any, would or could be proved by documents sought to be produced. West's Ann.Pen.Code, §§ 182, subd. 1, 484; West's Ann.Bus. & Prof.Code, § 17500; West's Ann.Code Civ.Proc. § 1985.

9. Criminal Law ⇨627½

Affidavit accompanying subpoena duces tecum must clearly show that requested papers contain competent and admissible evidence which is material to some disputed issue of fact at trial. West's Ann.Code Civ. Proc. § 1985.

10. Conspiracy ⇨47

In prosecution of chiropractor, for theft in treatment of patients by an oscilloclast, evidence was sufficient to support conviction of chiropractor for conspiracy to commit grand theft. West's Ann.Pen.Code, §§ 182, subd. 1, 484; West's Ann.Bus. & Prof.Code, § 17500.

11. Conspiracy ⇨23

Gist of criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of objects of agreement. West's Ann. Pen.Code, §§ 182, 184.

12. Conspiracy ⇨27, 47

Existence of conspiracy may be established by circumstantial evidence and it may be inferred from acts and conduct of accused in mutually carrying out a common purpose in violation of statute, and overt act in furtherance of object of conspiracy may be accomplished by only one of conspirators.

13. Conspiracy ⇨41

Members of conspiracy are bound by all acts of all members done in pursuance of agreed plot.

14. False Pretenses ⇨4

The making of a false pretense or representation with intent to defraud owner of his property and actual defrauding of owner are elements of theft by false pretenses. West's Ann.Pen.Code, § 484.

15. False Pretenses ⇨9

In order to establish offense of theft by false pretenses, the false pretense or representation must have materially influenced owner to part with his property, but false pretense need not be sole inducing cause. West's Ann.Pen.Code, § 484.

16. False Pretenses ⇨7(1)

A "false pretense" is a representation of some fact or circumstance calculated to mislead, which is not true.

See publication Words and Phrases, for other judicial constructions and definitions of "False Pretense".

17. Criminal Law ⇨1159(2)

It is not function of reviewing court to reweigh evidence and to substitute other inferences for those reasonably drawn by triers of fact, and reviewing court is limited to determining whether there was any substantial evidence to support implied findings of jury.

18. False Pretenses ⇨7(1)

A single false material representation is sufficient to constitute offense of obtaining property by false pretenses. West's Ann.Pen.Code, § 484.

19. False Pretenses ⇨51

In prosecution of chiropractor for theft, in treatment of patients for cancer and tuberculosis and other ailments in which an oscilloclast was used, whether representations by chiropractor as to effectiveness of treatment with oscilloclast were material inducements to his patients in taking treatments with machine was question of fact for jury. West's Ann.Pen.Code, §§ 182, subd. 1, 484; West's Ann.Bus. & Prof. Code, § 17500.

20. False Pretenses 51

In prosecution of chiropractor for theft, in treatment of patients for cancer, tuberculosis and other illnesses, whether representations by chiropractor as to effectiveness of oscilloclast in treating patients were made honestly or with intent to deceive was question of fact for jury. West's Ann.Pen.Code, §§ 182, subd. 1, 484; West's Ann.Bus. & Prof.Code, § 17500.

21. False Pretenses 42

In prosecution of chiropractor for theft in treatment of patients for tuberculosis and cancer and other illnesses by use of oscilloclast, admissions by chiropractor that he never checked findings prepared by osteopath, who made blood tests, and that he used no other diagnostic techniques, could be considered by jury in relation to issue of his good faith, but jury could also consider fact that chiropractor made a number of diagnoses which he knew were contrary to those made by physicians who had previously made examinations. West's Ann.Pen.Code, §§ 182, subd. 1, 484; West's Ann.Bus. & Prof.Code, § 17500.

22. False Pretenses 22

In prosecution of chiropractor for theft in treatment of patients with oscilloclast, even if treatments were reasonably worth consideration paid, that was no defense when patients were induced to submit to treatments by means of false pretenses. West's Ann.Pen.Code, §§ 182, subd. 1, 484; West's Ann.Bus. & Prof.Code, § 17500.

23. False Pretenses 52

In prosecution of chiropractor for theft in treatment of patients for cancer and tuberculosis with oscilloclast, instruction, that false pretenses may consist of a representation made recklessly and without information justifying a belief that it is true, was not erroneous and was not objectionable upon ground that it permitted jury to base its finding of guilt upon negligence rather than upon theft by false pretenses. West's Ann.Pen.Code, § 484.

24. False Pretenses 52

In prosecution of chiropractor for theft in treatment of patients for cancer,

tuberculosis, and other diseases with oscilloclast, instructions as to specific intent was sufficient to inform jury that they could not convict without proof of a specific intent to defraud. West's Ann.Pen.Code, § 484.

25. Criminal Law 829(3)

In prosecution of chiropractor for theft in treatment of patients for cancer and tuberculosis with oscilloclast, rejection of proposed instructions of defendant on issue of good faith was not error in view of instruction by court that they could not convict defendant unless they found that he intended to defraud his patients. West's Ann.Pen.Code, § 484.

26. Criminal Law 829(1)

When a jury has been properly instructed as to an applicable legal principle, it is not necessary to restate that principle in another way.

27. Criminal Law 814(1)

In prosecution of chiropractor for grand theft in treatment of patients for cancer and tuberculosis and other illnesses by use of oscilloclast, defendant's proposed instruction that he was authorized to use all necessary mechanical and hygienic and sanitary measures incident to care of body so long as no drugs were used in connection with his practice and that he could lawfully treat a patient for cancer or any other disease within limits of his chiropractic license was properly refused. West's Ann.Pen.Code, § 484.

28. Criminal Law 1170½(6)

In prosecution, of chiropractor for theft in treatment of patients for cancer, tuberculosis, and other illnesses by use of oscilloclast, defendant was not prejudiced by unresponsive statement made by People's witness during cross-examination in which witness said that she had been told that defendant had been arrested a couple of times before, when court immediately instructed jury to disregard the answer. West's Ann.Pen.Code, § 484.

29. Criminal Law 1171(3)

In prosecution of chiropractor for theft in treatment of patients for cancer, tuber-

culosis, and other illnesses, by use of oscilloclast, reference by district attorney in his closing argument to litigation between federal government and a foundation, which used oscilloclast, was not prejudicial when chiropractor and another defendant had admitted their knowledge of government's litigation. West's Ann.Pen.Code, § 484.

30. Criminal Law Ⓒ=730(1)

A judgment will not be reversed for improper remarks of prosecutor, not made in bad faith, when there is a prompt admonition by court and it appears that no prejudice has resulted.

31. Criminal Law Ⓒ=956(13)

In prosecution of chiropractor for theft in treatment of patients for cancer, tuberculosis, and other illnesses with oscilloclast, evidence was insufficient to show that jurors were improperly influenced by articles appearing in paper at time of trial condemning another form of treatment of cancer. West's Ann.Pen.Code, § 484.

32. Criminal Law Ⓒ=957(1)

Verdict of jury may not be impeached by affidavits of third persons which set forth substance of extra-judicial statements of jurors.

33. Criminal Law Ⓒ=1128(2)

Newspaper articles are outside the record and will not be considered by reviewing court.

Caryl Warner, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Joseph P. Busch, Jr., Deputy Dist. Atty., Los Angeles, for respondent.

SHINN, Presiding Justice.

By indictment Dr. Norman W. Schmitt and Dr. R. Evelyn Alvord were accused

of conspiracy (Penal Code, § 182, subd. 1), and of conspiring with Faye Reed to violate section 484 of the Penal Code (theft) and section 17500 of the Business and Professions Code (false advertising). The indictment set out thirteen overt acts allegedly committed in furtherance of the conspiracy. Upon a jury trial, defendants were found guilty of conspiracy to commit grand theft. They made motions for a new trial, which were denied. Proceedings were suspended as to Dr. Alvord and she was placed on probation for three years on condition that she pay a \$1,000 fine. Proceedings were likewise suspended as to Dr. Schmitt and he was placed on probation for five years on condition that he serve the first year in the county jail and pay a \$5,000 fine.¹ Schmitt appeals from the judgment (Penal Code, § 1237), and the order denying him a new trial. Dr. Alvord has not appealed.

The conviction of Dr. Schmitt was based upon evidence of the following facts. He is a licensed chiropractor and has practiced in Los Angeles since 1936. We shall refer to him hereinafter as defendant. From June 1953 until March 1955 Faye Reed worked in his office as a receptionist and nurse; her duties included the taking of patients' case histories and the giving of treatments with a machine called an oscilloclast. Dr. Alvord is licensed as an osteopath in Missouri and Kentucky. Although a resident of California since 1945, she has not applied for a license in this state. Beginning in 1953, Dr. Alvord analyzed blood samples which Dr. Schmitt sent to her home in Costa Mesa, using a machine called a radioscope. The radioscope and the oscilloclast will be described at a later point in our opinion.

October 12, 1953, defendant was consulted by Charles Stamps, who told him that Mrs. Stamps was suffering from cancer, that she had had four operations, and that

1. Other conditions of Dr. Schmitt's probation were that he "do not solicit, accept, make or have made through others, any blood analysis for anyone on the

radioscope or any similar device; do not treat patients by means of the oscilloclast * * *."

she was unwilling to submit to a fifth operation for removal of a rectal cancer, which her physician, Dr. Ralph Byrne, had advised her to do. Defendant said: "Oh, don't let him take that off. I believe that I can cure that without an operation." He also said that he could detect the presence of cancer through a blood test and that he had cured 500 to 600 cases of cancer in his office.

The following day, Mrs. Stamps went to Schmitt's office, where Mrs. Reed extracted a sample of her blood. The blood was wrapped in tinfoil and sent to Dr. Alvord. Several days later, Schmitt told Stamps that he had good news from the laboratory. He said that Mrs. Stamps had an enlarged heart, tuberculosis, and a scattering of cancer in the colon; the growth on her buttocks was not a cancer but was a fatty tumor. He stated that he could guarantee a cure after two or three months' treatment with an oscilloclast. Shortly thereafter, Mrs. Stamps began taking oscilloclast treatments at defendant's office; she went several times a week and paid \$2.50 a treatment. In January 1954, Mrs. Stamps had another blood test and defendant told her husband that the tuberculosis was clearing up and her heart was returning to normal. When Stamps complained that the growth on his wife's buttocks was increasing in size and causing her severe pain, Schmitt said: "Oh, that is just fine. That shows that this machine, this electricity is drawing all the cancer from the body. It is killing the cancer and drawing it into this fatty tumor." The treatments continued until June 1954, when Mrs. Stamps could no longer sit down, due to the size of the growth; defendant told Stamps that his wife was overcharged with electricity and needed a rest. By that time, Stamps had paid defendant nearly \$200 for blood tests and treatments with the machine. August 15, 1954, Stamps telephoned defendant about his wife's condition and defendant advised him not to call Dr. Byrne. The following evening, Schmitt paid a visit to Mrs. Stamps in order to see the growth, which he had not previously

examined; it was then the size of an orange. He cut some of it off and told Stamps that the wound would heal in a few days, that the oscilloclast had drawn all the cancer in Mrs. Stamps' body into the fatty tumor, and that she would never again be troubled with cancer. Early the next month, however, Mrs. Stamps underwent an operation for the removal of a rectal cancer. The operation was performed by Dr. Byrne, who had first examined Mrs. Stamps in 1952. He testified that he had diagnosed the growth at that time as a malignant tumor. Mrs. Stamps died of cancer in September 1955.

Hazel Snyder consulted defendant in April 1954, giving a history of pain in her side and a lack of pep and vitality. Defendant said "We will take a blood test and see what is wrong with you." A few days later he read to her from a sheet of paper what he said were the results of a laboratory analysis of her blood showing that she had a cancerous irritation originating in the colon and cancers in the thyroid and neck. Schmitt told her that he had had twenty-two unsuccessful operations for cancer of the rectum, but was cured with the oscilloclast. He stated that a year's use of the machine would cure her condition. Thereupon Mrs. Snyder began taking regular treatments at defendant's office, for which she paid a total of \$500. She discontinued the treatments after a year and consulted Dr. Charles Muller, a qualified physician, complaining that she still had a pain in her side and felt tired and worn out. Dr. Muller gave her a complete physical examination. He testified that Mrs. Snyder was suffering from a mild liver irritation, had a normal (though enlarged) thyroid, and was overweight. He found no evidence of cancer. After treatment for her overweight condition, Mrs. Snyder's health improved considerably.

In the latter part of 1954, Mr. and Mrs. Enrique Patt took their children, Bonnie and Lorry, to see defendant. Schmitt told Mrs. Patt that he didn't like Bonnie's complexion and suggested a blood test. He took blood samples from Bonnie and the

other members of the Patt family. Shortly thereafter, he told Mrs. Patt that Bonnie had a low blood count, which was due to a dormant cancer in the spleen and a tubercular infection in the liver, but that the oscilloclast would restore the electrons in her daughter's system to normal within six to eight months. He said that Mrs. Patt had low grade tuberculosis in the chest, sinus and pelvis, and benign tumors in the uterus and cranium. He also said that Lorry was suffering from malfunction of the endocrine glands and osteomyelitis of both eyes; there was some non-malignant cancer in Lorry's spleen, bone marrow and cranium. The Patts rented an oscilloclast from defendant at a rental of \$30 a month and used the machine for several months at their home. Mrs. Patt testified that the treatments were discontinued when Faye Reed told her that the machine was a fraud.

Mrs. Swannie Schaafsma brought her son, Lauren, to defendant's office sometime in 1953. Lauren was unable to walk or talk and was confined to a wheel chair; he was three and a half years old. His mother told defendant that Lauren's condition had been diagnosed as cerebral palsy but Schmitt said that a blood test would determine what was wrong with him. Defendant took a sample of the boy's blood, and when Mrs. Schaafsma returned for the results of the laboratory analysis, defendant told her that Lauren had tuberculosis and adhesions of the spine and that scar tissue in his central nervous system had affected his reflexes. Schmitt said that Lauren "can be cured within a year, after a year's treatment he will be walking." The boy received treatments with the oscilloclast during the ensuing year, for which Mrs. Schaafsma paid between \$400 and \$500. Additional blood tests were taken every month and after each test defendant told Mrs. Schaafsma that her son was getting better. She testified that Lauren's condition at the time of the trial was the same as it had been when she first consulted Schmitt, except that he had grown.

A similar series of events was described by Mrs. Clare Spalliero, who took her son,

Butch, to see defendant in October 1953. Mrs. Spalliero told defendant that Butch was a spastic and was unable to talk, and asked him if he could help; Schmitt replied that as soon as he took a blood test, he could tell whether he could help or not. Several days later, Schmitt told her that Butch had tuberculosis and cancer of the brain and spleen. He said that the boy would be completely normal after a year's treatment with the oscilloclast. Butch took the treatments for nearly a year and a half, for which his mother paid defendant about \$400.

The Schaafsma and Spalliero boys had been examined by Dr. Robert Sedgwick in 1952. Dr. Sedgwick, a qualified physician specializing in neurology, testified that Lauren Schaafsma was afflicted with cerebral palsy, which was due to the failure of his brain to develop; he found no evidence of tuberculosis or spinal adhesions. He stated that the Spalliero boy was suffering from maldevelopment of the brain, and that he had found no indication of cancer or tuberculosis. It was his opinion that both children had sustained irreparable brain damage and that medical science had no known cure for their condition.

Dr. Schmitt was likewise consulted by Mrs. Antoinette Capanna, who brought her two year old daughter, Denise, to his office in June 1953. Mrs. Capanna told defendant that her girl was mentally retarded and had suffered a brain injury. When she said that she had been told that nothing could be done for Denise, Schmitt replied: "Oh, that isn't true. I can cure her in six weeks. * * * I do it every day." Defendant took some blood from Denise and telephoned her mother a few days later. He said that Denise had anemia, liver trouble, sinus trouble and cancer of the brain. Denise did not receive any treatments from Dr. Schmitt. Several months before visiting defendant's office, she had been examined by Dr. Milton Heifetz, a qualified nerve surgeon. Dr. Heifetz diagnosed her condition as petit and grand mal seizures due to diffuse cerebral atrophy, which was probably caused by a lack of

oxygen at birth. He testified that his examination disclosed no evidence of cancer and that medical science had no remedy for her condition.

Mrs. Hermine Szabo went to see defendant in December 1952, complaining that she felt tired and run down. Defendant said he wanted to have her blood analyzed and Mrs. Szabo submitted to a blood test. A few days later Schmitt told her that she was in very bad shape, that her kidneys were bad, her spleen was deteriorating, and that she had cancer of the liver; he told her that he could cure her but that it would take a long time. She took several treatments with the oscilloclast and then consulted Dr. Robert Weber, who was a qualified physician. Dr. Weber gave Mrs. Szabo a complete physical examination. He testified that he found no symptoms of cancer.

Richard Lewis visited defendant's office in January 1954, complaining of pains in his foot. After a series of foot adjustments had proved unsuccessful, Schmitt examined Lewis' feet through a fluoroscope and told him that he needed a blood test because he had either tuberculosis or cancer of the bone. Schmitt took a sample of Lewis' blood and began giving him treatments without waiting for the results of the analysis. Shortly thereafter, defendant told Lewis that he had cancer, tuberculosis of the brain, and tuberculosis of the foot, male organ and liver. After fifteen oscilloclast treatments, which did not cure the pain in his foot, Lewis consulted Dr. Paul Pernworth, a qualified physician. Dr. Pernworth testified that he examined Lewis and found no evidence of cancer or tuberculosis. He sent Lewis to another physician who prescribed foot strappings which improved Lewis' condition considerably.

As we have said, the blood samples given to defendant by his patients were analyzed by Dr. Alvord with a device called a radioscope, which is a black box containing two electrical circuits, dials, switches, a variable condenser, an electrode or trap door, and some attachments. The radioscope was apparently invented by the late Dr. Albert Abrams, who was the founder

of the electronic school of medicine. Abrams thought that disease is a lack of harmony in the electronic oscillations of the human body, that diseased tissue gives off a rate of energy different from normal tissue, and that each disease has its own rate of vibration. Followers of Dr. Abrams use the radioscope to measure the vibratory rate of electro-magnetic energy in different parts of the human system.

In using the radioscope, Dr. Alvord was helped by an assistant, a Mrs. Ogle. Dr. Alvord first unwrapped a blood sample from its tinfoil container and placed it in the trap door of the machine, which she then closed. Next she clipped one of the attachments to the side of Mrs. Ogle, who stood in front of the machine with her abdomen exposed. Mrs. Ogle held another attachment in her hand, and touched it to various parts of her body as directed by Dr. Alvord. Meanwhile, Dr. Alvord took a glass wand or conductor and stroked it across the left side of Mrs. Ogle's bare abdomen. While stroking the wand, Dr. Alvord turned the dials on the machine and made notations of the vibratory rates of electro-magnetic energy indicated by the machine as Mrs. Ogle touched the attachment to different parts of her body. After determining the vibratory rates, Dr. Alvord referred to an "Atlas" prepared by a Dr. Colson, which correlated the rates of vibration with particular kinds of disease energy. Then she prepared a treatment chart, which she sent to defendant; this chart stated the nature of the patient's illness and gave directions as to the particular part of the patient's body to be treated with the oscilloclast. Dr. Alvord received from Schmitt \$10 for the first blood test and \$5 for subsequent tests.

The oscilloclast is a kind of vibrator. It is a black box, somewhat larger than the radioscope, containing two circuits, one of which is electronic and the other electric. It also has a number of dials and attachments. The electric circuit carries a 60-cycle alternating current, while the electronic circuit is composed of two vacuum tubes; one tube is connected to an oscilla-

tor which resonates at about 40 megacycles and the other tube acts as a switch, turning the power on and off at a rate of ninety times a minute. In theory, the oscilloclast dissipates disease energy by eradicating the electrical impulses emitted by the disease. Thus in giving treatments with the machine, the attachments are placed against those parts of the patient's body which are affected by the disease, and the dials are adjusted so as to transmit the precise rate of energy which, according to Colson's "Atlas", will counteract the disease.

A number of expert witnesses, testifying on behalf of the People, gave their opinions as to the scientific value of the radioscope and the oscilloclast. Dr. Moses Greenfield, a nuclear physicist, qualified as an expert on the effect of nuclear energy upon the human body. He testified that the radioscope would not measure any electro-magnetic energy emitted by a piece of dried blood for the reason that the radioscope is a closed circuit; electric current cannot flow in a circuit unless there is some source of energy and no energy is exchanged in the machine. The machine would not send any physical signals to Dr. Alvord or Mrs. Ogle and any sensations felt by the latter would be wholly subjective and unconnected with the radioscope. He stated that the power generated by the oscilloclast ($\frac{1}{1000}$ ths of a watt) is so minimal that the machine could not produce chemical changes in the human body; treatments with the machine would have no more effect than a vigorous rubbing of the skin. David Robbart, a police radio technician, gave similar testimony as to the oscilloclast. He stated that he attempted to measure its power in relation to its electronic output but found the power was so slight that it could not be measured.

Dr. Justin Stein, a physician specializing in the treatment of cancer, testified that at the present time there is no blood test which affords a specific or conclusive diagnosis of cancer. (Dr. Harry Penn, a cancer researcher called by defendant, testified that he is working with a blood serum test for cancer, but that the test has not yet been perfected.) According to Dr. Stein,

the only positive test for cancer is a biopsy, which is an examination under a microscope of tissue removed from a patient's body.

A similar opinion was expressed by Dr. Ian Macdonald, who is also a physician and specialist in cancer. Dr. Macdonald also testified that long wave radiation, as used in the oscilloclast, cannot destroy cancer cells, and that the application of $\frac{1}{1000}$ ths of a watt power at a frequency of 40 to 44 megacycles would have no effect upon a cancer. He stated that the type of electromagnetic radiation effective against cancer would be in the neighborhood of 200,000 volts.

Dr. Alvord, testifying in her own behalf, stated that she studied electronic medicine at the Electronic Medical Foundation in San Francisco. In performing a blood analysis, she followed the techniques prescribed by the writings of Dr. Abrams and accepted his conclusions respecting the correlation between particular disease energies and electro-magnetic vibration rates; however, she did not know whether those conclusions had been confirmed by other research. Although heart action, pain and vitality are not diseases, the radioscope gives readings for them. She never studied nuclear physics but took a six-week course in electronics. She made no independent inquiry about the radioscope and never checked her clinical findings with findings from other laboratories. She stated her belief that the radioscope can detect cancer before it has reached the stage where it can be discovered under a microscope. Except for analyzing blood samples and recommending specific treatments with the oscilloclast, she had nothing to do with either Schmitt's patients or the operation of his office. She was aware that an action was brought against the Electronic Medical Foundation in the fall of 1953 but she never inquired about it as she had too many other things to do.

Defendant likewise took the stand in his own defense. His original specialization was the treatment of foot ailments. After undergoing twenty-two operations for a rectal cancer, he had his blood tested at the

Foundation and was cured by a series of treatments with the oscilloclast. This personal experience convinced him of the value of the electronic theory of medicine, which he described as the use of magnetic energy to change body chemistry. He began using the oscilloclast in 1946 and had fourteen machines in his office. Before meeting Dr. Alvord he sent blood samples to the Foundation for analysis. He was introduced to Dr. Alvord in 1953 by a Mr. West, who was connected with the Foundation; he sent blood samples to her because of her speed and efficiency. In diagnosing illnesses and prescribing oscilloclast treatments, he relied entirely on the "Atlas" and on the reports and treatment charts submitted by Dr. Alvord; he always parroted her words to his patients. He never disagreed with her findings and never advised a patient to go to another laboratory because no laboratory could do work which was comparable to hers. It was his opinion that the Spalliero, Capanna and Schaafsma children were not suffering from cerebral palsy and that Lauren Schaafsma had not sustained any brain damage. He stated that his treatments changed Butch Spalliero from an idiot into a moron and that the boy was 90 per cent normal for a moron. Mrs. Stamps was his only cancer patient whose condition did not improve after taking the treatments.

On cross-examination Schmitt was asked whether, after October 1953, he heard that the Electronic Medical Foundation, of San Francisco, was involved in litigation. Counsel objected to the question on the ground that it was immaterial, but the court ruled that it might have some bearing on defendant's motives. In response to the question, Schmitt testified that he received from Mr. West sometime after March 15, 1954 a typewritten copy of a Consent Decree of Injunction pendente lite in an action whereby the United States of America sought to enjoin the Foundation from mislabeling oscilloclasts and radioscopes which were shipped in interstate commerce. He admitted reading the decree, but stated that the document did

not dissuade him from using the machines for the reason that the alleged mislabeling had nothing to do with their therapeutic value.

Dr. Winston S. Sibson, a licensed chiropractor called by the defense, testified that he uses the oscilloclast in his practice, though in an adjunctive capacity; he would not use it alone in the treatment of cancer, tuberculosis or cerebral palsy. Four of Schmitt's former patients also testified in his behalf. They stated that they had taken treatments with the oscilloclast and had been cured of various complaints.

All the points raised on the appeal may be discussed under the headings: (1) The court erred in the admission of evidence allegedly obtained by means of an unlawful search and seizure; (2) defendants were not sufficiently advised of the charges against them; (3) the court unduly restricted the cross-examination of witnesses for the People; (4) the court erred in quashing a subpoena duces tecum issued upon defendant's application; (5) the evidence was insufficient to support the verdict; (6) the court erred in instructing the jury; (7) misconduct was committed by one of the People's witnesses; (8) the district attorney was guilty of prejudicial misconduct in his closing argument to the jury.

[1] As to the first point, Schmitt contends that the court should not have received in evidence any of the medical records, papers and equipment which were removed from his office without a search warrant by police officers and an investigator for the state medical board. We cannot agree.

On April 4, 1955, Faye Reed went to see Bydie S. Woodruff, an investigator for the State Board of Medical Examiners. She told him about the operation of Schmitt's office and gave him the names of some of Schmitt's patients; among the names was that of Mr. Stamps, whom Woodruff contacted the following day. Shortly thereafter, a misdemeanor com-

plaint was issued at Woodruff's instigation, charging defendant with a violation of section 26286.5 of the Health and Safety Code in that he advertised a drug or device represented to have an effect on cancer. We set out a portion of the statute in the margin.² On April 14th, Woodruff went to Schmitt's office in the company of several police officers and an investigator for the Pure Food and Drug Administration; they had a warrant for his arrest but did not have a warrant to search the premises. After arresting defendant, Woodruff and the officers subjected the office to an intensive search which lasted several hours. They removed and carried away in a truck six oscillographs, a file drawer containing patients' case histories, a loose leaf ledger containing tax and financial records, three file cases containing similar material, two oxygen meters and miscellaneous office equipment.

Woodruff testified at the trial that he was careful not to take records pertaining to defendant's foot treatments because he was interested only in records concerning use of the oscillograph; in searching the case history file, he looked for names mentioned by Mrs. Reed. The following day, he turned over to the district attorney the materials which had been seized but he continued his investigation. He and his fellow officers interviewed about fifty of Schmitt's patients, most of whose names they obtained from the files. Woodruff stated that he mainly interviewed persons who had taken treatments from defendant within the year immediately preceding issuance of the complaint; others were interviewed in order to establish a scheme or design on the part of defendant. It appears that no further action was taken in the misdemeanor case

and that on May 31st the grand jury returned the present indictment.

At the commencement of the trial, defendant made a motion to suppress evidence upon the ground that the search was illegal and a violation of his constitutional rights. In support of the motion he submitted an affidavit, alleging that the papers and equipment removed by the officers were wholly unrelated to the offense for which he was arrested and that the search and seizure were therefore unreasonable. No counter affidavits were filed and no testimony was taken on the motion. During the argument, counsel for Schmitt conceded the validity of the arrest. The motion to suppress evidence was denied and it was not renewed at any stage of the proceedings. Defendant did not object to the introduction of any specific item of evidence on the ground that it was unlawfully obtained.

We have made a careful examination of the lengthy transcript in an effort to determine which of the items seized at defendant's office were actually used in evidence. An oscillograph was placed in evidence by the People, but it appears that the machine was the one which Schmitt had rented to Mr. and Mrs. Patt; one of the machines taken by Woodruff was offered in evidence by defendant. Case histories and blood test reports relating to witnesses for the People were introduced in evidence by the district attorney; the remainder of the case histories were offered in evidence by defendant at the close of the testimony.

[2] Although the record permits a doubt whether the motion to suppress evidence was sufficient to preserve the question for the purposes of an appeal, we prefer to consider the issue on its merits. Since the arrest under section 26286.5 of the Health

2. "§ 26286.5. Advertisement of drug or device represented to have any effect on certain diseases. The advertisement of a drug or device represented to have any effect in any of the following diseases is unlawful and prohibited: albuminuria, appendicitis, arteriosclerosis, blood poi-

son, bone disease, Bright's disease, cancer * * *." The complaint also accused Schmitt of using the suffix "Dr." in his practice without the qualification "D. C.", in violation of section 15 of the Chiropractic Act, West's Ann.Bus. & Prof.Code, § 1000-15.

and Safety Code was lawful, the officers had the right to make a reasonable search of the premises under Schmitt's immediate control and to seize evidence related to that offense. *People v. Winston*, 46 Cal. 2d 151, 161-163, 293 P.2d 40, and cases cited.

[3] It was a proper inference from Woodruff's testimony that the officers were acting in good faith and were seeking physical and documentary substantiation of the charge that Schmitt was guilty of the representations forbidden by the statute. The term "advertisement", as used in the statute, means, among other things, all representations "disseminated in any manner or by any means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase or sale of drugs or devices." Health and Safety Code, § 26209. The term is broad enough to include oral representations. *People v. Galway*, 120 Cal.App.2d 45, 49, 260 P.2d 212.

It cannot be doubted that the oscilloclast is the kind of device contemplated by the statute, that Schmitt used it in the treatment of cancer, and there was direct evidence that he told his patients the machine would effect a cure. The items offered in evidence by the People were directly related to activity falling within the scope of section 26286.5 and would have been competent and material evidence against defendant in a trial on the misdemeanor charge; the machines were the subject of the prohibited representations and while advertising the benefits of the machine to his patients, defendant referred to the case histories and quoted from the blood test reports. Those introduced by the People were relevant to the representations made by defendant to witnesses for the People respecting treatment for cancer and tuberculosis. It is not argued that the evidence seized by the officers and which was introduced by the People was not relevant to a charge of conspiracy to commit theft by false pretenses. We are of the opinion that the evidence secured by the officers and offered by the People was properly ad-

mitted and that it was not to be excluded merely because it was offered in order to support a more serious charge than the accusation contained in the misdemeanor complaint. Our conclusion is not inconsistent with *People v. Mills*, 148 Cal.App.2d 392, 306 P.2d 1005, which is relied upon by defendant. Mills was arrested in his office for a violation of the corporate securities act. At the time of his arrest, the officers had already secured convincing proof of his guilt. Nevertheless, they made a thorough search of the premises and found evidence which led to his conviction on a dozen other felony counts. In that case, the court reversed the judgments as to the counts based on evidence uncovered during the search, holding that the search was wholly exploratory, unreasonable, and that it could not be justified as an incident to a lawful arrest. In the present case, Schmitt's medical records which were received in evidence were connected with the commission of the crime for which he was arrested.

There is merit in defendant's argument that even if the search was relevant to the arrest it went to unreasonable lengths. It appears that there was a general ransacking of defendant's offices and that nearly everything in sight was carted away for future examination, but the question here is whether evidence obtained illegally was used against the defendant. And, as we have shown, the evidence that was used was uncovered in the course of a search that was permissible, since it was relevant to the complaint under which the arrest and search were made and reasonably necessary in order to make a thorough search. The fact that other documents and records were seized, which were not used in the prosecution, could not have influenced the verdict or affected the validity of the conviction. There is no error in the admission of the exhibits.

[4] There is also no basis for defendant's contention that he was not informed as to the nature of the charges against him and not given an opportunity to answer them. The indictment was sufficient to charge him with the commission of a

public offense. (Penal Code, §§ 950, 951, 952), and it was unnecessary for the accusatory pleading to specify the kind of theft with which he was being charged. *People v. Brock*, 21 Cal.App.2d 601, 607-608, 70 P.2d 210. The indictment alleged thirteen overt acts committed by Doctors Alvord and Schmitt in pursuit of the methods they jointly employed in the examination of patients; in making blood tests and reporting to the patients the results thereof, namely, that the persons examined were suffering from cancer or tuberculosis, or both; in representing that the treatments to be administered would cure and had cured said diseases; and in the use of the radioscope for the making of tests and the oscilloclast in the administration of treatment. These allegations of the indictment together with the charge of conspiracy to commit theft and statements of the district attorney that the People were proceeding on the theory of conspiracy to commit theft by false pretenses were sufficient to advise the defendants of the nature of the charges they would be required to meet.

With respect to the third point, it is contended that the court unduly limited the cross-examination of some of the People's witnesses. In this connection, defendant assigns as error sixteen rulings wherein the court sustained objections to questions asked by counsel on cross-examination. As to the majority of these assignments of error, suffice it to say that the questions counsel proposed to ask were objectionable in that they called for hearsay, assumed the truth of facts which were not in evidence, or were as to immaterial or inconsequential matters. No useful purpose would be served by a separate discussion of each ruling. The trial lasted for two months. The court was extremely liberal in permitting cross-examination by defense counsel, which was vigorous and thorough. However, several assignments of error deserve more extensive consideration.

[5] One theory of defense adopted by Schmitt's counsel was that his client was being persecuted for his scientific beliefs

and that the American Cancer Society, Mrs. Reed and a local television station were conspiring to put him out of business. It appears that Schmitt was arrested during the annual fund-raising drive of the cancer society and that three days after the arrest, Station KTTV broadcast a televised exposé of his methods of treatment. Dr. Stein and Dr. Macdonald, who testified as expert witnesses for the prosecution, were officers in the state division of the American Cancer Society. Each stated that he never received any of the society's funds, had no connection with its fund-raising activities, that he did not know Mrs. Reed, and that he was first contacted in relation to the case by Woodruff. On cross-examination, counsel proposed to ask them whether they knew how much money the cancer society had in its bank account and whether they knew that Schmitt's prosecution was being used to publicize the fund-raising drive. Objections to these questions were sustained on the ground that they were immaterial. He offered to prove the society's bank balance but the offer of proof was rejected by the court. As to these questions, his argument is that the purpose of the questions was "to prove the interest of the medical experts who were on the Cancer Panels, and also to show the relationship between the American Cancer Society, and the KTTV Television Program, and Mrs. Faye Reed."

[6] Certainly great latitude should be allowed in cross-examination for the purpose of showing the state of mind of a witness, his interest in the case and his bias and prejudice. However, the court may and should limit the cross-examination of witnesses in order to confine it within reasonable bounds and curtail digressions which serve no purpose as proof of any disputed material fact in the case. *People v. Lantz*, 120 Cal.App.2d 787, 791, 262 P.2d 19. Since the witnesses denied knowing Mrs. Reed and denied having any control over the funds of the cancer society, we do not believe that the line of questioning proposed by defendant, if permitted,

would have been advantageous to him, or that he suffered any disadvantage or prejudice through the rulings of the court.

[7] It is also argued that the court erred in sustaining objections to numerous questions asked Faye Reed on cross-examination. Counsel proposed to ask her whether she gave evidence against defendant because she was named in the indictment as a co-conspirator, whether she believed she was violating the law while working for him, whether she believed she was guilty of conspiracy, and whether she was trying to cheat people while in his employment. It is doubtful that these questions were asked with the expectation that the witness would give affirmative answers. Counsel also proposed to ask Mrs. Reed whether she helped to "case" defendant's office, whether she helped Woodruff organize a raid, and whether she knew that fifteen officers had descended on the premises. Counsel stated that the purpose of the questions was to show Mrs. Reed's motive and bias. Objections to these questions were sustained. While great latitude should be permitted in cross-examination for the purpose of developing bias and prejudice no harm resulted from the rulings. There was abundant evidence that the witness had given information to the authorities and was opposed to defendant's methods. Her cross-examination was extensive with respect to her activities, motives and interest in the case.

[8] As to the fourth point, defendant asserts error in the granting of the People's motion to quash a subpoena duces tecum addressed to station KTTV. The subpoena sought the production of the station's "financial records, charges, reports, correspondence, and memorandum" relating to the above-mentioned television broadcast, "including records of payment by American Cancer Society and/or Public Relations agent therefore." The affidavit for the subpoena averred that those documents were material to prove "interest and bias of witness Dr. Ian McDonald, Fay Reed, and others, and the system plan, and scheme

of the American Cancer Society to persecute defendants."

[9] In support of his motion, the district attorney argued that the affidavit was indefinite and insufficient to show the materiality of the documents. The court postponed its ruling until the following morning in order to give counsel an opportunity to file a supplemental affidavit, but no new material was presented. Section 1985 of the Code of Civil Procedure provides that all applications for subpoenas duces tecum shall be accompanied by an affidavit specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case. The accompanying affidavit must clearly show that the requested papers contain competent and admissible evidence which is material to some disputed issue of fact at the trial. *McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, 159 P.2d 944. See, also, *Proctor & Gamble Mfg. Co. v. Superior Court*, 124 Cal.App.2d 157, 161, 268 P.2d 199; *Nelson v. Superior Court*, 9 Cal.2d 729, 732, 73 P.2d 232. The allegations of defendant's affidavit were wholly insufficient to show what material facts if any, would or could have been proved by the documents sought to be produced. We are therefore of the opinion that the court did not err in quashing the subpoena duces tecum.

[10-13] With respect to the fifth point, Schmitt contends that the evidence was insufficient to support the conviction of conspiracy to commit grand theft. The gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the agreement. Penal Code, §§ 182, 184; *People v. Frankfort*, 114 Cal.App. 2d 680, 688, 251 P.2d 401. The existence of the conspiracy may be established by circumstantial evidence (*People v. Steccone*, 36 Cal.2d 234, 237-238, 223 P.2d 17), and it may be inferred from the acts and conduct of the accused in mutually carrying out a

common purpose in violation of the statute. *People v. Benenato*, 77 Cal.App.2d 350, 358, 175 P.2d 296. Furthermore, the overt act may be accomplished by only one of the conspirators for the members of the conspiracy are bound by all acts of all members done in pursuance of the agreed plot. *People v. Pierce*, 110 Cal.App.2d 598, 610, 243 P.2d 585.

[14, 15] Theft is characterized as the felonious taking of property which is not one's own. Penal Code, § 484; *People v. Moorhead*, 104 Cal.App.2d 688, 694, 232 P.2d 268. Since the amendment in 1927 of section 484 of the Penal Code, the separate offenses of larceny, embezzlement and obtaining property by false pretenses have been merged into the one classification. *People v. Cannon*, 77 Cal.App.2d 678, 688-689, 176 P.2d 409. It was the theory of the prosecution at the trial that Schmitt was guilty of conspiring with Dr. Alvord and Mrs. Reed to obtain money from his patients by false pretenses. The elements of theft by false pretenses are as follows: "To support a conviction of theft for obtaining property by false pretenses, it must be shown that the defendant made a false pretense or representation with intent to defraud the owner of his property, and that the owner was in fact defrauded. * * * The false pretense or representation must have materially influenced the owner to part with his property, but the false pretense need not be the sole inducing cause." *People v. Ashley*, 42 Cal.2d 246, 259, 267 P.2d 271, 279.

[16] False pretense is defined as "a representation of some fact or circumstance, calculated to mislead, which is not true." *People v. Wasservogle*, 77 Cal. 173, 175, 19 P. 270. Defendant argues that he made no false representations of fact to the complaining witnesses and that a finding that he intended to deceive them is without support in the evidence. We cannot agree.

[17] Defendant's attorneys, of course, know full well and recognize that it is not our function as a reviewing court to reweigh the evidence and to substitute other

inferences for those reasonably drawn by the triers of fact and that we are limited to determining whether there was any substantial evidence to support the implied findings of the jury. The argument that there was no substantial evidence is unavailing. The testimony of the People's witnesses revealed a consistent course of conduct on the part of Dr. Schmitt, Dr. Alvord and Mrs. Reed. In each instance, Schmitt told the prospective patient that laboratory analysis of a blood sample was necessary in order to make a proper diagnosis. The patient paid Schmitt \$15 and a specimen of his blood was sent to Alvord, who analyzed it with the radioscope and submitted her findings to Schmitt. When the patient returned to his office, Schmitt read from papers or told him orally the results of Alvord's laboratory analysis, viz., that he was afflicted with either cancer or tuberculosis or both. Schmitt then assured the patient that he had successfully treated hundreds of similar cases with the oscilloclast and that treatments with the machine would cure the conditions disclosed through the blood test. Most of the complaining witnesses thereupon submitted to a lengthy, expensive and fruitless series of treatments, which were administered by Mrs. Reed. In view of Dr. Alvord's representations as to the reliability of her reports, her knowledge that Schmitt was using them in the treatment of patients and the long continued use of their methods in the treatment of cancer and tuberculosis it was a reasonable conclusion that each had equal responsibility with the other for the representations that were made and that they had but a single purpose in mind.

Defendant strenuously argues that the therapeutic value of the radioscope and oscilloclast are matters upon which reasonable minds may differ and that since they are the subject of genuine dispute among scientists, his representations may not be made the basis of a criminal charge. The argument is without merit. The only dispute was between defendant's contention that his representations as to what he had accomplished and could accomplish were

true and the evidence which tended to prove they were false.

[18] There was expert testimony which, if believed by the jury, would support inferences that the radioscope cannot measure the electro-magnetic energy emitted by a bit of dried blood and that, in any event, a blood test does not afford a specific diagnosis of cancer. The jury could reasonably conclude from the testimony of Schmitt's patients and their physicians that the purported diagnoses prepared by Alvord and repeated by him were false and misleading. There was also expert testimony which, if credited by the jury, tended to show that the oscilloclast was ineffectual in the treatment of cancer. This testimony, together with the circumstances related by Mr. Stamps, would warrant a conclusion that there was no truth in defendant's statements that he had cured hundreds of cancer cases with the machine. A single false material representation is sufficient to constitute the offense of obtaining property by false pretenses. 12 Cal.Jur. 469-470; *People v. Cravens*, 79 Cal.App.2d 658, 664, 180 P.2d 453.

[19] Whether Schmitt's representations about the radioscope and oscilloclast were material inducements to his patients in taking treatments with the latter machine was a question of fact for the jury (*People v. Hong Quin Moon*, 92 Cal. 41, 27 P. 1096; *People v. Kemp*, 124 Cal.App.2d 683, 687, 688, 269 P.2d 186; *People v. Adams*, 137 Cal.App.2d 660, 668, 290 P.2d 944), and it was a proper inference and, we believe, a necessary one, that his patients were led by those representations to believe that treatments with the oscilloclast were indispensable in order to restore them to health.

[20] Whether the representations were made honestly or with an intent to deceive was likewise a question of fact to be resolved by the jury from all the circumstances in evidence. *People v. Henderson*, 79 Cal.App.2d 94, 118, 179 P.2d 406; *People v. Baird*, 135 Cal.App.2d 109, 114, 286 P.2d 832.

[21] Defendant vigorously maintained at the trial and now argues that he did not intend to defraud his patients and that he was practicing electronic medicine in good faith. The jury passed upon that precise question and there was substantial evidence to justify the implied conclusion that he intended to deceive his patients for his own gain. He testified that he never checked the findings prepared by Alvord and that he used no other diagnostic techniques; he stated that he relied upon the diagnostic theories of the "Atlas". However, on the first page of the "Atlas", which was before the jury, appears the statement that the electronic test does not purport to take the place of physical examinations, urinalysis, blood counts, X-rays and microscopic examinations. Defendant's admissions could be considered by the jury in relation to the issue of his good faith. *People v. Markos*, 146 Cal.App.2d 82, 85, 303 P.2d 363. In addition, the jury could also consider the fact that defendant made a number of diagnoses which he knew were contrary to those made by physicians who had previously made examinations. When Mrs. Schaafsma and Mrs. Spalliero brought their children to see Schmitt, they informed him that the children had been examined by physicians and that they had been told that the children were suffering from permanent and irreparable damage to the brain. Defendant nevertheless stated that the children were afflicted with cancer or tuberculosis, and that he could cure them. The record discloses numerous other irreconcilable discrepancies between the claimed results of the blood tests and the findings of licensed physicians. It is unnecessary to make further reference to the testimony heretofore recited. The jury could properly determine either that defendant knew of the falsity of his representations or that he made them recklessly and without information which would justify him in a belief that they were true. *People v. Cummings*, 123 Cal. 269, 55 P. 898; *People v. Daener*, 96 Cal.App.2d 827, 216 P.2d 511; *People v. Ryan*, 103 Cal.

App.2d 904, 230 P.2d 359; *People v. Davis*, 112 Cal.App.2d 286, 246 P.2d 160; 12 Cal. Jur. 457. We therefore conclude that there was sufficient evidence to warrant an inference that the representations were made with an intent to defraud and that defendant's sole purpose was to induce his patients to take and pay for a series of treatments which he knew would be unavailing.

[22] It is argued that since the complaining witnesses contracted for treatments with the oscilloclast and actually received what they bargained for, no fraud was practiced upon them. The argument is untenable. The patients paid for more than they received, but even assuming that the treatments were reasonably worth the consideration paid, this is no defense where, as was the case here, the patients were induced to submit to them by means of false pretenses. *People v. Pugh*, 137 Cal.App.2d 226, 232-233, 289 P.2d 826.

As to the sixth point, Schmitt contends that the court committed error in the giving and refusal of instructions.

[23] At the request of both the People and defendant, the court gave the instruc-

tion which we have set out in the margin.³ In this connection, it is argued that the court erred in instructing the jury that false pretenses may consist of a representation made recklessly and without information justifying a belief that it is true. Defendant does not question that the challenged instruction was a correct statement of the law. *People v. Cummings*, supra, 123 Cal. 269, 55 P. 898; *People v. Daener*, supra, 96 Cal.App.2d 827, 216 P.2d 511; *People v. Ryan*, supra, 103 Cal.App.2d 904, 230 P.2d 359; *People v. Davis*, supra, 112 Cal.App.2d 286, 246 P.2d 160. Furthermore, we find no substance in the suggestion, advanced in defendant's briefs, that this instruction permitted the jury to base its finding of guilt upon negligence rather than upon theft by false pretenses.

[24] It is next contended that the court erred in failing to give adequate instructions as to specific intent. The court read section 484 of the Penal Code and gave the instruction that we have already quoted. The court also gave two additional instructions which we have set out in the margin.^{4,5} These instructions, when con-

3. "To constitute the crime of theft by obtaining property by false pretense, the false pretense used must be a fraudulent representation of an existing or past fact by one who knows it to be not true, or who makes the representation recklessly and without information justifying a belief that it is true, and it must be such as is adapted to induce the person to whom it is made to part with something of value.

"A mere expression of opinion or a statement concerning the future is not such a fraudulent representation.

"It is not necessary that the pretense be such as can not be guarded against by common prudence. Nor is it necessary that the fraudulent representation be made by words, if it may reasonably be inferred from a person's acts and conduct.

"Proof of these four facts must be made against the defendant before he may be found guilty of the crime of theft by means of false or fraudulent representations or pretense:

"1. The defendant must have intended to defraud the person named in the information as the one against whom the crime was perpetrated.

"2. Actual fraud must have been committed by the defendant against that person.

"3. Some false representation or false pretense must have been used by [or at the direction of] defendant for the purpose of perpetrating the fraud, and must have been a material element in inducing the owner to part with the property.

"4. The fraud must have been accomplished; that is, the defendant, by means of the fraud, must have induced the owner to part with the property, the owner intending to divest himself of title, and the defendant thus must have obtained the property."

4. "In a prosecution for theft by false pretenses, if it is shown that the defendant practiced a fraud of a kind regarded by law as being a false pretense, and with the intent to deprive another of property, it is immaterial whether he did so to obtain property for himself or his own possession, or to accomplish its delivery to another, either for the benefit of that other or for the benefit of himself." [Emphasis ours.]

5. "Before one lawfully may be convicted of having obtained from any person any

sidered together, were sufficient to inform the jury that they could not convict defendant without proof of a specific intent to defraud.

[25,26] The court refused to give three instructions on the issue of good faith which were requested by defendant. We have likewise set them out in the margin.^{6, 7, 8} Defendant argues that rejection of these proposed instructions was error for the reason that the jury was thereby prevented from considering his defense that he made the representations in good faith. We think not. As we have already said, the court instructed the jurors that they could not convict Schmitt unless they found that he intended to defraud his patients. The jury was therefore required, under the instructions given by the court, to consider the

property or valuable thing by any false pretense, used with an intent and design to cheat or defraud another, the proof must comply with one or more of the following requirements:

"1. It must be shown that the pretense so used, or some note or memorandum thereof, was in writing, subscribed by, or in the handwriting of, the defendant; or

"2. It must be shown that the false pretense was expressed in language accompanied by some false token or by some false writing; or

"3. The pretense must be proved by the testimony of at least two witnesses or, if by only one witness, the testimony of that witness must be corroborated by circumstances shown in evidence." [Emphasis ours.]

6. "You are instructed that the charge against defendants does not involve negligence on their part, or that they acted foolishly, or that they did not exercise good judgment. This is a criminal case, and the essence of the offence is that defendants acted with bad intentions, and with the intent to cheat and defraud the persons named in the indictment. You are further instructed that unless such corrupt motives on the part of the defendants are shown beyond a reasonable doubt and to a moral certainty, then it is your duty to find them not guilty and to acquit them."
7. "You are instructed that procuring money by false pretences, as defined in Section 484 Penal Code, contemplates:

question of his good faith, for it could not find an intent to defraud without of necessity making an implied finding that defendant was not acting in good faith. The proposed instructions merely restated the substance of the instructions on specific intent, although negatively and in another form. When a jury is properly instructed as to an applicable legal principle it is unnecessary to restate that principle in another way. *People v. Kelley*, 81 Cal.App. 398, 404, 253 P. 773; *People v. Cravens*, supra, 79 Cal. App.2d 658, 668-669, 180 P.2d 453; *People v. Warner*, 134 Cal.App.2d 829, 832, 286 P.2d 560. Although a more specific instruction that honest intentions and good faith would be a good defense could well have been given we do not believe that such an instruction was necessary, in view of the instructions that were given. It is incon-

"'A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.'"

"In this regard, the question is not whether the electronic technique practiced by defendants was or was not scientifically valid. The sole question is, did defendants in good faith believe that there was therapeutic merit to the technique. Unless the jury find beyond a reasonable doubt and to a moral certainty, that defendants in fact intended to defraud, and that they did not believe in the validity of the electronic technique, then in such an event you must find them not guilty and acquit them."

8. "The jury is instructed that the question as to whether the services rendered were in fact proper or not, is not in issue in this proceeding. Neither is any question of negligence, or malpractice on the part of Dr. Schmitt an issue. The sole question is whether or not Dr. Schmitt and Dr. Alvord, with Fay Reed, wilfully and unlawfully conspired to cheat and defraud the patients named in the indictment. In this regard, whether or not the services were good or bad, beneficial or harmful is not the issue. The matter of guilt hinges on the good or bad intentions of the defendants. Good faith and honest intentions on the part of defendants constitute a complete defense to the charge of conspiracy, as contained in the indictment."

ceivable that during the trial of two months duration the jury could have failed to understand that the defense of good faith was the precise one upon which the defendants relied.

A great deal of defendant's argument is that he was convicted not of making false statements but of making reckless statements, and of mere negligence. He says that throughout the trial the People sought to prove only the falsity of his statements and that recklessness was dwelt upon only in the final arguments and in the instructions. As we have stated, both defendant and the People requested the instruction which stated that a false pretense must be a false representation of an existing fact known to be untrue or a statement made recklessly and without information justifying a belief that it is true. Defendant says also that if he followed standard methods of procedure (presumably his own procedure) he could not have been guilty of negligence or recklessness, and that this was a question for experts in the use of the machines in question, none of whom were used as witnesses by the People. The argument is untenable. Defendant represented that by his method he could detect cancer and tuberculosis and cure them and that he had done so in a great many cases. His statements were either true or false. He was no beginner. He was not relying upon what he had read or been told. He spoke from his own knowledge and experience. He was not mistaken because of misinformation. He knew, so he said, he could obtain certain results. That was the issue, and the jury found that he did not believe he had done in the past what he claimed to have done, and he did not believe he could do what he asserted, as a fact, he could do. We may add that we do not believe that upon the evidence the jury could reasonably have found any justification for the positive representations and assurances made to the patients who testified against him. The issue was clear cut and was well and fairly tried.

[27] Defendant also argues that the court erred in refusing to give a number of

instructions as to the scope of his chiropractic license. The proposed instructions would have told the jury that defendant was authorized to " * * * use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body" so long as he used no drugs in connection with his practice, and that " * * * a licensed chiropractor may lawfully treat a patient for cancer, or any other disease, within the limits of his chiropractic license * * *." These instructions were not material to any issue in the case and were properly refused. Schmitt was not charged with using a mode of treatment which he was not authorized to use under his chiropractic license, and the fact that he may have been authorized to engage in the drugless treatment of cancer was wholly immaterial to the question whether he induced his patients to submit to his treatments through fraudulent misrepresentations.

[28] As to the seventh point, there is no merit in the contention that one of the People's witnesses was guilty of prejudicial misconduct. During the cross-examination of Mrs. Spalliero, the witness was asked by defendant's counsel whether she had discussed Schmitt's treatments with Mrs. Reed and a certain attorney. Mrs. Spalliero replied that she did not talk the matter over with Mrs. Reed, but that a visiting nurse from the city health department "told me that he [Schmitt] was arrested a couple of times before", and that she (the witness) told Mrs. Reed about the statement and asked if it were true. Counsel promptly moved that the answer be stricken on the grounds that it was hearsay and unresponsive; the court granted the motion and instructed the jury to disregard the answer.

In support of the claim of error, defendant argues that it was the district attorney's duty to anticipate and prevent the improper statement, citing *People v. Baker*, 147 Cal. App.2d 319, 305 P.2d 97. The argument cannot be sustained. The case is not in point. The evidence improperly elicited by the district attorney in that case was such as he should have anticipated and warned the witness against. But such is not the

case here. The incident occurred during defendant's cross-examination. The deputy could not reasonably have foreseen that Mrs. Spalliero would volunteer an improper statement while being questioned by defense counsel. Furthermore, the court immediately instructed the jury to disregard the answer and embodied its admonition to disregard stricken matter in a formal instruction at the conclusion of the trial. It is to be presumed that the jury followed these instructions and confined its deliberations to a consideration of matters which were properly in evidence. There is no substance to the assignment of error.

[29] The next point raised on the appeal is that the district attorney committed prejudicial misconduct in making reference to the litigation between the United States of America and the Electronic Medical Foundation during his closing argument to the jury. Our attention is directed to the following remarks of the prosecutor: "Let's come out and say this is an agreement between these two defendants whom we are only faced with, of whom we must only consider that this agreement was one of a conspiracy to get money, to get money as the result of representations that were recklessly made, without a justification for believing in them, and then those people that are out there [i. e., other persons using the radioscope and oscilloclast], they are not going to say, 'Give me your money. This box will tell you what you've got,' *they are going to have to put up just like in San Francisco in the face of this injunction of the Federal Government* * * *."

Counsel for defendant cited the italicized language as misconduct and requested that it be stricken upon the grounds that the statement was untrue and was not proper rebuttal argument. The deputy stated: "They put good faith in here, in their argument", which counsel conceded. The court then admonished the jury to disregard the prosecutor's statement and added: "I believe the testimony did not show an injunction, that there was a consent decree pending the lawsuit that the merchandise

wouldn't be shipped out of the state, or something to that effect, so the fact that reference is made to an injunction may be misleading * * *." The deputy then said to the jurors: "When the judge tells you to disregard something I say, that is to be done without any equivocation. If what I do has been wrong, I apologize to the Court and counsel, and to the defendants, and to you. I do not seek to take unfair advantage of anyone anywhere * * *."

Defendant urges that the reference by the prosecutor to the San Francisco litigation constituted misconduct of so serious a nature that its prejudicial effect was not cured by the court's admonition. In support of the claim of prejudice, he points out that on the morning of the second day of its deliberations, the jurors requested additional instructions as to the meaning of a unanimous verdict and asked to have the transcript of Alvord's testimony read to them. Several jurors asked to hear her testimony about her knowledge of the lawsuit. This testimony was read to the jury at 1:30 p. m. and at 4:30 the same afternoon the jury returned its verdict.

While we have heretofore referred to the temporary injunction issued in the case of the government against the Electronic Medical Foundation, which uses the radioscope and oscilloclast, and to the questioning of Doctors Alvord and Schmitt as to their knowledge of the litigation, little is said in the briefs with respect to the propriety of referring to the litigation at all. This is for the reason that defendant does not now contend that reference to the decree in the cross-examination of the doctors was reversible error, and the further reason that the defense introduced the decree into evidence. On behalf of the defendants in the government's litigation consent was given to the issuance of a temporary injunction. It enjoined against the transportation in interstate commerce of certain things, among them the radioscope and the oscilloclast if they were misbranded. It is sufficient to say of the injunction that it would have been violated by the transportation of a radioscope or an oscilloclast branded or labeled

as intended for use in the treatment of cancer, tuberculosis or any other disease.

We cannot agree that the prosecutor was guilty of misconduct. The court had ruled that cross-examination of Doctors Alvord and Schmitt as to their knowledge of the decree was proper because it had some bearing upon their motives. In their testimony they admitted their knowledge and their indifference to the government's litigation. Comment upon their attitude was not improper. If the prosecutor misstated the purport of the decree at one time we find that he twice stated that it was entered without prejudice to those who had consented to it and that the government was only seeking an injunction. The decree had been placed in evidence by the defense and spoke for itself. The remarks of the prosecutor implied that the decree forbade use of the machines, and while this was not the case, we believe the inaccuracy was inadvertent and that the fact that the decree was before the jury, the admonition and remarks of the court and the attitude of the prosecutor rendered harmless the statement complained of.

We must say that we believe all evidence relating to the injunction should have been excluded. Perhaps it had some remote bearing upon the motives of the defendants in continuing to use the machines, but we cannot see that it was deserving of more than passing consideration for that purpose. Moreover we doubt that the prosecution in bringing the decree to the attention of the jury had a single purpose in mind. The fact that the decree enjoined against the transportation in interstate commerce of the radioscope and oscilloclast and other devices branded or labeled as intended for the detection or treatment of disease was, in effect, a denunciation by the government of the use of the machines, which would naturally have made a strong impression upon the minds of the jurors. The fact that evidence may have some slight value upon one factual issue does not justify its admission if its inevitable tendency is to do

serious harm to an adversary. But if there was harm it came from having the decree in evidence for the jury to read and not from the statements of the prosecutor.

[30] A judgment will not be reversed for improper remarks of a prosecutor, not made in bad faith, when there is a prompt admonition by the court and it appears that no prejudice has resulted. *People v. Willard*, 150 Cal. 543, 552, 89 P. 124; *People v. Craig*, 152 Cal. 42, 50, 91 P. 997; *People v. Montgomery*, 47 Cal.App.2d 1, 20, 117 P.2d 437.

[31-33] One other point remains to be considered. In support of the motion for a new trial, Schmitt's counsel filed an affidavit in which he alleged that following the discharge of the jury, two jurors asked him whether he was going to Texas to defend a Mr. Hoxsey, the founder of the Hoxsey cancer treatment. Attached to the affidavit were copies of newspaper stories which appeared in the local press during the trial; the stories concerned the condemnation of Hoxsey's cancer cure by the United States Government. Defendant argues that the jurors were improperly influenced by these articles in arriving at their verdict. There was no evidence that such was the case. Moreover, it is well settled that the verdict of a jury may not be impeached by the affidavits of third persons which set forth the substance of extra-judicial statements of jurors. *People v. Cahan*, 141 Cal.App.2d 891, 902-903, 297 P.2d 715. Furthermore, the newspaper articles are matters outside the record and will not be considered on the appeal. *People v. Ruiz*, 103 Cal.App.2d 146, 149-150, 229 P.2d 73, and cases cited.

After giving full consideration to the many claims of error in the trial we have found no disregard of defendant's right to a fair trial.

The judgment and the order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.

155 Cal.App.2d 69

AMERICAN AERONAUTICS CORPORATION, Plaintiff and Appellant,

v.

GRAND CENTRAL AIRCRAFT CO., a corporation; **P. A. Johnson**, **S. Carpenter** and **L. A. Keithley**, Defendants,

Grand Central Aircraft Co., a corporation,
Respondent.

GRAND CENTRAL AIRCRAFT CO., a corporation, Plaintiff and Respondent,

v.

AMERICAN AERONAUTICS CORPORATION, **Gordon Strube**, **Charles Frankel** and **Milton Cunha**, Defendants,

American Aeronautics Corporation,
Appellant.

Civ. 22170.

District Court of Appeal, Second District,
Division 3, California.

Nov. 8, 1957.

Owner's action for recovery of an aircraft, and damages for its detention, wherein contractor cross-complained for declaration of its right to possession of both of aircraft, which it had been hired to reconstruct, pending payment for labor performed and materials furnished. The action was consolidated for trial with a second action, in which the contractor had sued the owner for money alleged to be due for labor performed and materials furnished in modification of a third aircraft, and the owner cross-complained, alleging that contractor's improper performance had necessitated replacement of one engine and repair of another, to its damage. The Superior Court of Los Angeles County, Philbrick McCoy, J., rendered judgment adverse to the owner in both actions, and it appealed. The District Court of Appeal, Vallée, J., held that evidence would sustain finding that the contractor had fully performed all of the conditions and obligations of its agreement, but held that the evidence would not sustain the trial court's finding that the oral agreement by which the parties were bound had provided for payment of attorneys' fees in event of suit.

Modified and affirmed.

1. Replevin Ⓒ93

In owner's action for recovery of an aircraft and damages for its detention, wherein contractor cross-complained for declaration of its right to possession of both of aircraft, which it had been hired to reconstruct, pending payment for labor performed and materials furnished, there was no ambiguity in finding that parties had made oral agreement as to charges for work to be done and that they had thereafter set forth the complete terms of their agreement in proposed written contract which had never been signed by owner.

2. Aviation Ⓒ238

In owner's action for recovery of an aircraft and damages for its detention, wherein contractor cross-complained for declaration of its right to possession of both of aircraft, which it had been hired to reconstruct, pending payment for labor performed and materials furnished, evidence would not sustain finding that complete terms of oral agreement by which parties were bound had been set forth in proposed written contract thereafter prepared but not executed.

3. Aviation Ⓒ238

In owner's action for recovery of aircraft and damages for its detention, wherein contractor cross-complained for declaration of its right to possession of both of aircraft, which it had been hired to reconstruct, pending payment for labor performed and materials furnished, evidence would not support finding that owner had acted on proposed written contract (prepared after work had commenced under binding oral agreement between parties), and received benefits of contractor's performance thereunder, or finding that owner had assured contractor that proposed written contract correctly set forth agreement of parties.

4. Contracts Ⓒ24

An acceptance, to result in formation of binding contract, must meet exactly, precisely, and unequivocally the terms proposed in the offer.

5. Contracts ⇨24

An offer must be accepted according to its tenor before binding contract is formed.

6. Contracts ⇨22(1)

Mere statements of intention, or promissory expressions, will not suffice to constitute an acceptance. West's Ann.Civ. Code, §§ 1550, 1565, 1580.

7. Contracts ⇨24

Where a person offers to do a definite thing and another introduces new terms into the acceptance, his answer is a mere expression of willingness to treat or it is a counterproposal, and in neither case is there a contract.

8. Contracts ⇨241

Where proposed written contract, containing terms in addition to those fixed by prior oral agreement of parties, was presented by one of parties to the other, such other was entitled to treat it as the suggestion of a new agreement.

9. Contracts ⇨35

Where oral agreement contemplates execution of formal written contract by signing, other party has right to insist on condition, and mere acts on part of one who has not signed will not validate written contract.

10. Contracts ⇨42

A contract in writing signed by parties takes effect only on delivery. West's Ann. Civ.Code, §§ 1054, 1626; West's Ann Code Civ.Proc. § 1933.

11. Contracts ⇨32

Where it was part of understanding of parties that their oral agreement would be reduced to writing, signed by them, and delivered, but new terms were added in writing, and it was never signed by one of parties or delivered, oral agreement remained binding, and proposed written contract was of no force or effect.

12. Damages ⇨71

In absence of statute authorizing attorneys' fees as an element of damages, or of a contract to pay such fees in event of party's recovery, attorneys' fees paid

by successful party in action are never recoverable against unsuccessful party. West's Ann.Code Civ.Proc. § 1021.

13. Pleading ⇨279(1)

A motion to file a supplemental complaint is addressed to discretion of trial court, and its ruling will not be disturbed, in absence of showing of manifest abuse of that discretion.

14. Pleading ⇨279(2)

Request to file supplemental complaint was untimely when made eight months subsequent to filing of original complaint; and numerous depositions having been taken between filing of original complaint and date when request was made, on third day of trial, it was not abuse of discretion to deny same.

15. Pleading ⇨204(2), 364(2)

Where part of count states facts sufficient to constitute cause of action, it is improper to sustain a general demurrer; the proper procedure being to strike any irrelevant matter.

16. Aviation ⇨238

In owner's action for recovery of aircraft and damages for its detention, wherein contractor cross-complained for declaration of its right to possession of both of aircraft, which it had been hired to reconstruct, pending payment for labor performed and materials furnished, evidence sustained finding that contractor had fully performed all of conditions and obligations of its agreement.

17. Aviation ⇨238

It was not error to provide in judgment that contractor should recover value of aircraft, in lieu of its possession, with right to retain same until judgment for breach of agreement was paid. West's Ann.Code Civ.Proc. § 667.

18. Dismissal and Nonsuit ⇨3

A judgment of nonsuit may not be granted as to particular issues.

19. Aviation ⇨238

In contractor's action against owner for money alleged to be due for labor performed and materials furnished in modi-

fication and repair of an aircraft, wherein owner cross-complained, alleging that contractor's improper performance had necessitated replacement of one engine and repair of another, to owner's damage, it was error to grant plaintiff's motion for judgment of nonsuit as to allegations of cross-complaint with respect to one engine and deny it as to allegations with respect to other engine; but any prejudice from such ruling was eliminated when court weighed evidence with respect to both engines.

N. E. Youngblood, Beverly Hills, for appellant.

Latham & Watkins, Ira M. Price II, John S. Welch, Los Angeles, for respondent.

VALLEE, Justice.

Appeal from a judgment rendered in two consolidated actions. There was one set of findings and one judgment applicable to the two actions. American Aeronautics Corporation is plaintiff and cross-defendant in action 634602 and defendant and cross-complainant in action 637534. Grand Central Aircraft Co. is defendant and cross-complainant in action 634602 and plaintiff and cross-defendant in action 637534. The judgment was adverse to American in both actions and it appeals.

Action 634602

The complaint is in two counts: the first seeks recovery of an F-51D type aircraft; the second is for damages for detention of the aircraft. Grand Central answered, alleging a possessory right to the aircraft based on a lien for labor performed and materials furnished under the terms of an oral agreement with American embodied in a written contract. Grand Central cross-complained, alleging an oral agreement with American for reconstruction and assembly of two F-51D aircraft on a time and material basis; that the agreement was later reduced to writing; and that completion of work on one of the aircraft and prevention of completion of

work on the other was due to failure of American to deliver necessary parts and notice from American to cease work. Grand Central prayed for a declaration of its right to possession of both aircraft, pending payment for labor performed and materials furnished, and also for damages. American answered the cross-complaint, admitted the making of an oral agreement, alleging it was for the reconstruction and assembly of two aircraft at an estimated contract price with an agreed maximum and a fixed delivery date, and that it refused to execute the written contract on the ground it did not conform to the oral agreement.

About July 12, 1954 Major Cerruto, representing the Republic of Bolivia, contacted Strube, president of American, with respect to the purchase by Bolivia of one F-51D fighter plane and one F-51D dual trainer. About a week later Cerruto and Strube agreed on prices. On July 26 Strube contacted Keithley, manager of operations of Grand Central, and told him American wanted Grand Central to build the planes by overhauling miscellaneous components and materials in the possession of American, and that he wanted a firm price on the job. Keithley told Strube he would take it up with Grand Central's management and contact him.

On July 27 Keithley met with Strube and Cunha of American. Keithley made a tour of American's shop and inspected parts to be used in construction of the planes. The engines were not there. Keithley told Strube he would not give him any fixed or ceiling price on the job; and that Grand Central would take the job on a time and material basis at \$4.15 an hour for labor, and at cost plus 10 per cent for materials furnished by Grand Central. Strube stated the engines he had were new and would require only a top overhaul. Keithley told Strube that about 35 working days would be required to construct the fighter. There was no talk about a delivery schedule on the trainer.

On July 28 Keithley met with officials of American and checked various parts proposed to be used in construction of the planes. On July 29 Keithley wrote American "that on the basis of our investigation of July 28, 1954 we have found you to be in possession of the components and assemblies which will allow the complete build-up of two (2) F-51D type aircraft."

On July 29 Strube, Frankel, and Cunha of American met with Johnson, general manager of Grand Central, Keithley, and Carpenter, secretary-treasurer of Grand Central. Strube said he was going to put the job in Grand Central's hands. Johnson said Grand Central would take the job on a time and material basis at \$4.15 an hour for labor, and it would furnish materials at cost plus 10 per cent. Strube said that was satisfactory. Keithley said Grand Central would be able to construct the fighter in 35 working days provided it was given the materials and the trainer would be delivered on receipt of the parts and a conversion kit as soon as possible after completion of the fighter.

Frankel and Carpenter left the July 29 meeting and went to Carpenter's office "to arrange a contract." Carpenter told Frankel Grand Central's regular contracts were time and material contracts and the rate would be \$4.15 an hour with premium time for overtime, and materials furnished would be at cost plus 10 per cent, and Grand Central would require a deposit before starting work. Frankel said that would be satisfactory, and a deposit of \$4,000 was agreed to. Carpenter told Frankel he would give him a memorandum and prepare a contract.

On July 30 Carpenter wrote Strube the \$4,000 deposit would be made on delivery of the parts; further payments of \$4,000 would be made each week starting August 9, 1954 until completion of the work; and "As soon as the specifications have been received by our Mr. Keithley, a contract will be prepared and the above schedule of payments incorporated therein. It is understood that the job is for time and

material. The direct labor rate for straight time will be \$4.15 per hour and an additional premium for overtime and double time will be charged. This will be detailed in the contract to perform the work." Strube did not reply.

American delivered parts to Grand Central on July 31. Grand Central began the work on August 2, 1954. Somewhere between "7 to 14" days later Carpenter prepared a typewritten draft of a contract and submitted it to Frankel who took it with him. Somewhere "around the 20th or 25th" of August, "closer to the 25th," Frankel took the draft to Carpenter and requested changes. Carpenter said he would make the changes and submit the contract to Frankel. Carpenter testified Frankel said "with the changes, why, they would approve it, sign it." Carpenter then drew a formal, typewritten contract making the changes, signed copies of it on behalf of Grand Central, and about August 30 advised Frankel it was ready. Several days later Cunha picked it up. In a few days Carpenter called Frankel and asked that the proposed contract be returned, signed. Frankel said Strube was out of town and as soon as he got back "we would get the contract signed." Around September 10, 15, 20, or 22 Carpenter again asked Frankel to have the proposed contract signed and sent over. Carpenter testified Frankel said it would be signed and sent over. Frankel testified he told Carpenter American would not sign it because it "still did not comply with the original understanding that we had in our meeting with he and Mr. Johnson on the 30th of July.

"Q. What did he say? A. He said that it was necessary for them to have a signed contract and that I should overlook any difference that we might have at this time in view of the fact that the work was so far in progress, and sign this draft of the contract.

"Q. What did you say? A. I said that I could not sign this draft of the contract."

Carpenter testified:

"Q. Did Mr. Frankel ever tell you that he wouldn't sign Plaintiffs' Exhibit No. 9 [the proposed contract] or any copy thereof? A. Not that I recall.

"Q. Would you say he did not tell you? * * *

"The Witness: I don't recall that he stated he would never sign it. * * *

"Q. What did Mr. Frankel say to you and you to him about the execution of this contract at that time? A. I asked him to execute the contract.

"Q. What did he say? A. He said that he would.

"Q. He said that he would? A. Yes.

"Q. Is that the way he stated it? A. He said that substantially. He didn't say that he wouldn't.

"Q. Wait a minute. Which did he say? Did he say, 'I will sign it,' or did he say, 'I will not sign it'? A. He said he would have the contract signed." This was the last conversation Carpenter had with Frankel regarding the proposed written contract.

The proposed written contract was never signed by American or by anyone on behalf of American. Both the draft and the proposed contract contained a provision that in the event it became necessary for Grand Central by action to enforce the collection of any sum "under this contract, Aeronautics" would pay all necessary expenses including court costs and reasonable attorneys' fees that Grand Central might incur in the event it was awarded judgment.

Grand Central continued to perform the work. On intermittent dates, beginning August 2, 1954 to and including September 18, 1954, all the work performed by Grand Central was authorized by a representative of American on a Grand Central form. On each authorization, except those for overtime and for a few pieces of equipment, there was the notation, "T & M Labor \$4.15 per hour, Material at cost plus 10%." There were eleven authoriza-

tions for overtime work; one of them read: "(Subject to final settlement with Mr. P. A. Johnson) (per previous conversation between Mr. Frankel and Mr. P. A. Johnson)"; three of them read, "Signed under protest." The authorizations were prepared by a representative of Grand Central.

There were frequent shortages of parts and delay in delivery of parts by American. These were reported to it. Some needed parts which American had agreed to furnish were never furnished but had to be fabricated or otherwise supplied by Grand Central. Strube was told that unless various items were furnished the work would be delayed. American did not deliver the blueprints for the trainer to Grand Central until August 17, 1954. "Conversion kit" parts, which American was to obtain from the Air Force and furnish to Grand Central, were never delivered. Strube testified a substantial portion of them was not obtained from the Air Force until the latter part of October 1954, after suit was filed. Many of the parts furnished by American were not serviceable. The engines were damaged. American in writing authorized the repair and replacement of damaged and missing parts and additional work and parts. Numerous parts required more work than that involved in a "normal overhaul."

The fighter was completed on September 23, 1954. On September 29, 1954 American ordered Grand Central to stop all further work and demanded possession of the fighter. Grand Central refused until the amount it claimed due it was paid, and said it would release it on payment of \$32,108.95. American then filed action 634602 and secured possession of the fighter on posting a claim and delivery bond. American delivered it to Bolivia on October 17, 1954 in Texas. On the flight to Bolivia it crashed and was destroyed.

The court found: on July 29, 1954 the parties orally agreed Grand Central would perform the work on a time and material basis, with direct labor hours to be paid for at the rate of \$4.15 per hour and ma-

terials furnished by Grand Central at cost plus 10 per cent, premium rates to be charged for overtime hours, work on the fighter to be completed within a reasonable time of about 35 days, and on the trainer as soon thereafter as possible.

The court further found: "After the commencement of performance of said work by defendant and before the major portion of said work had been performed, plaintiff and defendant set forth the complete terms of their agreement pertaining to said F-51 aircraft in a document entitled 'Time and Material Contract', a copy of which is attached hereto as Exhibit 'A' and by this reference incorporated herein as though fully set forth at this place. Each of said parties accepted and approved said document as containing the express oral agreement of the parties and each of said parties agreed that it was bound thereby. Said parties did not make execution of said document a condition of becoming bound by said express oral agreement. Defendant executed said Time and Material Contract and delivered it to plaintiff. Plaintiff received and held said document and acted thereon and received the benefits of defendant's performance thereunder as hereinafter found. From time to time thereafter and during the performance of said work and the furnishing of said materials by said defendant, plaintiff stated to and assured defendant that said Time and Material Contract correctly set forth the agreement of the parties and that plaintiff would execute it and deliver it to defendant, but plaintiff did not execute or deliver said document to defendant."

The court also found: "In addition to said express oral agreement, each of the various phases of work of reconstructing, modifying and repairing said aircraft was authorized in writing by plaintiff. As in said agreement, each of said written authorizations specified that the work was to be performed on a time and material basis with labor at \$4.15 per hour and materials at cost plus 10%"; as to the fighter, Grand Central performed all the

conditions and obligations of the oral agreement and the written authorizations; the value of the fighter on October 12, 1954 was \$38,500; as to the trainer, Grand Central fully performed all the conditions and obligations of its agreement to the full extent of its ability to do so and would have completed it as agreed but for the fact that it was prevented from doing so by American demanding that it cease further work; Grand Central has possession of the partially completed trainer; during performance of the agreement American paid Grand Central \$24,000; there became due Grand Central the sum of \$56,108.95, "which constitutes the agreed value of the hours of labor performed thereon at the rate of \$4.15 per hour for straight time hours, \$5.75 for overtime hours at time and one-half, and \$6.80 for overtime hours at double time, and for materials calculated at defendant's list price less applicable discounts plus 10% handling charge, of which \$29,394.31 is applicable to labor and materials furnished to said fighter aircraft, \$22,354.84 is applicable to labor and materials furnished to said dual trainer aircraft, and \$4,359.80 is applicable to labor and materials furnished to said spare parts. The balance of \$32,108.95 (\$56,108.95 less \$24,000.00) was duly demanded by defendant from plaintiff on or about October 1, 1954 and is now due, owing and unpaid."

The court found it became necessary for Grand Central to seek to enforce collection of the amounts due it; that in action 634602 it did so and incurred expenses for attorneys' fees which were performed; the reasonable value of the attorneys' services is not less than \$7,500.

It was concluded that American and Grand Central are parties to a valid and binding express, oral agreement, the terms of which are contained in the document prepared by Carpenter; American breached its agreement; Grand Central is entitled to the return of the fighter "and since the return thereof is impossible, is entitled to the return of the value thereof, to wit: \$38,500.00, to be held as security

for the payment of the sum of \$32,108.95, together with interest thereon from the 1st day of October, 1954 at the rate of 7% per annum until paid"; Grand Central is entitled to retain possession of the trainer and spare parts in its possession until the \$32,108.95 with interest is paid.

Judgment was that Grand Central recover from American \$38,500, the value of the fighter, in lieu of its possession, with the right to retain the \$38,500 together with the trainer and certain supporting spare parts until it receives payment of \$32,108.95 with interest, which right is a lien; Grand Central have judgment against American for \$32,108.95 with interest, for \$600 paid by Grand Central as a premium on an insurance policy, and for \$7,500 attorneys' fees. As noted, American appeals.

The first point urged is that the judgment is based on a finding of fact and conclusion of law to the effect that American was a party to a valid and binding oral agreement, the terms of which were set forth in an unexecuted written contract, and that such judgment is erroneous as a matter of law. The attack is on the finding that after work began the parties set forth the complete terms of their agreement in the proposed written contract prepared by Carpenter which was signed by Grand Central but never signed by American.

[1] The court first found that on July 29, 1954 the parties agreed that Grand Central would perform the work at \$4.15 an hour and furnish materials at cost plus 10 per cent, and that premium rates would be charged for overtime. It next made the finding attacked. American says these findings are ambiguous. We think not. What the court found was that the parties entered into an oral agreement, that the complete terms of the oral agreement are to be found in the proposed written contract prepared by Carpenter, and that the parties are bound by the oral agreement. The court did not find that the proposed written contract prepared by Carpenter constituted a valid and binding

contract. The parties were not bound by both an oral agreement and a written contract; they were bound by an oral agreement. The court specifically found the "parties did not make execution of said document [the proposed written contract] a condition of becoming bound by said express oral agreement."

[2] American contends the finding we have quoted, which states that the parties "set forth the complete terms of their [oral] agreement" in the proposed contract prepared by Carpenter, is not supported by the evidence. This contention must be sustained. The oral agreement, as found by the court, was made on July 29, 1954. It was that Grand Central would reconstruct the fighter and trainer on a time and material basis at the rate for labor of \$4.15 an hour and for materials furnished by Grand Central at cost plus 10 per cent, and that premium rates would be charged for overtime. This finding is amply supported. The proposed contract says Grand Central shall do the work and American shall pay Grand Central \$4.15 an hour for straight time, \$5.75 an hour for time and a half, and \$6.80 an hour for double time. It says that materials furnished by Grand Central shall be paid for at cost plus 10 per cent. This portion of the proposed contract was the oral agreement. However, the oral agreement and the proposed contract are not identical. There are numerous other matters in the proposed contract which were not discussed in the conversations of July 29, 1954 which constitute the oral agreement. Most of them are of no consequence and need not be discussed.

One provision in the proposed contract which American vigorously attacks and on the basis of which the court made an award of attorneys' fees to Grand Central provides that if it should become necessary for Grand Central by action to enforce the collection of any sum due it, American should pay all necessary expenses including reasonable attorneys' fees. Payment of attorneys' fees in the event of suit

was not a part of the oral agreement. The finding that this provision was a part of the oral agreement is wholly unsupported. There is no evidence that American ever at any time agreed to this or any other provision of the proposed contract.

[3] The evidence does not support the finding that each of the parties accepted and approved the proposed written contract as containing the oral agreement, or the finding that each agreed it was bound thereby. There is no evidence to support the finding that American acted on the proposed contract and received the benefits of Grand Central's performance thereunder, or the finding that American stated to and assured Grand Central that it correctly set forth the agreement of the parties. The most the evidence shows is that American acted on the oral agreement and received the benefits of Grand Central's performance thereunder and that American told Grand Central the document would be signed and sent over. It was never signed or sent over. The proposed contract was nothing more than a proposal to contract according to its terms in lieu of the oral agreement. Failure to sign under the facts of this case is not the equivalent of assent to the terms of the proposed written contract.

One of the essential elements of a contract is the consent of the parties. Civ. Code, § 1550. This consent must be mutual. Civ. Code, § 1565. "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." Civ. Code, § 1580. It is only on evidence of such consent that the law enforces the terms of a contract or gives a remedy for the breach of it. One cannot be made to stand on a contract to which he has never consented. (12 Cal. Jur.2d 201, § 13.)

[4-6] An acceptance must be absolute and unqualified. Civ. Code, § 1585. An acceptance, to result in the formation of a binding contract, must meet exactly, precisely, and unequivocally the terms proposed in the offer. *Caldwell v. Dalaray Mines, Inc.*, 68 Cal.App.2d 180, 184, 156 P.2d 52; *Howard v. Chow*, 27 Cal.App.2d 755, 757, 81 P.2d 994. An offer must be

accepted according to its tenor before a binding contract is formed. *Patterson v. Clifford F. Reid, Inc.*, 132 Cal.App. 454, 456, 23 P.2d 35. The Restatement says: "If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract." (Rest., Contracts, § 61.) Mere statements of intention, or promissory expressions, will not suffice to constitute an acceptance. 17 C.J.S. Contracts § 46, p. 387.

[7, 8] Where a person offers to do a definite thing and another introduces a new term into the acceptance, his answer is a mere expression of willingness to treat or it is a counterproposal, and in neither case is there a contract; if it is a new proposal and it is not accepted it amounts to nothing. *Milliken v. Bank of Italy*, 66 Cal.App. 507, 516, 226 P. 640; *Ajax Holding Co. v. Heinsbergen*, 64 Cal.App.2d 665, 669-670, 149 P.2d 189; *Lawrence Block Co. v. Palston*, 123 Cal.App.2d 300, 310, 266 P.2d 856; 17 C.J.S. Contracts § 43, p. 381. In other words, when the proposed contract prepared by Carpenter was presented to American containing the additional terms, American was entitled to treat it as the suggestion of a new agreement.

[9] It is the rule that where the oral agreement contemplated the execution of a formal written contract by signing, either party has the right to insist on the condition, and mere acts on the part of one who has not signed will not validate the contract. *Kessinger v. Organic Fertilizers, Inc.*, 151 Cal.App.2d 741, 312 P.2d 345. *Linnard v. Sonnenschein*, 94 Cal.App. 729, 733-734, 272 P. 315; *Little v. Union Oil Co.*, 73 Cal.App. 612, 618-619, 238 P. 1066; *Emirzian v. Asato*, 23 Cal.App. 251, 257, 137 P. 1072; *Emeric v. Alvarado*, 64 Cal. 529, 577-580, 2 P. 418; *Jackson and Thomas v. Torrence*, 83 Cal. 521, 538, 23 P. 695; *Barber v. Burrows*, 51 Cal. 404, 406; *Northam v. Gordon*, 46 Cal. 582, 587-589; *Fuller v. Reed*, 38 Cal. 99, 107-108; *Tewksbury v. O'Connell* 21 Cal. 60, 68-69. *Spinney v. Downing*, 108 Cal. 666, at page 668, 41 P. 797, at page 798, says:

"It is a general rule, to which this case presents no exception, that, when it is a part of the understanding between the parties that the terms of their contract are to be reduced to writing, and signed by the parties, the assent to its terms must be evidence in the manner agreed upon, or it does not become a binding obligation upon either. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other."

The foregoing was quoted in the recent case of *Kessinger v. Organic Fertilizers, Inc.*, 151 Cal.App.2d 741, 312 P.2d 345.

Williston says and quotes from *Sparks v. Mauk*, 170 Cal. 122, 148 P. 926, thus:

"It may also be supposed that the written contract was made and was signed by but one party, although a signing by both parties was contemplated. 'It is the undoubted rule that where the contract contemplates the execution of it by signing, either party has the right to insist upon the condition, and mere acts of performance upon the part of one who has not signed will not validate the contract.'"

(1 Williston on Contracts, 67, § 28A.)

[10] Furthermore a contract in writing signed by the parties takes effect only on delivery. Civ.Code, §§ 1054, 1626; *LaMar v. LaMar*, 30 Cal.2d 898, 904, 186 P.2d 678; *Helperin v. Guzzardi*, 108 Cal.App.2d 125, 128, 238 P.2d 141. Section 1933 of the Code of Civil Procedure reads:

"The execution of an instrument is the subscribing and delivering it, with or without affixing a seal."

In *re Quartz Crystal Products Co., D.C.*, 71 F.Supp. 949, at page 951, says that: "The Courts of California and the Circuit Court of Appeals for the Ninth Circuit have held that this section means exactly what it says, i. e., it means *subscribing not by one party, but by all the parties who are required to sign it and delivering it to the party for whose benefit it is made, or delivering it for record so as to make it notice to the world.*" This decision was affirmed by the Ninth Circuit Court of Appeals in *Heffron v. U. S. Machinery Co.*, 166 F.2d 1023.

The oral agreement as found by the court took effect at once on July 29, 1954. It is manifest from the evidence that both parties understood that the proposed contract would not be effective until signed by both parties, else why would Grand Central draft it with a number of duplicate copies, and why would Grand Central sign, and why was space provided for American to do the same thing, and why did Carpenter ask Frankel to have it signed by American and returned to Grand Central? The formal provisions of the proposed contract indicate that it was to be fully executed by both parties signing.¹

As soon as the oral agreement was made both parties acted under it and received the benefits from it. The parties clearly understood that definite terms had been agreed on. On July 30, 1954 Carpenter wrote Strube that "This will confirm our agreement for the work which you anticipate" on the fighter and trainer. On July 30 Grand Central sent an invoice for \$4,000 to American reading, "Advance Payment as per agreement with Mr. Carpenter on overhauling of two (2) F-51B Aircraft (this

1. The testimonium clause of the proposed contract reads:

"In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

"Witness:

Mary E. Kemme /s/

"Witness:

Grand Central Aircraft Co.

S. Carpenter /s/

S. Carpenter, Secretary-Treasurer
American Aeronautics Corporation

"

payment due Monday, August 2, 1954)."

The agreement referred to was the oral agreement. On July 31 American delivered parts to Grand Central. Grand Central's records in evidence show the continuous performance of labor beginning August 2. Similar invoices to that of July 30 with the same wording except for different dates of payment were sent on August 6, 13, 20, 27, September 10, and 17. Pursuant to these invoices American made payments of \$4,000 to Grand Central on August 2, 9, 18, and 30, and the latter accepted and applied them on account of labor and materials on the fighter and trainer. On August 16 Grand Central reported to American the number of man-hours expended on the project through August 13; on August 20, the number through August 8; on August 24, the number through August 22. Fifteen work authorizations were signed by American and accepted by Grand Central on August 2, seventeen on August 3, two on August 4, 12, and 23, and one each on August 13, 17, 19, and 30. Overtime authorizations were given on August 7, 9, 14, and 21. On September 1 Grand Central wrote American that it was scheduling delivery of the fighter on September 17 "as per our original commitment," and rescheduling delivery of the trainer on October 8, all contingent on its receiving the balance of the parts and materials. Thus it appears that the major part of the labor and materials was authorized, accepted, and done long before the proposed written contract was even prepared by Carpenter—it was not ready until August 30. There is no evidence that Grand Central performed the work or furnished the materials in reliance on American's promise to sign the proposed written contract, and the court did not so find. The parties acted strictly under the oral agreement.

[11] Applying the rules stated to the facts, it is immediately apparent that insofar as the proposed written contract is concerned two of the necessary elements of a valid contract are lacking. There was no mutual assent and there was no delivery. It was part of the understanding of the parties

that their oral agreement should be reduced to writing, signed by them, and delivered. The oral agreement, as made, was not reduced to writing. New terms were added in the writing and it was never signed by American or delivered. The result was that the oral agreement remained binding (*Johnston v. 20th Century-Fox Film Corp.*, 82 Cal.App.2d 796, 820, 187 P.2d 474; *Columbia Pictures Corp. v. DeToth*, 87 Cal. App.2d 620, 629, 197 P.2d 580), and the proposed written contract was of no force or effect. This is not a case in which it can be said the parties acted on the unexecuted written contract, or in which there was part performance of an unexecuted written contract. See *Sparks v. Mauk*, 170 Cal. 122, 148 P. 926. It follows that the finding the parties set forth the complete terms of their agreement in the proposed written contract prepared by Carpenter is not supported by the evidence.

[12] In the absence of a statute authorizing attorneys' fees as an element of damages, or of a contract to pay such fees in event of the party's recovery, attorneys' fees paid by a successful party in an action are never recoverable against the unsuccessful party. Code Civ.Proc. § 1021; *Williams v. Krumsiek*, 102 Cal.App.2d 541, 545, 227 P.2d 889. The award of attorneys' fees to Grand Central cannot be sustained.

[13, 14] The complaint was filed October 5, 1954. The trial began June 6, 1955. On the third day of the trial American sought leave to file a supplemental complaint. The request was denied. American urges error. There was no error. The request was not timely. Eight months had elapsed and numerous depositions had been taken between the filing of the original complaint and the trial. No excuse was offered for the delay. A motion to file a supplemental complaint is addressed to the discretion of the trial court and its ruling will not be disturbed in the absence of a showing of a manifest abuse of that discretion. No such showing is made.

[15, 16] During consideration of the request to file the supplemental complaint,

Grand Central orally demurred generally to the second count of the original complaint. After argument the court at first announced it sustained the demurrer. Appellant asserts error. If the ruling had stood, it would have been error. Later the same day the court ruled that parts of the second count stated facts sufficient to constitute a cause of action for damages sustained prior to or incident to the delivery of the fighter. Thus the demurrer was in fact overruled except only as it related to allegations respecting threats by Bolivia to cancel its contract with American because of delay in delivery of the fighter. This ruling obviously was error. There is no such procedure as sustaining a general demurrer to part of a count which states facts sufficient to constitute a cause of action. The proper procedure is to strike any irrelevant matter. *Continental Building & Loan Ass'n v. Bogges*, 145 Cal. 30, 34, 78 P. 245. However, in view of the fact the court found Grand Central did not breach its agreement with respect to delivery and did not unlawfully detain the fighter, which findings are supported by the evidence, American was not prejudiced by the ruling.

In action 634602 American claims certain other findings are not supported by the evidence.² The claim is without merit. There is no point in reviewing in detail the evidence to be found in the 3,250 pages of the reporter's transcript and 127 exhibits. Suffice it to say the evidence we have related and much other in the record supports these findings.

[17] Lastly, American complains of the provision of the judgment reading: "That

defendant has the right to retain said sum of \$38,500.00 in lieu of said fighter aircraft, together with that certain partially completed F-51D dual trainer aircraft now in the possession of defendant and those certain supporting spare F-51D aircraft parts now in the possession of defendant until defendant receives payment in full of the total sum of \$32,108.95. * * *

We find nothing prejudicially erroneous in the form of the judgment in this respect. The judgment in favor of Grand Central is for \$32,108.95 and interest—no more—on account of American's breach of the agreement with respect to the fighter and the trainer. It does not give Grand Central an unqualified right to the \$38,500. The provision for recovery of \$38,500 as a lien in lieu of the fighter is entirely proper. See Code Civ.Proc. § 667. The judgment expressly provides that after satisfying the obligation which the lien secures, the excess, if any remains, is to be returned to the party entitled thereto. Grand Central's right to interest on the award of \$32,108.95 and its rights under the claim and delivery bond given by American when it secured possession of the fighter are thus protected.

Action 637534

Grand Central sued American for money alleged to be due for labor performed and materials furnished in modification and repair of a DC-3 aircraft. American answered and cross-complained, admitting authorization of the work, and alleging that as a result of the improper and unworkmanlike manner in which the work was performed it became necessary to replace

2. The findings challenged are:

"* * * that the work on the fighter model would be completed within a reasonable time of approximately 35 working days and that the dual trainer model would be completed as soon thereafter as possible."

"As to said fighter aircraft (No. 44-84810) defendant has duly and fully performed all of the conditions and obligations of said agreement and of said written authorizations."

"* * * and but for the further fact that on or about September 29, 1954,

plaintiff demanded that defendant cease any further work under said agreement, although defendant was at such time and at all other times acting in full compliance with said agreement."

"It is not true that plaintiff suffered damage in the sum of \$35,000.00, or \$250,000.00, [the amount covered by plaintiff's second cause of action No. 634602] or any other sum, by reason of the refusal of defendant to deliver possession of said fighter aircraft to plaintiff."

one engine and repair the other, to American's damage. Grand Central denied the allegations of the cross-complaint.

On the close of American's case on its cross-complaint Grand Central made a motion for a judgment of nonsuit. The court stated the motion was granted in part and denied in part, but that if it did not have the power to follow that procedure it was not going to require Grand Central to put on proof with respect to certain matters alleged in the cross-complaint.

After completion of work on the DC-3 Grand Central delivered it to American. Shortly after American took possession, Cerruto flew it and had to make an emergency landing in Palmdale because the right engine had failed. An expert in American's employ went to Palmdale and inspected the right engine. He testified that in his opinion the engine failed as a result of a hydraulic lock; that a hydraulic lock is caused as a result of an engine's being permitted to remain idle for several weeks or a month without proper maintenance then is improperly started; that he based his opinion on the fact that the rod in cylinder 8 was broken. The engine had to be replaced. Cerruto testified that in flying the DC-3 to Bolivia the left engine failed over Peru; that the engine had endured about 35 hours of flight after its delivery to American. The failure was in cylinder 8.

[18, 19] The court granted the motion for judgment of nonsuit as to the allegations of the cross-complaint with respect to the left engine which failed on the flight to Bolivia and denied it as to the allegations with respect to the right engine. American

asserts it was error to grant the motion in part. Manifestly it was error. The second count of the cross-complaint stated a single cause of action for failure to properly maintain the DC-3. A judgment of nonsuit may not be granted as to particular issues. *Fox v. Hall*, 164 Cal. 287, 290, 128 P. 749; *Meier v. Golden Auto Tour Corp.*, 50 Cal.App. 277, 281, 195 P. 290; 2 *Witkin, California Procedure*, 1856, § 123. Cf. *In re Estate of Jamison*, 41 Cal.2d 1, 6, 256 P.2d 984.

It is apparent from the record that when American rested on its cross-complaint the court felt that as to the left engine there was not sufficient evidence to require Grand Central to go forward with its defense.³ The court in effect told Grand Central it was not required to defend as against American's claim with respect to the left engine and that at the conclusion of the trial it would find for Grand Central on that issue. Thereafter, much evidence was received with respect to the maintenance performed by Grand Central on the left engine. At the conclusion of the trial the court weighed the evidence with respect to the left engine and made specific findings in favor of Grand Central with respect thereto. American was not prejudiced by the error of the court in granting the motion for judgment of nonsuit in part.

The judgment is modified by striking therefrom the paragraph which awards Grand Central attorneys' fees reading: "That defendant have further judgment against plaintiff in the sum of \$7500.00, together with interest thereon at the rate of 7% per annum from the date hereof until paid." As thus modified, it is affirmed.

3. The court said: "Although both engines are involved, and properly so, in the first alleged cause of action, consequently I am not too sure about the court's power in nonsuit to deny a nonsuit in part. I think that that is a proper disposition of the case. Consequently, as to the claim on the Palmdale engine, the motion for nonsuit is denied. The defendant will go to his proof on that matter. On the left engine, which was the Peru engine, the engine which failed

on the flight from Lima to La Paz, the motion is granted.

"Assuming I have no power to thus grant in part and deny in part, and in order to protect the record, and in the event that my ruling might therefore here be considered erroneous, I am not going to require the defendant to put on any proof with respect to the failure of the left engine, which is the one that failed over Peru."

American shall pay six-sevenths of the costs on appeal; Grand Central shall pay one-seventh.

SHINN, P. J., and PARKER WOOD, J., concur.



155 Cal.App.2d 188

Ernest L. CLEMENTS and Ronald D. Coats,
Individuals doing business as co-partners
under the firm name and style of Clements
& Co., Plaintiffs and Appellants,

v.

**John A. RAGGHIANI, Rose Ragghianti, T.
R. Bechtel, T. R. Bechtel Co., a cor-
poration, et al., Defendants,**

T. R. Bechtel, Defendant and Respondent.
Civ. 17526.

District Court of Appeal, First District,
Division 2, California.

Nov. 13, 1957.

Proceeding on motion for a nonsuit. From an order of the Superior Court, Contra Costa County, Hugh H. Donovan, J., dismissing the action, the plaintiffs appealed. The District Court of Appeal, Dooling, J., held that where plaintiffs were present for trial and asked leave to produce at least one witness so that the trial would be started but plaintiffs were denied that privilege because of defendants' attack on the sufficiency of plaintiffs' pleading, case was brought to trial as of that date, and action was not subsequently subject to dismissal for plaintiffs' failure to bring action to trial within five years after it was filed.

Order reversed.

1. Dismissal and Nonsuit ⇐60(6)

Where plaintiffs were present for trial and asked leave to produce at least one witness so that trial would be started

but plaintiffs were denied that privilege because of defendants' attack on sufficiency of plaintiffs' pleading, case was brought to trial as of that date, and action was not subsequently subject to dismissal for plaintiffs' failure to bring action to trial within five years after it was filed. West's Ann.Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇐68

Under statute giving court discretionary power to dismiss whenever plaintiff has failed for two years after action is filed to bring such action to trial, motion to dismiss must be made before the action is brought to trial. West's Ann.Code Civ. Proc. § 583.

3. Dismissal and Nonsuit ⇐60(2)

Unreasonable delay in bringing an action on for further trial after a partial trial justifies court in dismissing action under its inherent power.

Orlando J. Bowman, Oakland, for appellants.

Crozier C. Culp, Oakland, for respondent.

DOOLING, Justice.

Plaintiffs appeal from a judgment of dismissal entered pursuant to Code of Civil Procedure section 583.

[1] The action was commenced on May 23, 1951. On May 17, 1956, the action came on regularly for trial against respondent Bechtel and the following proceedings occurred:

After the opening statement counsel for Bechtel moved for a nonsuit on the ground that the complaint did not state a cause of action against him. It was suggested by the court that the parties submit briefs on the question of whether evidence could be introduced under the pleadings.

Appellants' attorney stated: "We can't brief it, if Your Honor please, because five days from now this action is beyond the five year period."

After further discussion the following exchange occurred:

"The Court: I know. You must bring it to trial. You are bringing it to trial now.

"Mr. Culp: This is the trial.

"The Court: You are.

"Mr. Culp: That's why I am making a motion for nonsuit.

"The Court: You are bringing it to trial. And the passage of time doesn't affect you here, once I take hold.

"Mr. Culp: Right.

"The Court: And I am taking hold here.

"Mr. Bowman: May we then, before we are required to brief that point, at least start the evidence so that we will have started the trial?

"The Court: No, Counsel, I think that we want to clear the decks and make—I'd like to cite that Latin maxim *Festina lente*, make haste slowly. Let's make haste slowly, yes.

"Mr. Culp: I'm sure that's the best way to save time in this case."

Appellants' attorney then received permission to amend the complaint.

Appellants' attorney stated: "And I understand, then, the trial is postponed." The Court replied: "Yes, it's postponed to be fixed for a later date, mutually agreeable."

Finally this exchange occurred:

"Mr. Bowman: Well, I understand counsel won't raise the five year business.

"Mr. Culp: Well, Counsel hasn't made any statement whatever, and he's not going to." (This in the face of counsel's previous statement while he was seeking the ruling of the Court: "This is the trial.")

"The Court: Well, he can raise all the—What shall I say?—the objections that he wants to. But, Counsel, I think we're in the trial of this thing."

On May 28, 1956, a Notice of Motion for Summary Judgment and an affidavit in support thereof were filed. The record does not indicate that the complaint had been amended.

The Minute Order dated June 12, 1956, recites that a hearing was held on appellants' motion for summary judgment and respondent's motion to dismiss under Code of Civil Procedure section 583. The motion to dismiss under Code of Civil Procedure section 583 was argued and submitted and the Court ordered that the motion be submitted on briefs. The motion for summary judgment was argued and the Court ordered that this motion stand submitted until a ruling was entered on respondent's motion to dismiss.

The Minute Order dated June 26, 1956, states that respondent's motion to dismiss "is hereby granted."

Code of Civil Procedure section 583 makes it mandatory to dismiss an action "* * * unless such action is brought to trial within five years after the plaintiff has filed his action * * *" The main question is whether by the proceedings had on May 17, 1956 the action was "brought to trial" within the meaning of the section. Cases have held, in construing this section, that an action is brought to trial if even one witness is sworn and gives any testimony. *City of Los Angeles v. Superior Court*, 15 Cal.2d 16, 98 P.2d 207; *Mercantile Invest. Co. v. Superior Court*, 218 Cal. 770, 25 P.2d 12; *Kosturos v. Municipal Court*, 51 Cal.App.2d 700, 125 P.2d 572; *Krasnow v. Superior Court*, 15 Cal.App.2d 141, 59 P.2d 442. The record shows that counsel for appellants was well aware of this rule and in view of it requested the trial court to be allowed to "* * * start the evidence so that we will have started the trial." The trial court denied this request and counsel for respondent Bechtel supported this order.

Before the recent ruling of the Supreme Court, enlarging the scope of cases in which motions for new trial may be granted (*Carney v. Simmonds*, 49 Cal.2d 84,

315 P.2d 305) it had been the rule that a new trial could only be granted where there had been a trial on an issue of fact (see the cases collected in *Carney v. Simmonds*, supra, 49 Cal.2d at page 88, 315 P.2d at page 306. Despite this ruling the courts had held that where the case was brought on for trial and the plaintiff was prevented from introducing any evidence by reason of motion for nonsuit or objection that the complaint failed to state a cause of action there was, in such situation, a trial so as to permit the granting of a motion for new trial. *Stow v. Superior Court*, 178 Cal. 140, 172 P. 598; *Bice v. Stevens*, 129 Cal.App.2d 342, 277 P.2d 106; *Allen v. California Mut. B. & L. Ass'n*, 40 Cal.App. 2d 374, 104 P.2d 851.

The situation in this case is parallel to that in the last cited cases. Appellants were present for trial and asked leave to produce at least one witness but were denied that privilege because of counsel's attack on the sufficiency of their pleading. The procedure of counsel for appellants in this respect followed exactly the procedure recommended in *Miller & Lux, Inc. v. Superior Court*, 192 Cal. 333, 342, 219 P. 1006. Under the circumstances we are satisfied that the case was brought to trial on May 17, 1956.

[2] Counsel for respondent argues that in any event the dismissal may be supported under that portion of Code of Civil Procedure section 583 which gives the court discretionary power to dismiss "* * * whenever plaintiff has failed for two years after action is filed to bring such action to trial * * *" No case has been cited authorizing the court to dismiss under this provision after the action has in fact been brought to trial and we are satisfied that such motion must be made before the action is brought to trial.

[3] It is doubtless true that unreasonable delay in bringing an action on for further trial after a partial trial would justify the court in dismissing under its inherent power, but the order here is ex-

pressly based on Code of Civil Procedure section 583 and it so recites.

We have not undertaken to assess the merits of counsel's objections to the complaint since the order appealed from is not based on that ground and that matter is not properly before us for decision on this appeal.

The order appealed from is reversed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



155 Cal.App.2d 309

Donald S. KLING and Virginia L. Kling,
Petitioners and Appellants,

v.

CITY COUNCIL OF CITY OF NEWPORT BEACH, and Dora Hill, Jay Mackay, Leland L. Wilder, Jay Stoddard, C. A. Higbee, Stanley E. Ridderhof and Gerald C. Bennett, Defendants and Respondents.

Civ. 5566.

District Court of Appeal, Fourth District,
California.

Nov. 18, 1957.

Mandamus proceeding to compel city council to approve proposed subdivision. The Superior Court of Orange County, Kenneth E. Morrison, J., rendered judgment denying mandamus, and the applicants appealed. The District Court of Appeal, Barnard, P. J., held that under subdivision ordinance authorizing city council to pass upon subdivision map and to disapprove map if it does not conform to requirements of subdivision ordinance or if council is not satisfied with subdivision plan, city council could not deny proposed subdivision on ground that majority of people in the tract were opposed or on ground that the tract was beautifully

planned and that many of the lots were of large size and that persons had purchased property in the tract with knowledge thereof.

Reversed with directions.

1. Administrative Law and Procedure ⚡791

The power of the trial court on reviewing an order of a local quasi-judicial body is confined to determining whether there was substantial evidence before such body to support its decision. West's Ann. Code Civ.Proc. § 1094.5.

2. Municipal Corporations ⚡43

Under subdivision ordinance authorizing planning commission to determine whether subdivision map conforms to law and to report to city council the commission's approval or disapproval of map and authorizing city council to pass upon the map and to disapprove map if it does not conform to requirements of subdivision ordinance or if council is not satisfied with subdivision plan, council cannot deny subdivision on grounds not connected with map or plan of subdivision.

3. Municipal Corporations ⚡43

Under subdivision ordinance authorizing city council to pass upon subdivision map and to disapprove map if it does not conform to requirements of subdivision ordinance or if council is not satisfied with subdivision plan, city council could not deny proposed subdivision on ground that majority of people in the tract were opposed or on ground that the tract was beautifully planned and that many of the lots were of large size and that persons had purchased property in the tract with knowledge thereof.

A. K. Phelps, Corona Del Mar, for appellants.

Karl Lynn Davis, City Atty., Santa Ana, John C. Penney, Asst. City Atty., Newport Beach, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying the appellants' application for a writ of mandate ordering the city council of Newport Beach to approve a proposed subdivision.

The appellants are the owners of Lot 140 in a tract known as "Shore Cliff" tract. There are 142 lots in this tract, of which 138 lots are subject to a tract restriction providing that only one single family residence may be situated upon each lot. Four lots, including Lot 140, were specifically excepted from that restriction. These four lots form the northerly end of the tract, and face the state highway on one side. Lot 140 is somewhat triangular in shape and lays between the state highway on the north, a curved street on the south, another street on the west, and Lot 141 on the east. This lot contains about 25,000 square feet and is much wider in its western portion than at the easterly end. The appellants' home is located upon the westerly portion of this lot and they desire to sell the vacant easterly portion of the lot, thus dividing the lot into two separate parcels or building sites. The proposed subdivision would leave about 12,000 square feet in appellants' home site and put about 13,000 square feet in the new lot to be sold. The maps indicate that this new lot would have a street frontage of something over 300 feet and a depth at its westerly end of something over 100 feet. The great majority of the lots in this tract have a street frontage of from 40 to 70 feet. While some of the lots in this tract are larger than either of the proposed new lots, most of them are smaller in area.

The appellants' land is located in an "R-1B" area as set forth in a zoning ordinance adopted by this charter city in December, 1950. This ordinance requires, in an R-1B area, that there shall be no more than one single family dwelling on any one building site; that each building site shall have a minimum of 6,000 square feet, with a minimum width of 60 feet; and that certain requirements as to front, rear and side yards be complied with.

Article IX½ of the Municipal Code of Newport Beach regulates the subdivision of lands within the city and prescribes rules and procedure for the obtaining of permits to subdivide such lands, and it was enacted as Ordinance 650 in October, 1951. This ordinance provides that the planning commission shall determine whether the tentative map conforms to the provisions of law and of this Article, and "upon that basis" approve, conditionally approve or disapprove the same. It then provides that the planning commission shall report its action to the subdivider and to the city, and that the city council shall then consider said map and the plan of subdivision. It then provides, insofar as material here, "If the City Council shall determine that said map is in conformity with the requirements of this Article and that it is satisfied with the plan of subdivision, it shall approve said map. * * * If the City Council shall determine either that said map is not in conformity with the requirements of this Article or that it is not satisfied with the plan of subdivision, it shall disapprove said map specifying its reason or reasons therefor, and the City Clerk shall in writing advise the subdivider of such disapproval and of the reason or reasons for such disapproval. Within thirty (30) days after the City Council has disapproved any map the subdivider may file with the Planning Commission a map altered to meet the approval of the City Council."

Pursuant to the provisions of this subdivision ordinance the appellants filed an application for a permit to subdivide their lot into two parcels. The planning commission heard and approved the application on February 16, 1956, with a written finding and report in which it stated that neither the recorded restrictions nor the municipal codes prohibited the resubdivision of this lot; that substantial property rights and values are apparent; that the commission did not interpret the intent of the municipal codes as interfering with such rights unless there is a conflict with the codes or with established policies relating to the general health, welfare and safety; and that the

commission recommended that the application be granted upon certain named conditions as to the location of the building site and the size of the front, rear and side yards to be provided for. These conditions were consented to and agreed to by the appellants.

Pursuant to the ordinance provisions appellants' application for a permit was then referred to the city council for final action. A hearing before the council was had on February 27, 1956 and by a vote of six to one the application was denied. No finding was made that the proposed subdivision did not comply with all laws and ordinances, the council did not specify wherein it was not satisfied with the plan of subdivision, and no suggestion was made that any alteration was required. With reference to the action of the council the city clerk advised the appellants in writing that a discussion was had on the proposal to divide Lot 140 into two lots; that eight named persons spoke from the floor; that the city attorney expressed the opinion that the city council "could either deny or grant this resubdivision and would probably be correct within the legal rights of the Council"; and that "In view of the apparent desire of the majority of the people in Shorecliffs to disallow the resubdivision requested, and even though the Planning Commission recommended the granting of this resubdivision, the resubdivision was denied." On a roll call vote six councilmen voted "Aye" and one "No".

The appellants filed a petition for a writ of mandate in the superior court based on the contention that the action of the council in denying them a permit was arbitrary, unreasonable and an abuse of discretion. An alternative writ was issued and the respondents answered and certified to the court a transcript of the records and proceedings before the city council. The petition for the writ alleged, the answer admitted, and the court found that the proposed subdivision conformed with the ordinances of the city of Newport Beach. The court also found that the appellants purchased Lot 140 knowing that said lot

is one parcel of land; that about 73 residents in this tract had opposed the resubdivision of Lot 140 by written petitions, and that the board of directors of the Shore Cliff Association opposed any subdivision within said tract; that because of the shape of the lot and the contour of the land a large portion of the square footage of said lot is undesirable as a building site, "and therefore said proposed resubdivision of Lot No. 140 will not provide a building site in conformity with the Shore Cliff development"; that it is not true that the members of the city council acted arbitrarily or fraudulently in denying this application; and that the members of the city council acted within their discretion in denying said application, basing their decision on the following reasons: "That Shore Cliff Tract, Tract No. 1116, is subdivided into 142 lots; that it is one of the most beautifully planned subdivisions within the boundaries of the city of Newport Beach; that many of the lots within the tract No. 1116 are of a large size; and that persons that purchased property within said tract go in there with that knowledge." Judgment was entered denying the petition for writ of mandate and this appeal followed. The appeal is presented on a clerk's transcript, which includes a transcript of the hearing before the city council, and upon the documents and maps which were admitted in evidence.

The appellants contend that an administrative board may not act arbitrarily in refusing such a permit as this; that the city council as an administrative board acted arbitrarily and unreasonably in refusing this permit; that an abuse of discretion by an administrative board is established if its order or decision is not supported by the findings; that the subdivision ordinance of this city does not grant to the city council an unlimited power or discretion to grant or deny applications to subdivide lands; that the findings made in this case do not support the order or decision made by the city council; and that the trial court erred in finding that the property proposed to be subdivided did not

contain approximately 25,650 square feet, in finding that the appellants would not be damaged if their application for a permit to subdivide is denied, and in finding that the city council denied this application for reasons different from those stated by the council through its clerk.

While the respondents admit that they did not have an "indefinite discretion" in this matter and that any discretion they have may not be exercised arbitrarily or whimsically, they contend that they had a "legal discretion to grant or deny a subdivision"; that under the terms of the subdivision ordinance the city council has the discretion to deny any subdivision if it is not satisfied with the plan of subdivision; that the members of the city council did not act arbitrarily or unreasonably, and no abuse of discretion appears, since the evidence supports the findings made by the city council and the trial court; and that the court did not err in making the other findings complained of by appellants. Briefly stated, it is respondents' position that the provisions of the subdivision ordinance, relating to whether or not the council is satisfied with the plan of subdivision, give the council the right to exercise its discretion in deciding whether or not any particular subdivision shall be permitted at all. In support of this position they cite *Wood v. City Planning Commission*, 130 Cal.App.2d 356, 279 P.2d 95, where the court held that the underlying purpose of the ordinances there in question was to repose in the planning commission and the city council a discretion to determine first whether or not an oil drilling district should be established in a given area at all and second, if so, under what conditions and restrictions such drilling should be permitted.

[1] It is the usual rule, and it is here conceded, that the power of the trial court on reviewing an order of a local quasi-judicial body is confined to determining whether there was substantial evidence before the board to support its decision. Section 1094.5 of the Code of Civil Procedure provides in part:

"The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

[2] The situation here is factually very different from that being considered in *Wood v. City Planning Commission*, where the ordinances authorized the city authorities to determine whether or not an oil drilling district should be permitted in a given area. In the subdivision ordinance here in question the city council is not authorized to determine whether or not any subdivision shall be permitted. It is authorized only to pass upon the map submitted, and it may disapprove that map only if it does not conform to the requirements of the subdivision ordinance or if the council is not satisfied with the plan of subdivision. If the council disapproves the map the ordinance further provides that the subdivider must then be advised of the reason for such disapproval, and that the subdivider may then file an altered map to meet the objections made by the council. These provisions and the provisions for the proceedings before the planning commission clearly indicate that there was no intent to authorize the council to deny any subdivision at all on grounds not connected with the map or plan of subdivision. If the proposed subdivision does not comply with the zoning ordinance or with other applicable laws this would constitute a valid reason for disapproving the proposed map and suggesting changes that should be made. On the other hand, when all laws are complied with and there is nothing wrong with the plan of subdivision itself, the subdivision ordinance does not authorize the city council to deny the permit because of the "apparent desire" of certain

people. That desire, even if more accurately ascertained, could not be controlling under the circumstances which here appear. *Roussey v. City of Burlingame*, 100 Cal. App.2d 321, 223 P.2d 517; *Gaylord v. City of Pasadena*, 175 Cal. 433, 166 P. 348.

[3] No evidence was received at the hearing before the city council other than certain maps and documentary evidence showing the proceedings before the planning commission. There was an argument and discussion between members of the council and other persons present, with no definite statement of any material fact. One of the councilmen expressed the opinion that the planning commission had no choice in recommending as they did, and stated that "I am kind of fishing around for a good legal reason to deny it, but so far I haven't found it." Although the record discloses no such reason, he later voted to deny the subdivision request. There was no evidence before the trial court except the transcript of the proceeding before the council and the same documentary evidence. The city council based its decision on the sole ground that it was "the apparent desire of the majority of the people in Shorecliffs to disallow the resubdivision requested." The trial court found that the council based its decision on the different reasons that this was a beautifully planned subdivision, that many of the lots therein are of a large size, and that persons purchasing property in that tract go there with that knowledge. While it may well be held that neither the findings of the city council nor those of the trial court are sustained by the evidence in the record, the controlling consideration here is that the findings which were made do not support the judgment. On the record before us the appellants were entitled to the issuance of the writ.

The judgment is reversed, with directions that a writ of mandate be issued ordering the respondent council to approve this proposed subdivision.

GRIFFIN and MUSSELL, JJ., concur.

155 Cal.App.2d 242

PALM SPRINGS TURF CLUB, a corporation, Petitioner and Respondent,

v.

CALIFORNIA HORSE RACING BOARD, and Dwight Murphy, B. W. Railey, and George I. Holmes, as members thereof, Appellants.

Civ. 5516.

District Court of Appeal, Fourth District, California.

Nov. 14, 1957.

Rehearing Denied Dec. 13, 1957.

Hearing Denied Jan. 6, 1958.

Proceeding in mandate to require California Horse Racing Board to issue license to conduct thoroughbred horse racing at Palm Springs, Riverside County, California. The Superior Court of Riverside County, John G. Gabbert, J., rendered judgment granting the writ of mandate, and the board appealed. The District Court of Appeal, Stone, J. pro tem., held that the evidence which revealed the 14-day limitation of racing at Palm Springs, the geographical location of the proposed site, the population of the area, the testimony of breeders and track operators, together with the board's visit to the area, constituted substantial evidence to support board's findings that the proposed thoroughbred horse racing at Palm Springs was not in the public interest.

Judgment reversed with direction.

1. Administrative Law and Procedure ⇨485

It is helpful to a reviewing court to have detailed findings before it; however, if the statute pursuant to which administrative proceeding is held does not require administrative board conducting the hearing to make detailed and specific findings they are not required.

2. Theaters and Shows ⇨3

In proceeding on application to California Horse Racing Board for license to conduct thoroughbred horse racing, board's findings which were findings of the ultimate facts in the general language of the statute were sufficient in absence of any require-

ment in the statute that the board should make detailed findings. West's Ann.Bus. & Prof.Code, § 19480.5.

3. Administrative Law and Procedure

⇨744, 757, 791

Licenses ⇨22

A review of the proceedings of a constitutional administrative agency pursuant to which an application for a license to do business has been denied is not a trial de novo, whether the matter is reviewed in the Superior Court or an appellate court; the sole function of a court reviewing such proceeding is to determine whether there is substantial evidence in the record to support the findings of the board and whether there has been abuse of discretion. West's Ann.Code Civ.Proc. § 1094.5.

4. Theaters and Shows ⇨3

In determining whether horse racing is in the public interest as required by statute permitting issuance of license if the conducting of horse race meetings at a particular place is in the public interest, the well being of students, whether in a public, parochial or private school, is always a matter of "public interest". West's Ann.Bus. & Prof.Code, § 19480.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Interest".

5. Theaters and Shows ⇨3

In proceeding on application to California Horse Racing Board for license to conduct thoroughbred horse racing at Palm Springs, California, evidence which revealed 14 day limitation of racing at Palm Springs, the geographical location of the proposed site, the population of the area, the testimony of breeders and track operators, together with the board's visit to the area, constituted substantial evidence to support the board's finding that the conducting of thoroughbred racing meetings at the proposed track would not be in the public interest. West's Ann.Bus. & Prof. Code, §§ 19530, 19534, 19480.5.

6. Theaters and Shows ⇨3

Where the 14 day limitation on horse racing in counties of the third class was

statutory, there was no discrimination by California Horse Racing Board merely because such 14 day limitation was the major factor in the board's denial of application for thoroughbred horse racing license in a third class county. West's Ann. Bus. & Prof.Code, §§ 19530, 19480.5.

7. Theaters and Shows ⇐3

There was no discrimination and abuse of discretion because California Horse Racing Board granted license for quarter horse racing and denied license for thoroughbred horse racing in third class county, in view of legislative distinction between such types of racing, the greater length of quarter horse racing season, the smaller investment proposed for the quarter horse racing venture and the locations of the proposed race tracks for each type of racing. West's Ann.Bus. & Prof.Code, §§ 19539.5, 19480.5.

Edmund G. Brown, Atty. Gen., William V. O'Connor, Chief Deputy Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for appellants.

Rogers & Clark, and Webster V. Clark, San Francisco, for respondent.

STONE, Justice pro tem.

Respondent filed an application with appellant California Horse Racing Board for a license to conduct thoroughbred horse racing at Palm Springs, Riverside County, California. The application was filed pursuant to section 19480.5 of Division 8, Article 4 of the Business and Professions Code, generally referred to as the California Horse Racing Act. Section 19480.5 provides that:

"The board shall not issue a license to conduct a horse racing meeting at any place, inclosure, or track, not used for horse racing meetings prior to July 1, 1941, unless prior to the beginning of the construction or preparation of such place, inclosure, or track for horse racing meetings, the board, upon application in such form as it may require, has determined that conduct-

ing horse racing meetings at such place will be in the public interest and will subserve the purposes of this chapter."

The application was heard before the California Horse Racing Board on February 15th and 16th, 1954, at Palm Springs, Riverside County, California, at which hearing evidence was offered on behalf of the Palm Springs Turf Club and on behalf of objectors in opposition to the granting of such application. Another corporation, the Desert Turf Club, had filed an application for a license to conduct quarter horse racing at a different location near Palm Springs, Riverside County, sometime prior to the hearings on February 15th and 16th, 1954. Some of the objections to respondent's application applied equally to the Desert Turf Club application and by stipulation the evidence presented at the hearings which was applicable to both petitions was deemed received as to each. After hearing the evidence adduced, the board inspected the proposed site of each applicant. Thereafter, the board granted the application of the Desert Turf Club and denied the application of Palm Springs Turf Club.

Respondent then filed a proceeding in the Superior Court of Riverside County pursuant to Section 1094.5 of the Code of Civil Procedure requesting a writ of mandate requiring the California Horse Racing Board to issue a license to the Palm Springs Turf Club enabling it to conduct thoroughbred horse racing meetings at a proposed site near Palm Springs, Riverside County, California. The Superior Court granted the writ of mandate and the board has appealed.

In its petition for writ of mandate and on this appeal respondent contends: (1) That the findings of the board were insufficient; (2) That the board's decision is not supported by substantial evidence as required by section 1094.5, subdivision (c) of the Code of Civil Procedure; and (3) That the board abused its discretion by discriminating against Palm Springs Turf Club in denying its application for a license while granting a license to the Desert Turf Club.

Sufficiency of the Findings.

The board's findings are framed in the language of the statute and are as follows:

"1. That the applicant, Palm Springs Turf Club, has failed to show that the conducting of thoroughbred racing meetings at the applicant's proposed Palm Springs Track would be in the public interest and would subserve the purposes of the California Horse Racing Act * * *.

"2. That the conducting of thoroughbred racing meetings at the applicant's proposed Palm Springs Track would not be in the public interest and would not subserve the purposes of the California Horse Racing Act."

[1] It would be helpful to a reviewing court to have detailed findings before it as was pointed out by the Superior Court. However, if the statute pursuant to which an administrative proceeding is held does not require the administrative board conducting the hearing to make detailed and specific findings they are not required. *California Shipbuilding Corporation v. Industrial Accident Commission*, 31 Cal.2d 270, 271, 188 P.2d 27.

[2] Respondent relies upon two California cases in support of its contention that detailed findings should have been made by the board. It cites *Swars v. Council of City of Vallejo*, 33 Cal.2d 867, 206 P.2d 355; and *Temescal Water Company v. Department of Public Works*, 44 Cal.2d 90, 280 P.2d 1. A reading of the *Swars* case reveals that the statute under which the administrative proceeding there involved had been authorized required specific findings. We have found no provision in the Business and Professions Code under which the hearing in this case was conducted requiring the California Horse Racing Board to make such findings and none has been cited to us. The *Temescal Water Company* case, 44 Cal.2d at page 102, 280 P.2d 1, holds in substance that findings must conform to the statutes governing the particular agency and that if the findings do not conform to the stat-

ute and if they are insufficient to allow a fair review of the decision the defect may be corrected at a hearing pursuant to a writ of mandate under section 1094.5 of the Code of Civil Procedure. It does not overrule the cases holding that detailed findings are not required in a proceeding before an administrative body unless the statute authorizing the proceeding requires them. Nowhere do we find support in the *Temescal* case for respondent's proposition that a failure to make detailed findings constitutes a prejudicial abuse of discretion on the part of appellant board under Code of Civil Procedure, section 1094.5.

In the case of *Southern California Jockey Club v. California Horse Racing Board*, 36 Cal.2d 167, 177, 223 P.2d 1, a case in many respects similar to the one we are now considering, the court referred to the findings in connection with the interpretation of the words "public interest" and held that the findings couched in the language of the statute were sufficient. At pages 177-178 of 36 Cal.2d, at page 8 of 223 P.2d, the court said:

"Be that as it may, the finding of the board was in the language of the statute. It reads: 'That the applicant has failed to show that the conducting of the horse racing meetings at the proposed Puente track would be in the public interest and would subserve the purposes of the California Horse Racing Act and that therefore said application is hereby denied.' Likewise the court's finding was sufficient."

The findings of the board in the instant case are findings of the ultimate facts by an administrative agency in the general language of the statute and are sufficient. *California Shipbuilding Corporation v. Industrial Accident Commission*, supra.

**Is There Substantial Evidence
to Support the Finding of
the Board?**

[3] This proceeding in mandate pursuant to Code of Civil Procedure, section 1094.5 stems from the California Horse Racing Board's denial of respondent's ap-

plication for a license to engage in the horse racing business. It has been established that a review of the proceedings of a constitutional administrative agency pursuant to which an application for a license to do business has been denied is not a trial de novo, whether the matter is reviewed in the Superior Court or an appellate court. The sole function of a court reviewing such a proceeding is to determine whether there is substantial evidence in the record to support the findings of the board and whether there has been an abuse of discretion. *Southern California Jockey Club v. California Horse Racing Board*, 36 Cal.2d 167, 173-175, 223 P.2d 1; *Marcucci v. Board of Equalization*, 138 Cal.App.2d 605, 608, 292 P.2d 264. A review of the record in this case reflects that the board proceeded under the provisions of the Business and Professions Code sections governing horse racing in California, commonly known as the California Horse Racing Act. Sections 19530 and 19534 of that code limit the number of days available for thoroughbred horse racing in Riverside County in which the city of Palm Springs is located to fourteen days a year. Spokesmen for the five major racing tracks in California testified in substance that based upon their experience in conducting thoroughbred racing there was little likelihood that the proposed track at Palm Springs would be a success. They testified that in reaching such conclusion the 14-day limitation on thoroughbred horse racing in Riverside County was considered in addition to the proposed location of the Palm Springs track, the transportation facilities available, and the population of the surrounding territory. They all testified that failure of a thoroughbred track at Palm Springs would be detrimental to horse racing in California. A Doctor Frank Porter Miller testified on behalf of the directors of the California Thoroughbred Breeders. He stated his group represented breeders with an investment of \$60,000,000 in animals and breeding farms in California and that this group opposed the granting of the license because California now has all of the racing it

can absorb. He stated there were 347 days of thoroughbred racing in 1953, plus 94 days of quarter horse racing and standard breeds in 18 separate meetings or a total of 441 days of racing. Excluding Sundays there were only 313 days available for 441 days scheduled racing, and as at some racing meetings no races are held on Monday, the number of available racing days would be reduced accordingly. There was testimony that the overlapping of racing dates of thoroughbred horses would be fatal to racing.

There were a number of home owners, some ministers, a welfare worker, and the superintendent of schools of Palm Springs, who opposed the granting of the license. The substance of their testimony was that the location of Palm Springs, its limited size and the characteristics of the community were such that the juvenile problem, as well as the general police problem, would be greatly accentuated by the establishment of a race track in the community. They also testified that the schools would be overcrowded, traffic would be congested, and municipal facilities would be burdened, all of which would be detrimental to the general public in the area, and that to meet these burdens would be difficult and costly.

There was also testimony that there is a private school located adjacent to the proposed location of the track. The owners objected upon the ground it would be detrimental to the school and jeopardize their investment of some \$250,000. It was also alleged on behalf of the school that many dissolute and unsavory characters follow racing or are attracted to race tracks which would provide a bad influence if not a real danger to children attending the school, especially girls of teen-age.

[4] Respondent argues and the Superior Court found that this objection is a matter of private interest while only matters of public interest are to be considered. It may be that the proprietary interest of the owners of the school should be considered a private interest but the well-being of students, whether in a public, parochial or private

school is always a matter of public interest. Weiss v. State Board of Equalization, 40 Cal.2d 772, 775, 256 P.2d 1.

Respondent also argues that the board based its findings to a great extent upon opinion evidence which is not substantial when weighed against the mathematical computations respondent presented. Respondent did quote facts and figures taken from the records of other major race tracks, but when those statistics were projected to the proposed Palm Springs track they too became opinion evidence. In fact, most of the evidence adduced by both respondent and appellant was opinion evidence. The Supreme Court in Southern California Jockey Club v. California Horse Racing Board, *supra*, recognized that reliance upon this type of evidence is incapable because of the very nature of the proceedings. The court said, 36 Cal.2d at page 177, 223 P.2d 1, 7:

"Thus it was for the board to determine whether plaintiff's evidence was such that the burden had been met. This is especially true where most of the evidence consists of opinions, and the issues involved public interest and purposes of the act are general and incapable of exact definition. Indeed, plaintiff states in its brief: 'A moment's reflection upon the very nature of the determination that the board was required to make shows that such determination must be predicated, not upon provable concrete facts, but upon opinion evidence exclusively.' In such a case, wide discretion is necessarily vested in the factfinder."

[5] We believe the evidence which revealed the 14-day limitation of racing at Palm Springs, the geographical location of the proposed site, the population of the area, the testimony of breeders and track operators, together with the board's visit to the area, constitute substantial evidence to support the board's findings. We have not attempted here to relate or evaluate the evidence produced by respondent because it is not the province of this court to weigh

or compare it with the evidence produced by appellant. As the court said in Marcucci v. Board of Equalization, 138 Cal. App.2d 605, at page 609, 292 P.2d 264, at page 266:

"* * * had this court heard the evidence, as the board did through its hearing officer, its evaluation of the contents of the record might have been the same as the board's evaluation. All of which is simply to say that the power of factual decision must be placed somewhere; that it has been placed with the board and it matters not what, upon the cold record presented, a reviewing court might think it would have done had it been finding the facts in the first instance. The rules above stated must be applied and enforced and the search of the reviewing court limited to ascertaining whether or not on the whole record there is substantial support for the administrative decision under review."

Did the Board Discriminate Against Palm Springs Turf Club?

[6] Respondent dwells at some length upon the fact that horse racing, except for county fairs, agricultural associations and quarter horse racing associations, is confined to four of the metropolitan counties of the state, namely, Alameda, San Mateo, Los Angeles and San Diego.

The basic problem lies not in the board's desire to favor metropolitan counties but in the legislative restrictions on the number of days racing permitted the various classes of counties. Business and Professions Code, Section 19530 provides:

"Counties; classification. For the purpose of this chapter there are four classes of counties in the State of California, as follows:

"1. Counties of the first class are those having a population of 1,000,000 or over;

"2. Counties of the second class are those having a population of 600,000 or over and less than a million;

"2.5 Counties of the second and one-half class are those having a population of 500,000 or over and less than 600,000;

"3. Counties of the third class are those counties having a population of less than 500,000."

Riverside is a county of the third class under the classification of section 19530 of the Business and Professions Code. Section 19534 then provides in part:

"Counties of third class. In each county of the third class, but outside the additional area included in counties of the second class, the board may allow not to exceed 14 racing days per year in each county."

Undoubtedly this 14-day limitation was a major factor in the denial of the license to respondent. This limitation is statutory, the board is bound by it, and it is illogical to charge the board with discrimination when it is merely authorized to administer the statute which allows more racing days to metropolitan counties than the smaller counties.

[7] Respondent also alleges discrimination and abuse of discretion because the board granted a license for quarter horse racing at Palm Springs while denying respondent's application to engage in thoroughbred horse racing. The legislature has made a distinction between these two types of horse racing. Business and Pro-

fessions Code, section 19539.5 authorizes the horse racing board to allot a maximum of seven weeks of racing seven days per week for quarter horse racing in one county in any one year as contrasted with the 14-day limitation on thoroughbred racing heretofore mentioned. The quarter horse racing season could be $4\frac{1}{2}$ times as long as the thoroughbred racing season at Palm Springs, and the board could have concluded that the longer racing season presaged a greater likelihood of success. Then too the Desert Turf Club proposed an investment of less than half that of respondent. The longer racing period and smaller investment may have been considered as significant dissimilarities by the board. It should also be noted that the board visited both proposed sites and the location of each track may have had a bearing upon its decision. In view of the distinctions enumerated and the fact that the two types of racing are treated differently in the Business and Professions Code, the charge of discrimination is untenable.

The judgment of the Superior Court granting a peremptory writ of mandate against the California Horse Racing Board is reversed and said Superior Court is directed to enter its order denying the peremptory writ.

BARNARD, P. J., and GRIFFIN, J.,
concur.

49 Cal.2d 434

The PEOPLE of the State of California,
Respondent,

v.

Rommel Wayne BRICE, Appellant.

Cr. 6110.

Supreme Court of California,
In Bank.

Nov. 22, 1957.

Prosecution for first degree murder. Judgment of conviction was entered in Superior Court, Los Angeles County, H. Burton Noble, J., and defendant appealed. The Supreme Court, Gibson, C. J., held that defendant could not complain on appeal that prosecutor's questions on jurors' voir dire examination and prosecutor's argument misled jury into believing death penalty was preferred where defendant made no objection to such questions or argument at time of trial, and in any event, jury was properly instructed that penalty for first degree murder was death or life imprisonment at discretion of jury.

Affirmed.

1. Homicide ☞253(1)

Evidence sustained conviction for first degree murder.

2. Homicide ☞354

The selection of the applicable penalties of life imprisonment or death is within absolute discretion of jury returning conviction for first degree murder; regardless of the circumstances connected with the murder, there is no requirement of or preference for either of the applicable penalties.

3. Criminal Law ☞1035(6), 1037(1)

Defendant who was found guilty of first degree murder by jury which fixed penalty as death could not complain on appeal that prosecutor's question on jurors' voir dire examination and prosecutor's argument misled jury into believing death penalty was preferred where defendant made no objection to questions or argument at time of trial, and in any event, jury was properly instructed that penalty for first degree murder was death or life imprison-

ment at discretion of jury. West's Ann. Const. art. 6, § 4½; West's Ann.Pen.Code, § 1239(b).

Andrew R. Edwards and Douglas J. Stapel, Pasadena, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Los Angeles, for respondent.

GIBSON, Chief Justice.

The jury convicted defendant of murder of the first degree and fixed the penalty at death. This appeal comes before us automatically under the provisions of subdivision (b) of section 1239 of the Penal Code.

About 10:30 p. m. on July 21, 1956, G. Estanol was shot to death in his liquor store on Sepulveda Boulevard in San Fernando Valley. Richard Provencio witnessed the shooting from his automobile at a nearby intersection. He saw a man facing Estanol fire a gun and back out of the store. The man ran around the side of the building and disappeared into a parking lot at the rear. Provencio got out of his automobile and went to the back of the building. A man sitting on the passenger's side of a 1950 or 1951 Oldsmobile sedan pointed a gun at him as the car drove away.

When the police arrived at the scene of the killing, they found three empty cartridges on the floor and three bullets embedded in the wall behind the spot where the victim lay. About a week later, a gun was discovered in the vicinity of the store. It was traced to defendant, and an expert on firearms identified it as the weapon used in the killing.

After defendant's arrest, he freely and voluntarily admitted the shooting when questioned by the police. According to his account, he had gone to Los Angeles from Bakersfield on July 21 in an automobile with Thomas Crow, and, on their way back to Bakersfield, they stopped at a liquor store on Sepulveda Boulevard. Crow, who was driving, remained in the

car, and defendant went inside. There was no one in the front part of the store, and defendant walked to the rear with a gun in his hand. An old man was sitting there, listening to the radio, and defendant told him to get up and demanded "the money." As the man walked to the front of the store, he picked up a soda bottle and began "hollering" something in a language which defendant did not understand. Defendant thought the victim "was going to do something," and, before he "knew it" the gun went off in his hand. Defendant returned to the car, told Crow to drive slowly so as to escape notice, threw away his gun and his hat, and changed his shirt.

Crow testified that, on the night in question, he was driving a 1951 Oldsmobile, that defendant directed him to stop at the next liquor store, and that, upon returning to the car from the store at which they stopped, defendant told him to take a circuitous route to Bakersfield. After they were on their way, defendant told Crow that he had shot a man in the store.¹

[1] The evidence is clearly sufficient to support the verdict, and we find no error in rulings on the admission of evidence or in the instructions given to the jury. Defendant's sole contention is that he was denied a fair trial on the issue of punishment because of the prosecutor's conduct. During the voir dire examination of prospective jurors and the argument at the close of the evidence, the prosecutor asked questions or made statements which might have been understood as meaning that, under the law applicable to first degree murder, the death penalty is preferred to life imprisonment and must be imposed, unless there are mitigating circumstances, and that death is

the legally required punishment in the case of a "murder for profit." No objection was made to any of these questions or statements.

[2,3] It is settled that, regardless of the circumstances connected with a murder of the first degree, there is no requirement of or preference for either of the applicable penalties but that, to the contrary, the selection of punishment is in every instance completely within the absolute discretion of the jury. *People v. Green*, 47 Cal.2d 209, 217-232, 302 P.2d 307; *People v. Friend*, 47 Cal.2d 749, 306 P.2d 463. In the absence of objections, however, defendant cannot now complain of the prosecutor's conduct where, as here, any danger that the jury might misunderstand its duty could easily have been removed at the trial. *People v. Hampton*, 47 Cal.2d 239, 240-241, 302 P.2d 300; *People v. Byrd*, 42 Cal.2d 200, 207-209, 266 P.2d 505. We cannot assume that the court would not at once have taken corrective action, had the matter been called to its attention.²

Moreover, there is no reason to believe the jury was misled. In the instructions given by the court following the closing arguments, the jurors were told: "You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me." We must assume, therefore, that the jurors followed the subsequent instruction relating to punishment in which they were informed that, under the law of the state, death or life imprisonment was the penalty for first degree murder "at the discretion of the jury," that, in performing their duty of selecting one of the penalties, they should be unanimous and should indicate their choice on the

1. Crow was initially made a co-defendant in this case. He was discharged pursuant to section 1099 of the Penal Code, which provides: "When two or more defendants are included in the same accusatory pleading, the court may, at any time before the defendants have gone into their defense, on the application of the prosecuting attorney, direct any defendant to be discharged, that he may be a witness for the people."

2. The only objection made during the prosecutor's argument to the jury was directed at a misleading comparison between the respective penalties for first degree murder and robbery, and the court immediately required the prosecutor to clarify the point in a manner favorable to defendant.

form to be provided them, and that they were free to act according to their own judgment and discretion.

Under the circumstances, there is no basis for concluding that there was an error resulting in a miscarriage of justice. See Cal.Const. art. VI, § 4½.

The judgment and the order denying a new trial are affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.



49 Cal.2d 402

ESTATE of Frederick Arthur FALLON, also known as Frederick A. Fallon, also known as F. A. Fallon, Deceased.

AMERICAN TRUST COMPANY, Special Administrator of the Estate of Frederick Arthur Fallon, Deceased, Appellant,

v.

Margaret FALLON, Respondent.
S. F. 19539.

Supreme Court of California,
In Bank.

Nov. 19, 1957.

Rehearing Denied Dec. 17, 1957.

Proceedings by widow for family allowance after husband, from whom she was separated, died. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., rendered order granting widow family allowance and special administrator appealed. The Supreme Court, Spence, J., held that where husband's and wife's reciprocal divorce actions had been denied but court awarded wife support of \$250 a month for one year only and husband paid support for one year, fact that husband permitted wife to keep flat in building which he owned and fact that he bequeathed money to her did not constitute agreement on his part to support wife while they lived apart and did not justify allowance to wife

on husband's death by reason of changed circumstances, although husband's death did not prevent her from thereafter seeking family allowance based on changed circumstances occurring before his demise and she was not to be penalized for not seeking a modification of support decree during his last illness.

Orders granting family allowance reversed; appeal from order denying petition to vacate orders for family allowance dismissed.

Carter and Shenk, JJ., dissented.

Opinion, Cal.App., 308 P.2d 389, vacated.

1. Executors and Administrators ⇨194(7)

An order denying petition to vacate order granting a family allowance is not an appealable order and attempted appeal therefrom would be dismissed. West's Ann. Prob.Code, § 1240.

2. Executors and Administrators ⇨176, 194(5)

The right of widow to a family allowance is conditioned upon her right to support at time of her husband's death; ordinarily wife establishes a prima facie case for an allowance by showing that marriage relation continued until time of her husband's death.

3. Executors and Administrators ⇨188, 194(3)

In proceedings by widow for a family allowance, widow is not required to allege and prove that there were no circumstances by which she lost right to support, which is ordinarily inherent in her position as wife, and right to allowance is not ordinarily lost merely because spouses are living apart at time husband died or because wife had been supporting herself without financial aid from husband.

4. Executors and Administrators ⇨188

Where husband and wife had filed reciprocal divorce actions but both had been denied divorce although court awarded wife support of \$250 a month for one year only and husband paid support for one year, fact that husband permitted wife to keep flat in

building which he owned and fact that he bequeathed in his will sum of money to her did not constitute agreement on his part to support wife while they lived apart and did not justify family allowance to wife on theory of changed circumstances existing after support order was entered.

5. **Executors and Administrators** ⇨188

Husband's death would not prevent widow, from whom he was separated, from seeking a family allowance based on changed circumstances occurring before his demise and widow would not be penalized for not seeking modification of support decree during his last illness.

Lange & Rockwell and C. Dan Lange, San Francisco, for appellant.

Appel, Liebermann & Leonard and Cyril Appel, San Francisco, for respondent.

SPENCE, Justice.

[1] American Trust Company, special administrator of the above estate, appeals from two orders granting a family allowance of \$1,000 a month to Margaret Fallon, widow of the deceased, and from an order refusing to vacate these orders for family allowance. The order denying the petition to vacate the order granting a family allowance is not an appealable order. Prob.Code, § 1240. The appeal from that order will therefore be dismissed. In re Estate of Caldwell, 67 Cal.App.2d 652, 155 P.2d 380.

The administrator attacks the propriety of the award of a family allowance to the widow under the particular circumstances of this case. The record sustains its position, and the orders granting such allowance must be reversed.

Frederick Arthur Fallon died on November 18, 1955, aged approximately 86. Shortly thereafter the trust company filed its petition for the probate of his will. On December 15, 1955, the widow filed her verified petition for a family allowance, seeking \$2,500 per month. She claimed that the estate had a value in excess of \$600,000 and that its monthly income was adequate to pay the allowance she sought.

At the hearing it appeared that she and deceased had married in 1940 and had filed reciprocal divorce actions in 1945. Both parties were denied divorces but the court awarded Mrs. Fallon support of \$250 a month for one year only. This decree was affirmed on appeal. Fallon v. Fallon, 83 Cal.App.2d 798, 189 P.2d 766. The husband made the ordered payments for the one year and then stopped. Some seven years elapsed before the husband's death, during which time Mrs. Fallon moved to British Columbia and received no further payments from him.

On December 22, 1955, the court granted the widow a family allowance of \$1,000 per month. On December 29, 1955, the court, on the trust company's petition, appointed it special administrator of the estate. On January 4, 1956, the court filed a second order identical to its previous order granting the widow the \$1,000 monthly family allowance. Thereafter the special administrator filed its petition seeking vacation of the orders granting the family allowance. It alleged that because of the previous divorce proceedings (Fallon v. Fallon, supra, 83 Cal.App.2d 798, 189 P.2d 766) the widow was not entitled to a family allowance. It also alleged that, as guardian of the deceased's estate, it had filed an inventory on December 6, 1955, showing assets of some \$337,000 and income for 1955 of less than \$10,000. After a hearing this petition was denied.

[2,3] The right of a wife to a family allowance is conditioned upon her right to support at the time of her husband's death. In re Estate of Brooks, 28 Cal.2d 748, 171 P.2d 724. Ordinarily the wife establishes a prima facie case for an allowance by showing that the marriage relation continued until the time of her husband's death. She is not required to allege and prove that there were no circumstances by which she lost this right to support, which is ordinarily inherent in her position as a wife. Nor is the right ordinarily lost merely because the spouses were living apart at the time that the husband died or because the wife had been supporting her-

self without financial aid from the husband. In re Estate of Coons, 107 Cal.App.2d 531, 536, 237 P.2d 291; see 34 A.L.R.2d 1056. The effect of the award for the wife's support for a limited period, which expired before the husband's death, however, is an additional circumstance which must be considered here.

In Estate of Brooks, supra, 28 Cal.2d 748, 171 P.2d 724, the wife had obtained an interlocutory decree of divorce which made no provision for her support. While the marriage continues until the final decree, an "interlocutory judgment of divorce is * * * so far as it determines the rights of the parties, a contract between them. * * * Until that contract is in some manner changed, either in the action or in some independent proceeding, or by a reconciliation, her right to support is suspended." London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 465-467, 184 P. 864, 867.

This court in the Brooks case noted that the manifest purpose of the family allowance is "to continue, during the settlement of the estate, the support that the wife was previously receiving or was at least entitled to receive." 28 Cal.2d at page 755, 171 P.2d at page 727. Since the wife there was not entitled to support under the divorce decree, the order granting a widow's allowance was reversed.

A situation more similar to the present case was involved in Monroe v. Superior Court, 28 Cal.2d 427, 170 P.2d 473 where the wife had been granted separate maintenance for only a limited period. After that period expired, she sought a further allowance for her support, "alleging that the circumstances upon which the decree was based had materially changed." 28 Cal.2d at page 428, 170 P.2d 473. This court held that additional support might be granted, although jurisdiction to do so had not been reserved in the original decree, if sufficiently changed circumstances were shown. Relief could be granted since a "separate maintenance decree does not end the marriage" nor "the obligation to support" arising from it, but "only regulates the extent

of that support." 28 Cal.2d at page 429, 170 P.2d at page 474.

[4, 5] While the wife here, under the terms of the support decree, was not receiving support payments from her husband at the time of his death, she could have sought modification of that decree during his lifetime if she could have shown sufficiently changed circumstances occurring before the death. Monroe v. Superior Court, supra, 28 Cal.2d 427, 170 P.2d 473; O'Toole v. O'Toole, 215 Cal. 441, 10 P.2d 461. His death should not prevent her from thereafter seeking a family allowance based on changed circumstances occurring before his demise (see In re Nowell, D.C., 99 F. 931) nor should she be penalized for not seeking a modification of the decree during his last illness. If the probate court finds, upon competent evidence, that circumstances had changed sufficiently so that the support decree could have been modified during the husband's lifetime to provide further support and that she was therefore entitled to support at the time of the husband's death, that court could properly order a family allowance for the widow after his death.

The record here, however, reveals no evidence of such changed circumstances occurring before the death of the husband. Nor can we agree with the widow that the fact that her husband permitted her to keep a flat in a building which he owned and to store personal effects there constituted an agreement on his part to support her while they lived apart. This act, as well as the provision in his will bequeathing his widow \$2,500, must be regarded simply as evidence of his continued kindly disposition toward her despite their marital differences. We therefore conclude that in the absence of evidence upon which the probate court could have found that the widow was entitled by reason of changed circumstances to support from her husband at the time of his death there was no basis for the granting of the family allowance.

The orders granting the family allowance are reversed. The appeal from the order

denying the petition to vacate said orders for family allowance is dismissed. Appellant shall recover costs on appeal.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

McCOMB, Justice.

I concur in the judgment.

CARTER, Justice.

I dissent.

In my opinion neither *In re Estate of Brooks*, 28 Cal.2d 748, 171 P.2d 724 nor *London G. & A. Co. v. Industrial Acc. Comm.*, 181 Cal. 460, 184 P. 864, announces a rule of law which may be invoked to defeat the claim of Mrs. Fallon to a family allowance here. Furthermore, this is not a *Monroe* case (*Monroe v. Superior Court*, 28 Cal.2d 427, 170 P.2d 473). There, an action for separate maintenance had been brought by the wife, and after issue joined, had been tried and a decree rendered which had become final. In that case the trial court had entered a decree of separate maintenance which contained no reservation of jurisdiction as to property rights or otherwise, and which purported to be a final decree and to fully and forever settle the reciprocal rights and obligations of the parties. It made provision for support of a minor child; it awarded to the wife as her sole and separate property the family home, with all furniture, furnishings, and equipment therein; it awarded to her the specific amount of \$250 a month to be paid by the husband for 27 months commencing on a specified date, and certain insurance which was to be kept in force by the husband for her benefit and that of the child; it awarded the husband, as his sole and separate property, a certain automobile, bank funds, tax bonds, and war savings bonds. It was my view as expressed in my dissenting opinion in that case (28 Cal.2d 432, 170 P.2d 475) that the decree there entered, which had become final, was res adjudicata on the issues there determined, and I am still of that opinion. Here, actions for divorce were brought by both parties which

resulted in a judgment denying either party a divorce but awarded the wife \$250 per month for her support for one year pursuant to section 136 of the Civil Code. Unquestionably, either party could thereafter have brought another action for divorce based upon conduct of the other occurring after the rendition of the former judgment, and the court would have had jurisdiction in such an action to make such provision for the support and maintenance of either party which the pleadings and evidence warranted. Such being the law, the court here unquestionably has jurisdiction to pass upon the issue of family allowance to the widow notwithstanding the former judgment denying a divorce to either party. The effect of the prior judgment was not to determine the right of the wife to support and maintenance for all time as this issue was not litigated in the divorce action. It would seem clear that if the wife was not entitled to a divorce in the former actions, she was not entitled to permanent alimony or separate maintenance. The allowance to her of \$250 per month for one year was only temporary and should not deprive the court of jurisdiction to make a subsequent adjudication of this issue.

It must be obvious that if an award of separate maintenance is made for a definite period, and becomes final, and the husband should die during such period, the award could not thereafter be increased or extended, and an award of alimony would terminate upon the husband's death (*Hilton v. McNitt*, 49 Cal.2d 79, 315 P.2d 1) with no power in a court to modify it. Such is not the situation here, and it is my view that the prior judgment in the divorce actions and the allowance of temporary support pursuant to section 136 of the Civil Code in no way impedes the jurisdiction of the probate court to determine what if any family allowance should be awarded to Mrs. Fallon in the probate proceedings on her husband's estate. In other words, the court had jurisdiction to hear all competent evidence relative to the status of the parties prior to the death of the decedent and make an award in favor of Mrs. Fallon for a family allow-

ance if such an award was justified by the evidence. In my opinion the trial court was justified in making an award for a family allowance in favor of Mrs. Fallon and its order should, therefore, be affirmed.

SHENK, Justice.

I dissent. The majority opinion relies on *In re Estate of Brooks*, 28 Cal.2d 748, 171 P.2d 724 and *Monroe v. Superior Court*, 28 Cal.2d 427, 170 P.2d 473 as authority for holding that where during marriage an order for maintenance and support has been made to the wife for a limited period and no decree of divorce has been granted, a showing of changed circumstances must thereafter be made as a necessary foundation for an award of a family allowance from the estate of her deceased husband.

In *re Estate of Brooks*, an interlocutory decree of divorce had settled the property rights of the parties and terminated the right to support. In the present case the widow's right to support was not terminated by the 1945 support order. If she had petitioned the court for additional support during Mr. Fallon's lifetime, she might have obtained it, under the holding of this court in the *Monroe* case, upon a showing of changed circumstances and by modification of the order. Upon Mr. Fallon's death, however, Mrs. Fallon was no longer entitled to move for a modification of the prior support order. See *Hilton v. McNitt*, 49 Cal.2d 79, 315 P.2d 1; Civil Code, § 139. Her right thereafter to any financial assistance resulting from the marital relationship became a preferential statutory right under section 680 of the Probate Code which provides that the widow is "* * * entitled to such reasonable allowance out of the estate as shall be necessary for [her] maintenance according to [her] circumstances, during the progress of the settlement of the estate * * *."

This court now requires the surviving widow to show, before she may obtain a family allowance after the death of her husband, such change of conditions as would entitle her to a modification of a support order made during the lifetime of

her deceased husband. Such a requirement should relate only to the distinct and separate remedy in a proceeding to modify the support order made during the husband's lifetime.

The *Brooks* case should not be extended beyond a holding that where the right to support has been terminated during the lifetime of the husband no family allowance may be granted from his estate. It is a sufficient showing to entitle her to a family allowance that Mrs. Fallon's right to support was not cut off by the expiration of the 1945 support order. The court now extends the *Brooks* and *Monroe* cases to reach a result which is neither consonant with the holdings of those cases nor with the direct terms and unquestioned spirit of Probate Code, section 680. I would affirm the orders.

Rehearing denied; SHENK and CARTER, JJ., dissenting.



49 Cal.2d 442

The PEOPLE of the State of California,
Plaintiff-Appellant,

v.

John Jack FISCHER, Defendant-
Respondent.

Cr. 6144.

Supreme Court of California.

Nov. 22, 1957.

Proceeding on motion of defendant charged with bookmaking and related offenses to set information aside on ground that evidence was obtained by illegal search and seizure. The Superior Court, Los Angeles County, Herbert V. Walker, J., granted motion and People appealed. The Supreme Court, Shenk, J., held that where police officer had information that suspected bookmaking activities were being conducted over a certain telephone number and officer upon calling such number heard a male

voice answer and indicate a willingness to take a bet, and shortly thereafter, defendant was seen leaving premises at which telephone was located, there was probable cause for arrest and search of premises following arrest as an incident thereto was lawful.

Reversed.

Opinion, 312 P.2d 336, vacated.

1. Arrest ⚡63(4)

Probable cause for arrest is shown if man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.

2. Arrest ⚡63(4)

Probable cause for arrest may exist even though there may be some room for doubt and the court, not the officer, must make determination of whether officer's belief is based upon reasonable cause.

3. Arrest ⚡63(4)

The test on whether or not there was probable cause for arrest is not whether the evidence upon which the officer made the arrest is sufficient to convict, but only whether the prisoner should stand trial.

4. Criminal Law ⚡419(3)

In proceeding on motion of defendant charged with bookmaking and related offenses to set aside information on ground of illegal search, testimony of officer, making arrest as to his source and nature of advanced information that suspicious bookmaking activities were being carried on at a certain telephone number, was admissible and not objectionable as hearsay.

5. Arrest ⚡63(4), 71

Where police officer had been informed of suspicious activities being carried on at certain telephone number and after calling number officer heard a male voice answer and indicate a willingness to accept a bet, and immediately after hanging up phone officer observed defendant leaving premises, there was probable cause for defendant's

arrest, and search of premises as an incident to such arrest was lawful.

6. Criminal Law ⚡386

In proceeding before committing magistrate on charge of bookmaking and related offenses, testimony of conversations on telephone at defendant's premises between arresting officer and those who called house to place bets was admissible for purpose of proving use to which telephone was being used.

7. Searches and Seizures ⚡7(27)

Whether in a particular case consent to search is voluntarily given or is in submission to an express or implied assertion of authority is a question of fact to be determined in light of all the circumstances.

8. Searches and Seizures ⚡7(27)

It cannot be said as a matter of law that consent given by a defendant is involuntary because it is given while he is under arrest.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Los Angeles, Jere J. Sullivan, Lewis Watnick and Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for appellant.

Henry Galen, Los Angeles, for respondent.

SHENK, Justice.

By information the defendant was charged with one count of bookmaking, one count of unlawfully keeping and occupying an apartment for the purpose of recording and registering bets on horse races, and one count of having recorded and registered a bet or bets on horse races. His motion to set the information aside (Pen.Code, § 995) was granted on the ground that the evidence against him was obtained by illegal search and seizure in violation of his constitutional rights. The People appeal.

On July 21, 1956, Deputy Sheriff Frank W. Bridges was informed by his captain that bookmaking was being conducted over telephone number Angelus 3-2811 which

was listed at 2238 Cowlin Street in East Los Angeles. Bridges and three other deputies went to that address at approximately 1:40 p. m. The deputies kept the front and rear entrances to that place under surveillance for ten to fifteen minutes. That address was for one of two duplexes located in a single story frame building. There were separate entrances and exits for each duplex. Bridges stationed himself in a glass-windowed telephone booth some 100 to 200 feet south from which location he could watch the front entrance. From this place Bridges dialed Angelus 3-2811. A male voice answered. The following ensued: "Bridges: This is Al for Red. I want two to win on Satin Lady in the second. Voice: All right. Wait a minute, who is this? Bridges: It is Al for Red. Voice: I don't know what you are talking about. Bridges: Shall I have Red call you? Voice: Yes." Bridges then hung up the phone yelled to a fellow deputy "It's good" and proceeded toward the front entrance. No one had entered or left No. 2238 during this surveillance. The defendant was then seen leaving this address. He was carrying a National Daily Reporter scratch sheet under his arm. When the defendant was several feet from the door to No. 2238, Bridges reached him, informed him of his identity and stated that he was arresting the defendant on suspicion of bookmaking. The two of them went into the premises at No. 2238. Bridges there observed a telephone with the number Angelus 3-2811, and noticed that there were a small blackboard, a box of chalk and several pencils near the telephone. There was no evidence that anyone else was on the premises. The defendant was asked how long he had been bookmaking at the location and he stated "For one day." He added that he had been hired by a man known as Ben Zack to take bets over the telephone at that location, using the blackboard and chalk for this purpose; that at various times during the day a person would call him and would relay these bets out and then he would erase the blackboard. The National Daily Reporter

scratch sheet he carried was for July 21, the day of the arrest.

The defendant placed certain articles on the table, among them several keys. He was asked if any of the keys belonged to his car and he stated that they did. He replied that he had a Kaiser and that it was parked "around the corner." Bridges asked if they could look at the car and the defendant said "yes." Bridges handed the keys to Deputy Collins and in the defendant's presence told him to search the vehicle. Collins then left the house, found the car and looked through the window. He was able to observe some yellow pieces of paper approximately 3 to 3½ inches wide partially under a newspaper. There was some writing on these yellow papers but he could not read it through the window. The right front door was unlocked. He opened the door, picked up the newspaper and the yellow papers. At the preliminary hearing these yellow papers were identified as betting markers containing bets on horses running at various tracks throughout the country and numerals or symbols of bettors. Certain figures and letters thereon indicated the third race at Jamaica Race Track, a \$5 win wager which the horse had won and the amount of the payoff.

While Bridges was in the house with the defendant immediately following the arrest the telephone rang several times and Bridges answered it. On one occasion a woman's voice stated: "This is 111, and for 112 and 113 I want four to win on Roman Disk in the second." A few minutes later another call came in and a voice stated: "This is 207, where is Jack?" Bridges replied that Jack had gone out, that it was Frank and everything was okay. The voice then said: "Give me two to win parlay from Satin Lady in the second to Count Chick in the seventh, and a two to place parlay from Mott in the third to Count Chick in the seventh." In another call a male voice stated: "This is number 110. I want two and two on Leona Welch, two and two on Betty Rose, two to win on Social Climber, two and two on Spike,

\$2.00 to place on All She Wrote, and a \$2.00 place parlay from All She Wrote to Breezing Bebe."

Officer Bridges was qualified at the trial as an expert with reference to bookmaking procedures in Los Angeles County. He compared these telephone conversations with the scratch sheet carried by the defendant at the time of his arrest and discovered that the horses' names given over the telephone appeared in the scratch sheet, that they were running that day, and that these conversations were bets on horses running that day. He compared the yellow betting markers with the scratch sheet and testified that they contained bets on horses running at various tracks located throughout the country. A handwriting expert testified that in his opinion the handwriting on the yellow betting markers was that of the defendant.

The crucial issue at the preliminary hearing was the lawfulness of the search and seizure.

[1-3] Probable cause for an arrest is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. *Bompensiero v. Superior Court*, 44 Cal.2d 178, 183, 281 P.2d 250; *People v. Brite*, 9 Cal.2d 666, 687, 72 P.2d 122; *Trowbridge v. Superior Court*, 144 Cal.App.2d 13, 17, 300 P.2d 222. Probable cause may exist even though there may be some room for doubt. *People v. Nagle*, 25 Cal.2d 216, 222, 153 P.2d 344; *People v. Platt*, 124 Cal.App.2d 123, 130-131, 268 P.2d 529. The court and not the officer must make the determination whether the officer's belief is based upon reasonable cause. *People v. Burke*, 47 Cal.2d 45, 48, 301 P.2d 241; *Willson v. Superior Court*, 46 Cal.2d 291, 294 P.2d 36; *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469; *People v. Boyles*, 45 Cal.2d 652, 290 P.2d 535. The test in such case is not whether the evidence upon which the officer made the arrest is sufficient to convict but only whether the prisoner should stand trial.

[4] Bridges testified that he believed a felony was being committed at the time he

made the arrest. He disclosed the source and nature of his advance information. The defendant did not challenge the source of the information. It came from Bridges' superior officer, the captain of the vice detail. Nor did the defendant challenge its reliability. His sole objection was that the information was hearsay. It was not objectionable as hearsay since it was not offered to prove the truth of the matter asserted. It was not limited to evidence that would be admissible only on the trial on the merits. On this record the court properly overruled this objection. *Brinegar v. United States*, 338 U.S. 160, 171-176, 69 S.Ct. 1302, 93 L.Ed. 1879; *Carroll v. United States*, 267 U.S. 132, 160-161, 45 S.Ct. 280, 69 L.Ed. 543; *United States v. Li Fat Tong*, 2 Cir., 152 F.2d 650; *United States v. Heitner*, 2 Cir., 149 F.2d 105, 106-107; *Willson v. Superior Court*, supra, 46 Cal.2d 291, 294, 294 P.2d 36; *People v. Boyles*, supra, 45 Cal.2d 652, 656, 290 P.2d 535. Moreover, Bridges did not seek to justify the arrest solely on the ground that his superior officer had informed him that a crime was being committed. He presented evidence to the court which would justify the conclusion that his reliance on that information was reasonable. There was evidence apparent to his sense of hearing that a crime was being committed at the address and over the telephone number given him by his captain. A male voice answered the telephone and indicated a willingness to accept a bet. Almost immediately thereafter a male person, the defendant, was seen leaving the premises. There was evidence that no one else had entered or left the premises since this surveillance was begun. With his knowledge and experience of bookmaking practices, the officer was justified in assuming that the person who answered the telephone might become alarmed and attempt to leave the premises, and that the person observed leaving the premises immediately thereafter was the person who answered the telephone.

[5] The search of the premises followed as an incident to the arrest. If there was probable cause for the arrest both the

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Rosario Joseph BOUCHARD, Defendant
and Respondent.

Cr. 6138.

Supreme Court of California,
In Bank.

Nov. 22, 1957.

arrest and the search were lawful. The evidence found there was seized as part of a lawful search and was not therefore illegally obtained. Here, there was evidence independent of that revealed by the search to justify the arrest.

[6] The committing magistrate did not err in receiving evidence of the conversations on the telephone between the arresting officer and those who called the house to place bets. It is pertinent to observe that in the case of a bookmaker the telephone is usually an indispensable facility for the extension and safe operation of his business. It constituted a means by which bets might be placed with the defendant. These conversations came in the midst of the occurrences concerning the defendant at the time of his arrest. They were admitted for the purpose of proving the use to which the telephone was being used. The use of the room occupied by the defendant was in issue and the nature of the telephonic call was a circumstance to establish that fact. *People v. Radley*, 68 Cal.App.2d 607, 609, 157 P.2d 426; *People v. Joffe*, 45 Cal.App.2d 233, 235, 113 P.2d 901; *People v. Reifenstuhel*, 37 Cal.App.2d 402, 405, 99 P.2d 564.

[7,8] There was evidence that the search made of the defendant's car was consented to by him and there is no evidence to the contrary. Whether in a particular case consent is voluntarily given or is in submission to an express or implied assertion of authority is a question of fact to be determined in the light of all the circumstances. *People v. Burke*, supra, 47 Cal.2d 45, 49, 301 P.2d 241; *People v. Gorg*, supra, 45 Cal.2d 776, 782, 291 P.2d 469; *People v. Michael*, 45 Cal.2d 751, 754, 290 P.2d 852. It cannot be said as a matter of law that consent given by a defendant is involuntary because it is given while he is under arrest.

The order is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

Proceedings on motion by attorney to quash service upon her of Attorney General's opening brief after state appealed from an order granting a motion to set aside information charging a defendant with possession of dangerous weapon. The Superior Court, Los Angeles County, Louis H. Burke, J., granted attorney's motion and state appealed. The Supreme Court, Gibson, C. J., held where attorney represented defendant and had been successful in obtaining an order granting motion to set aside information charging defendant with possession of dangerous weapon, and state appealed, Attorney General was entitled to consider attorney as attorney for defendant and serve opening appeal brief on her.

Motion to quash denied.

Opinion, 312 P.2d 47, vacated.

1. Attorney and Client ⇨70

There is presumption that an attorney of record has authority to appeal and presumption will prevail unless appellant himself objects or there is a clear showing of lack of authority.

2. Appeal and Error ⇨765

Service of appeal briefs can be made upon attorney of record after entry of judgment in a civil case where there has been no substitution of attorney in manner prescribed by law. West's Ann.Code Civ. Proc. §§ 284, 285.

3. Criminal Law ⇨1130(4)

Sections of Code of Civil Procedure relating to change of attorney at any time before or after judgment of final determin-

ation are applicable to criminal cases and taken in connection with Rules on Appeal must be construed as providing that opening brief on appeal is to be served on counsel of record in trial court in absence of an effective change in status or authority. West's Ann.Code Civ.Proc. §§ 284, 285; West's Ann.Rules on Appeal, rules 30, 37, 40(e, f), 48(b).

4. Criminal Law ☞1130(4)

Where attorney represented defendant and had been successful in obtaining an order granting motion to set aside information charging defendant with possession of dangerous weapon, and state appealed, Attorney General was entitled to consider attorney as attorney for defendant and serve opening appeal brief on her. West's Ann.Code Civ.Proc. §§ 284, 285; West's Ann.Rules on Appeal, rules 30, 37, 40(a, f), 48(b).

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty. (Los Angeles), Jere J. Sullivan, Fred N. Whichello, Lewis Wattenick and Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

Gladys Towles Root, Los Angeles, in pro. per.

Eugene V. McPherson and Joseph A. Armstrong, Los Angeles, for movant.

GIBSON, Justice.

The People have appealed from an order granting a motion to set aside an information charging defendant with possession of a dangerous weapon, and Gladys Towles Root, the attorney who represented defendant in the trial court, seeks to quash service upon her of the appellant's opening brief.

When Mrs. Root was informed by the county clerk that a copy of the transcript was being sent to her, she wrote to the district attorney and to the clerks of the superior court and the District Court of Appeal stating that she was not the defendant's attorney on appeal and that all correspondence with respect to the appeal should be

with defendant, whose address she did not know. Subsequently, appellant's opening brief was served on Mrs. Root, and she then appeared specially before the District Court of Appeal and moved to quash such service. In support of her motion, she filed an affidavit in which she states that she has not heard from defendant since the granting of the motion to set aside the information, that no arrangements for representation with or without fee have been made with him, and that she believes that she has no authority or right to represent him. The District Court of Appeal granted the motion, and this court granted a hearing.

It clearly appears that Mrs. Root was attorney of record for defendant in the trial court, and her claim, as indicated by her affidavit, is that her authority to act ceased when the superior court granted the motion to set aside the information.

[1, 2] It has been held that the presumption that an attorney of record has authority to appeal will prevail unless the appellant himself objects or there is a clear showing of lack of authority. *United States of Mexico v. Rask*, 109 Cal.App. 497, 500-502, 293 P. 108; see *Parkside Realty Co. v. MacDonald*, 167 Cal. 342, 346, 139 P. 805; *Board of Commissioners of Funded Debt of City of San Jose v. Younger*, 29 Cal. 147, 149; cf. *Dodd v. Tebbetts*, 198 Cal. 333, 338, 244 P. 1081; *Woodbury v. Nevada, etc., Ry. Co.*, 120 Cal. 367, 369, 52 P. 650. There would seem to be just as much reason to presume that an attorney who has obtained a favorable judgment has authority to protect it and to take any necessary steps to insure that it is not set aside or reversed. Accordingly, it has been held that service can be made upon the attorney of record after entry of judgment in a civil case where there has been no substitution in the manner prescribed by law. *Grant v. White*, 6 Cal. 55, 56 [argument on motion for new trial]; *Sherman v. Panno*, 129 Cal.App.2d 375, 378-380, 277 P.2d 80 [notice of entry of judgment]; *Scarpel v. East Bay Street Ry.*, 42 Cal.App.2d 32, 33, 115 P.2d 862 [notices of entry of judgment and denial of new

trial]; *United States v. Curry*, 6 How. 106, 47 U.S. 106, 111-112, 12 L.Ed. 363 [citation to appellees to appear on appeal]; *Henderson v. Richardson Co.*, 4 Cir., 25 F.2d 225, 226 [same]; see *Brown v. Arnold*, 8 Cir., 131 F. 723, 725-726; cf. *Reynolds v. Reynolds*, 21 Cal.2d 580, 584, 134 P.2d 251 [divorce, motion to modify child support]; *Russ v. Russ*, 68 Cal.App.2d 400, 405-406, 156 P.2d 767 [same].

Section 284 of the Code of Civil Procedure provides: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other except that in all civil cases in which the fee or compensation of the attorney is contingent upon the recovery of money, in which case the court shall determine the amount and terms of payment of the fee or compensation to be paid by the party." Section 285 provides: "When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney." It may be noted that it would have been unnecessary to refer to "civil cases" in subdivision 2 of section 284 if that section had been intended to apply only to civil actions. No claim is made that there was any compliance with these sections.

Rule 30 of the Rules on Appeal states that the rules governing appeals from the superior court in civil cases shall be applicable to appeals in criminal cases "except where express provision is made to the contrary, or where the application of a particular rule would be clearly impracticable or inappropriate." Rule 48(b) provides: "Withdrawal or substitution of attorneys may be effected by serving and filing a stipulation in the reviewing court, signed by the party, the retiring attorney and any substituted

attorney. In the absence of stipulation, withdrawal or substitution may be effected only by an order made pursuant to a noticed motion in the reviewing court * *." This rule is found in part VI of the rules under the heading of "General Provisions," and it is applicable to criminal appeals by reason of the provisions of rule 30. (See *Witkin*, *New Rules on Appeal*, 17 So.Cal.L. Rev. 232, 268-269.)

[3, 4] Rule 37 provides that the opening brief in criminal cases shall be "served and filed," and rule 40(f) states that the quoted words mean that such a document is to be accompanied by proof of service "on counsel for each adverse party who is represented by separate counsel." Rule 40(e) states that whenever "a notice is required to be given to or served on a party such notice or service shall be made on his attorney of record, if he has one." In the light of sections 284 and 285 of the Code of Civil Procedure, rules 37, 40(e), 40(f) and 48(b) must be construed as providing that the opening brief on appeal is to be served on the counsel who was of record in the trial court in the absence of an effective change in status or authority. The Attorney General was therefore entitled to consider Mrs. Root as the attorney for defendant.

There are two old decisions which held that a change of attorneys in a criminal case could be effected without compliance with sections 284 and 285 of the Code of Civil Procedure, but they involved a different type of problem from the one presented here. *Ex parte Clarke*, 62 Cal. 490; *People v. Garnett*, 9 Cal.App. 194, 199-200, 98 P. 247. In each instance the attorney who signed the notice of appeal came into the case without a formal substitution. However, his authority to act for the defendant was recognized by opposing counsel, and no one was prejudiced by the failure to comply with the statutory requirements for substitution of attorneys. In upholding the authority of the new attorney, the court was protecting both the defendant's right to appeal and his right to be repre-

sented by counsel of his own choice. There is a statement in the Clarke opinion to the effect that sections 284 and 285 have no application to criminal cases, and the Garnett case, relying upon Clarke, contains a similar statement. The facts of those cases, however, did not compel such a broad determination, and any language in those opinions inconsistent with the views expressed herein is disapproved.

The motion to quash is denied.

SHENK, CARTER, TRAYNOR,
SCHAUER, SPENCE and McCOMB,
JJ., concur.



49 Cal.2d 409

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Velva Irene McCAUGHAN, Defendant
and Appellant.

Cr. 6050.

Supreme Court of California,
In Bank.

Nov. 19, 1937.

Defendant was found guilty of involuntary manslaughter and the Superior Court, Stanislaus County, Frank C. Damrell, J., denied her motion for new trial and the defendant appealed. The Supreme Court, Traynor, J., held that invalidity of part of the statute proscribing harsh, cruel or unkind treatment of or any neglect of duty towards an insane person with respect to the words "harsh" and "unkind" did not invalidate the remainder of the statute in so far as it proscribed cruel treatment of or any neglect of duty towards an insane person, that a hypothetical question to a medical witness was improper, and that other evidence was properly admitted.

Orders denying a new trial and admitting defendant to probation reversed.

Opinion, 306 P.2d 61, vacated.

1. Constitutional Law ⇨258

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates due process of law.

2. Criminal Law ⇨13

A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the court called upon to apply it.

3. Statutes ⇨47

A statute will be upheld if its terms may be made reasonably certain by reference to the common law or to its legislative history or purpose.

4. Criminal Law ⇨13

A statute will be upheld despite the fact that the acts it prohibits are defined in vague terms if it requires an adequately defined specific intent, but a court may not create a standard and a specific intent defined in the same vague terms as those defining the prohibited acts does not make a statute acceptably definite.

5. Mental Health ⇨51

Under statute proscribing harsh, cruel or unkind treatment of, or neglect of duty towards an insane person, the phrase "neglect of duty" has an accepted legal meaning and means an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty. West's Ann.Pen.Code, §§ 242, 361.

See publication Words and Phrases, for other judicial constructions and definitions of "Neglect of Duty".

6. Mental Health ⇨51

Under the statute proscribing the harsh, cruel or unkind treatment or neglect of duty towards an insane person, the word "cruel" means disposed to give pain to others, willing or pleased to hurt or afflict, and "cruel treatment" means the intentional

infliction of pain for the mere purpose of causing pain or indulging vindictive passions. West's Ann.Pen.Code, §§ 242, 361.

See publication Words and Phrases, for other judicial constructions and definitions of "Cruel" and "Cruel Treatment".

7. Mental Health §51

Under the statute proscribing harsh, cruel or unkind treatment or neglect of duty towards an insane person, the word "harsh" means offensive to sense as being coarse, rough, grating, discordant, astringent, offensive to physical feelings, roughly unpleasant, causing physical discomfort, and "unkind" means wanting in kindness or sympathy, cruel or harsh. West's Ann. Pen.Code, §§ 242, 361.

See publication Words and Phrases, for other judicial constructions and definitions of "Harsh" and "Unkind".

8. Criminal Law §13

The statute proscribing harsh, cruel or unkind treatment of or any neglect of duty towards an insane person does not in view of the words "harsh" and "unkind" provide an ascertainable standard of conduct or a working standard of guilt and in so far as it purports without further definition to make "harsh" treatment and "unkind" treatment criminal offenses the statute is void for vagueness. West's Ann.Pen.Code, § 361.

9. Criminal Law §803½, 1172(1)

In prosecution for violation of statute proscribing harsh, cruel or unkind treatment of an insane person, instruction relating to the statute given in the language of the statute which is void for vagueness was erroneous and in view of conflicting evidence as to the nature of defendant's acts and general verdict of guilty, the error was prejudicial. West's Ann.Pen.Code, §§ 192, subd. 2, 242, 361.

10. Statutes §64(1)

Fact that a statute is unconstitutional in part does not necessarily invalidate the entire statute since the remaining parts can be preserved if they can be separated from the unconstitutional part without destroying the statutory scheme or purpose.

11. Statutes §64(6)

Under the statute proscribing harsh, cruel or unkind treatment or any neglect of duty of an insane person, unconstitutional provisions relating to "harsh" and "unkind" treatment are severable from the provisions relating to "cruel" treatment and "neglect of duty" and do not vitiate the whole statute. West's Ann.Pen.Code, § 361.

12. Mental Health §32

The statute providing that every person guilty of any harsh, cruel or unkind treatment of or any neglect of duty towards an insane person in so far as it provides that any person guilty of any cruel treatment of or any neglect of duty towards an idiot, lunatic or insane person is guilty of a misdemeanor is valid. West's Ann.Pen.Code, § 361.

13. Criminal Law §485(1)

In prosecution for violation of the statute proscribing cruel treatment of or neglect of duty towards an insane person, where it was charged that act of defendant in forcibly feeding a mental patient caused her death, hypothetical question to a medical witness that cause of death of the decedent was due to asphyxia caused by obstruction of the trachea with food was improper where the undisputed evidence showed that the food in the body of the deceased was partially digested. West's Ann.Pen.Code, § 361.

14. Witnesses §41

The statute providing that persons who are of unsound mind at the time of their production for examination cannot be witnesses does not impose an absolute disqualification on insane persons. West's Ann.Code Civ.Proc. § 1880, subd. 1; West's Ann.Pen.Code, § 1321.

15. Witnesses §41

In determining whether an insane person is competent as a witness, the question is whether the proposed witness' mental derangement or defect is such that he was deprived of the ability to perceive the event about which he is to testify or is deprived of the ability to recollect and communicate

with reference thereto. West's Ann.Code Civ.Proc. § 1880, subd. 1; West's Ann. Pen.Code, § 1321.

16. Witnesses Ⓒ41

The statute providing that persons who are of unsound mind at the time of their production for examination cannot be witnesses is addressed to the time at which a witness is produced for examination and the insanity at the time of the event witnessed is a matter for consideration in determining whether the proposed witness is competent to testify. West's Ann.Code Civ. Proc. §§ 1879, 1880, subd. 1.

17. Witnesses Ⓒ41

If a proposed witness was suffering from some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event. West's Ann.Code Civ.Proc. §§ 1879, 1880, subd. 1.

18. Witnesses Ⓒ79(1)

Competency of a witness is to be determined by the trial court in the exercise of its judicial discretion, but "sound discretion" demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of inquiry in a case in which the question is not simply whether an act was done but rather the manner in which it was done and in which testimony as to the details may mean the difference between conviction and acquittal. West's Ann.Code Civ.Proc. §§ 1879, 1880.

19. Criminal Law Ⓒ369(2)

Except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution or to overcome any material facts sought to be proved by the defense is admissible although it may connect the accused with an offense not included in the charge, and in determining such fact, the trial court should be guided by the rule that such proof is to be received with extreme caution, and doubt is to be resolved in favor of the accused,

instead of suffering the minds of the jurors to be prejudiced by an independent fact carrying with it no proper evidence of the particular guilt.

20. Criminal Law Ⓒ338(7)

If evidence is determined to be relevant to prove a material fact in issue, it is for the trial court in exercise of its judicial discretion to determine whether its probative value is outweighed by its possible prejudicial effect and to admit it or exclude it accordingly.

21. Criminal Law Ⓒ371(1)

In prosecution for violation of the statute proscribing cruel treatment or neglect of duty towards an insane person, where the People were attempting to prove that defendant in forceful feeding of an inmate was guilty of willful and unlawful use of force upon the inmate, defendant's intent was in issue and her treatment of the inmate on other occasions was relevant to prove the nature of her relations with the inmate and her intent at the time of the offense charged. West's Ann.Pen.Code, §§ 242, 361.

22. Criminal Law Ⓒ338(4)

In prosecution of a hospital technician for violation of the statute proscribing cruel treatment of a mental patient, where it was charged that act of forcible feeding of inmate caused her death, excluding coroner's verdicts relating to six other deaths from aspiration of stomach contents which occurred at the state hospital wherein defendant sought to prove that such other deaths occurred naturally was not an abuse of discretion where court concluded that their admission would involve inquiry into an excessive number of collateral issues. West's Ann.Pen.Code, §§ 242, 361; West's Ann.Code Civ.Proc. § 1868.

Sutter & Carter and Douglas M. Sutter, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and John Fourt, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

A jury found defendant guilty of involuntary manslaughter (Pen.Code, § 192, subd. 2), and the court denied her motion for a new trial. Judgment was suspended, and defendant was admitted to probation for a term of three years on the condition that she serve one year in a county detention facility. Defendant appeals.

Defendant was a psychiatric technician at the state hospital in Modesto in charge of a ward of fifty mental patients. One of the patients in defendant's ward was Grace Belill, a 71 year old woman suffering from involuntional psychosis, a mental condition that commonly causes a patient to refuse to eat. On October 12, 1955, a doctor at the hospital noted in Miss Belill's record that if necessary she was to be spoon fed. On October 14, 1955, at the noon meal, Miss Belill was not eating, and defendant spoon fed her. During the feeding the patient collapsed and shortly thereafter died. The cause of death was asphyxiation from the aspiration of stomach contents.

The gravamen of the charge against defendant is that she used improper methods and excessive force in spoon feeding the decedent. The People sought to prove that defendant's conduct constituted either criminal negligence or a misdemeanor and that the misdemeanor consisted of a violation of either section 242 (battery) or section 361 (treatment of insane persons) of the Penal Code. The jury was given instructions appropriate to each of the People's theories, including an instruction in the statutory language of section 361, and returned a general verdict of guilty.

[1-4] Defendant contends that the provisions of section 361 are so vague and uncertain that her conviction thereunder is a denial of due process of law. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. Gen-*

eral Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322; *Lanzetta v. State of New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888; *In re Peppers*, 189 Cal. 682, 685-687, 209 P. 896. A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. *Winters v. People of State of New York*, 333 U.S. 507, 515-516, 68 S.Ct. 665, 92 L.Ed. 840; *In re Peppers*, supra, 189 Cal. at pages 685-687, 209 P. at pages 897-898; *People v. Building Maintenance Contractors' Ass'n*, 41 Cal. 2d 719, 725, 264 P.2d 31; *People v. Saad*, 105 Cal.App.2d Supp. 851, 854, 234 P.2d 785. A statute will be upheld if its terms may be made reasonably certain by reference to the common law (see *Connally v. General Const. Co.*, supra, 269 U.S. at page 391, 46 S.Ct. at page 127; *Lorenson v. Superior Court*, 35 Cal.2d 49, 60, 216 P.2d 859) or to its legislative history or purpose. See *Connally v. General Const. Co.*, supra, 269 U.S. at pages 391-392, 46 S.Ct. at pages 127-128; *People v. King*, 115 Cal.App.2d Supp. 875, 878, 252 P.2d 78. A statute will likewise be upheld, despite the fact that the acts it prohibits are defined in vague terms, if it requires an adequately defined specific intent. See *People v. Building Maintenance Contractors' Ass'n*, supra, 41 Cal.2d at page 724, 264 P.2d at page 35, and cases cited. A court, however, may not create a standard (*Lanzetta v. State of New Jersey*, supra, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888; *Connally v. General Const. Co.*, supra, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322), and a specific intent defined in the same vague terms as those defining the prohibited acts does not make a statute acceptably definite.

[5-7] Section 361 provides: "Every person guilty of any harsh, cruel, or unkind treatment of, or any neglect of duty towards, any idiot, lunatic, or insane person, is guilty of a misdemeanor." The phrase "neglect of duty" has an accepted legal meaning. It means an intentional or grossly negligent failure to exercise due

diligence in the performance of a known official duty. See *Rapaport v. Civil Service Commission*, 134 Cal.App. 319, 323-324, 25 P.2d 265; *M. F. Kemper Const. Co. v. City of Los Angeles*, 37 Cal.2d 696, 702, 235 P.2d 7; *People ex rel. Finigan v. Perkins*, 85 Cal. 509, 511, 26 P. 245; *Reinhard v. Lawrence Warehouse Co.*, 41 Cal.App.2d 741, 747, 107 P.2d 501. The word "cruel" has a commonly accepted meaning. It means "[d]isposed to give pain to others; willing or pleased to hurt or afflict. * * *" (Webster's New International Dictionary, 2d ed., unabridged.) "Cruel treatment" as used in a criminal statute has been defined to mean the intentional infliction of pain for the mere purpose of causing pain or indulging vindictive passions. *Commonwealth v. Lufkin*, 7 Allen 579, 581, 89 Mass. 579, 581. It appears, therefore, that if section 361 were limited to the punishment of cruel treatment of, or neglect of duty towards insane persons, it would not be unconstitutionally vague. Defendant, however, directs her attack at the terms "harsh" treatment and "unkind" treatment. Webster's New International Dictionary, Second Edition, Unabridged, defines "harsh" as "1. Offensive to sense as being coarse, rough, grating, discordant, astringent. * * * 2. Offensive to the sensibilities; disagreeable to one's feeling of aesthetic or intellectual propriety. * * * 3. Of persons or things, offensive to a sense of justice or kindness; unfeeling, severe, cruel, unduly rigorous. * * * 4. Offensive to the physical feelings; roughly unpleasant; causing physical discomfort. * * *" The same authority defines "unkind" as "[n]ot kind, esp., wanting in kindness, sympathy, or the like; hence, cruel; harsh." It is apparent from the mere recitation of the meanings ascribed to "harsh" and "unkind," most of them indefinite themselves, that men of common intelligence must necessarily guess at the meaning of these words as used in the statute and that they will differ as to their application in a specific situation. The words in question have no established common law meaning. Nor have they any

adjudicated meaning. Although section 361 has been in the Penal Code since its adoption in 1872, and although the New York statute (New York Penal Code (1864), § 425), which served as the model for our code section (Rev.Laws of the State of California (1871), vol. IV, § 361, Code Commission note), contains identical language, the terms "harsh" treatment and "unkind" treatment have never been construed by an appellate court either in New York or in this state. Referring to the purpose of the statute to protect insane persons, the attorney general contends that, like "cruel" treatment, the terms "harsh" treatment and "unkind" treatment should be limited to mean treatment likely to cause physical harm or pain. We find nothing in the statute, however, indicating that protection was meant to be limited to protection against physical harm or pain. Indeed, the use of the words "harsh" and "unkind" in addition to the word "cruel" indicates that protection was not meant to be so limited.

The trial court correctly interpreted section 361 as requiring a specific intent (see *People v. Vogel*, 46 Cal.2d 798, 801, 299 P.2d 850; *People v. Stuart*, 47 Cal.2d 167, 173, 302 P.2d 5) and instructed the jury that to convict defendant under that section they must find that she treated the decedent "* * * with an intent to be harsh, cruel or unkind * * * or with intent to neglect her." The requirement that defendant must have acted with an intent to be harsh or unkind, however, does not make clear what those words mean.

[8-12] We conclude that the words "harsh" and "unkind" do not provide an ascertainable standard of conduct or a workable standard of guilt and that insofar as it purports, without further definition, to make "harsh" treatment and "unkind" treatment criminal offenses, section 361 of the Penal Code is void for vagueness. The court's instruction relating to section 361, given in the language of the statute, was therefore erroneous, and in view of the conflicting evidence as to the nature of defendant's acts and the general verdict,

the error must be deemed prejudicial. *Oettinger v. Stewart*, 24 Cal.2d 133, 140, 148 P.2d 19, 156 A.L.R. 1221; *Huebotter v. Follett*, 27 Cal.2d 765, 771, 167 P.2d 193; *Clement v. State Reclamation Board*, 35 Cal.2d 628, 643-644, 220 P.2d 897; *Screws v. United States*, 325 U.S. 91, 106-107, 65 S.Ct. 1031, 89 L.Ed. 1495. The orders appealed from must, therefore, be reversed. Since the reversal may result in a new trial, however, it is necessary to determine whether section 361 is valid in part and to consider several other alleged errors. Code Civ.Proc. § 53.

The fact that a statute is unconstitutional in part does not necessarily invalidate the entire statute. The remaining parts of the statute may be preserved if they can be separated from the unconstitutional part without destroying the statutory scheme or purpose. *Danskin v. San Diego Unified School Dist.*, 28 Cal.2d 536, 555, 171 P.2d 885; *Ex parte Gerino*, 143 Cal. 412, 420, 77 P. 166, 66 L.R.A. 249. The unconstitutional provisions relating to "harsh" and "unkind" treatment are severable from the constitutional provisions relating to "cruel" treatment and "neglect of duty" and do not vitiate the whole statute. Since the dominant purpose of the statute to protect insane persons can be effected by the elimination of the severable unconstitutional provisions, the constitutional provisions may stand alone and remain in force. *People v. Lewis*, 13 Cal.2d 280, 284, 89 P.2d 388. We conclude, therefore, that insofar as it provides that any person guilty of any " * * * cruel * * * treatment of, or any neglect of duty towards, any idiot, lunatic, or insane person * * *" is guilty of a misdemeanor, section 361 is a valid statute.

Defendant contends that as a matter of law the evidence that the decedent's death was caused by an act of defendant does not support her conviction. The evidence viewed most favorably to respondent discloses that defendant fed the decedent three tablespoons of cubed, creamed potatoes. She held the decedent's head back by grasping her hair with one hand and fed

her with the other. At intervals during the feeding defendant covered the decedent's mouth and nose with a towel. Another attendant was holding the decedent's arms, and at some time during the feeding or immediately thereafter a hospital inmate sat on the decedent's lap. At some time during the feeding the decedent wiggled her legs. After the third spoon of food was put into her mouth the decedent collapsed. Efforts to revive her failed, and shortly thereafter she died. Dr. Miller, who performed the autopsy, testified that she found lodged in the decedent's trachea and bronchi three to four tablespoons of partially digested food, white in color and creamy in substance. The cause of death was established as asphyxiation from the aspiration of stomach contents. Dr. Miller testified that no food was found in the decedent's stomach and explained on cross-examination that the decedent must have swallowed the food as it was fed, regurgitated, and then aspirated the regurgitated matter. At the time of her death, the decedent was suffering from chronic inflammation of the gall bladder with stone formation, and a quantity of "bile-tinged" liquid, characteristic of a gall bladder attack, was found in her stomach. Decedent also had coronary arteriosclerosis; the inside diameter of the anterior descending branch of the left coronary was reduced in size to that of a pin point.

[13] It is defendant's contention that there is no proof whatever that any act of hers caused the decedent to regurgitate and aspirate the stomach contents and that, on the contrary, there is evidence that these events were not caused by defendant's acts. The district attorney asked Dr. Miller the following hypothetical question:

"If a person is sitting on a chair, and her head is held back by the hair of her head so that her face is looking up towards the ceiling—also, her arms are being held, and another person is sitting on her lap—and then an amount of food is placed into the person's mouth, and she is resisting the food—and then a

towel is placed over her mouth and her nose is also being held for a period of time, and then the person slumps over and thereafter expires, and approximately four heaping tablespoons of food is found lodged in the trachea; now, Doctor, based upon this hypothetical question, what would be the cause of death, Doctor?"

Defendant objected to the question on the ground that it omitted a material fact in evidence, namely that the food found in the decedent's trachea was partially digested. The court overruled the objection, and Dr. Miller answered, "The cause of death would be due to asphyxia, caused by obstruction of the trachea with food." The objection should have been sustained. The undisputed evidence was that the food was partially digested. This fact was essential to a consideration of causation, for it showed that the food had been in the stomach and must have been regurgitated and that, therefore, it was not aspirated directly as it was put into the decedent's mouth.

It is obvious that the hypothetical question and Dr. Miller's answer did not advance the inquiry into what caused the decedent to regurgitate and aspirate her stomach contents. Dr. Miller had previously testified to the cause of death. Her answer to the hypothetical question merely repeated that testimony, and her answer was obviously based on only two of the facts in the question, namely that the decedent died and that approximately four tablespoons of food were found lodged in her trachea. On cross-examination Dr. Miller testified that she did not know what caused the decedent to regurgitate, that it was possible that either the decedent's heart condition or her gall bladder condition could have caused it, but that she thought these possibilities improbable. Dr. Toller, a defense witness, was presented with the same hypothetical set of facts presented to Dr. Miller. It was his opinion that none of the circumstances disclosed therein, either singly or collectively, could have caused the decedent to regurgitate and aspirate her stomach contents. He testified that it was possible that the

regurgitation might have been caused by the decedent's heart condition or gall bladder condition. He suggested as a third possibility that the regurgitation might have been caused by the decedent's revulsion because of her mental condition to the thought of eating.

Thus, the testimony of the expert witnesses supports defendant's contention. If the jury rejected the opinion evidence, however, they could infer that the manner in which the decedent was fed was at least a contributing cause of her regurgitation or that, even if the regurgitation was not caused by an act of defendant, her placing the towel over the decedent's mouth and nose preventing the vomitus from escaping and was the cause of the decedent's aspirating the regurgitated matter. The latter inference is weakened by the fact that neither the time at which the decedent regurgitated nor the time at which the towel was held over her mouth and nose was established and also by the fact that it was not shown that the vomitus ever came high enough into the throat to be expelled through the mouth. We cannot say as a matter of law, however, that either of these inferences is unreasonable.

Defendant contends that the court erred in qualifying as competent witnesses several mental patients in the state hospital at Modesto. All of these patients were in the ward over which defendant had supervision, and some of them had histories of insane delusions relating to food and to persecution by hospital personnel. Much of the evidence most damaging to defendant is in the testimony of these patients. We deem it unnecessary to discuss the witnesses individually, for their testimonial qualifications may be changed at the time of a new trial and would have to be reexamined at that time. Our review of the record, however, indicates the desirability of our reviewing the rules governing the qualifications of an insane person as a witness.

[14] Section 1321 of the Penal Code provides, with exceptions with which we

are not here concerned, that the rules for determining the competency of witnesses in civil actions apply also to criminal actions. Section 1880 of the Code of Civil Procedure provides: "The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. * * *" This section, however, does not impose an absolute disqualification on insane persons. As was said in *People v. Tyree*, 21 Cal.App. 701, 706, 132 P. 784, 787, "The statute does not undertake to prescribe or define the amount or degree of mental unsoundness that must exist in order to disqualify the witness, but the reason for the existence of such a statute should be invoked, and we interpret that reason to require that the witness should have some apprehension of the obligation of the oath, and that he shall be capable of giving a fairly correct account of the things he has seen or heard, and this test should be made with special reference to the field of inquiry and character of the subject on which the witness is to give testimony."

[15] The question to be determined is whether the proposed witness's mental derangement or defect is such that he was deprived of the ability to perceive the event about which he is to testify or is deprived of the ability to recollect and communicate with reference thereto. *People v. Ives*, 17 Cal.2d 459, 476, 110 P.2d 408; *People v. Harrison*, 18 Cal.App. 288, 294, 123 P. 200; see *Wigmore on Evidence*, 3rd ed., vol. 2, §§ 493-495, pp. 586-587. It bears emphasis that the witness's competency depends upon his *ability* to perceive, recollect, and communicate. (See *Wigmore on Evidence*, supra, § 478, p. 519.) Whether he did perceive accurately, does recollect, and is communicating accurately and truthfully are questions of credibility to be resolved by the trier of fact.

[16, 17] The language of section 1880 is addressed to the time at which a witness is produced for examination, and there is language in several cases suggesting that insanity at the time of the event witnessed is not a matter for consideration in the de-

termination whether or not a proposed witness is competent to testify. See *People v. Harrison*, supra, 18 Cal.App. at page 296, 123 P. at page 203; *People v. Tyree*, supra, 21 Cal.App. at pages 706-707, 132 P. at page 786; *McComb v. Atchison, T. & S. F. Ry. Co.*, 110 Cal.App. 303, 307-308, 294 P. 81; *People v. Mendez*, 193 Cal. 39, 48-49, 223 P. 65; *People v. Curry*, 97 Cal.App. 2d 537, 541-542, 218 P.2d 153. The rule is to the contrary. It is apparent from the requirement that the witness have the ability to give a substantially accurate account of the event witnessed (*People v. Tyree*, supra, 21 Cal.App. at pages 706-708, 132 P. at pages 786-787 and cases there cited; *People v. Ives*, supra, 17 Cal.2d at page 476, 110 P.2d at page 417) that he must have had the ability to perceive the event with a substantial degree of accuracy. Moreover, section 1879 of the Code of Civil Procedure requires as a general testimonial qualification the ability to perceive the event about which testimony is to be given. See, also, *Wigmore on Evidence*, supra, §§ 492-493, p. 586; *Bradburn v. Peacock*, 135 Cal.App.2d 161, 164, 286 P.2d 972, construing Code Civ.Proc. § 1880(2); Code Civ.Proc. § 1845. It follows that if the proposed witness was suffering from some insane delusion or other mental defect that deprived him of the ability to perceive the event about which it is proposed that he testify, he is incompetent to testify about that event. Any implication to the contrary in the foregoing cases is disapproved.

[18] It is universally recognized that the competency of a witness is to be determined by the trial court in the exercise of its judicial discretion. *People v. Ives*, supra, 17 Cal.2d at page 476, 110 P.2d at page 417; *People v. Harrison*, supra, 18 Cal.App. at page 295, 123 P. at page 203; see *McCormick on Evidence*, p. 123. Manifestly, however, sound discretion demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of inquiry in a case in which the question is not simply whether or not an

act was done but, rather, the manner in which it was done and in which testimony as to details may mean the difference between conviction and acquittal.

Defendant contends that the court erred in allowing two prosecution witnesses to testify, over defendant's objections, that defendant used improper methods and excessive force in feeding the decedent the morning meal on the day of her death and on several other occasions. Defendant contends that the only purpose of this evidence was to prejudice the jury against her and that it should have been excluded.

[19, 20] "It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge." *People v. Woods*, 35 Cal.2d 504, 509, 218 P.2d 981, 984. In determining whether such evidence is relevant to prove a material fact and not just criminal disposition, the trial court should be guided by the rule that "such proof is to be received with 'extreme caution,' and if its connection with the crime charged is not clearly perceived, the doubt is to be resolved in favor of the accused, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." *People v. Albertson*, 23 Cal.2d 550, 577, 145 P.2d 7, 20; see, also, *People v. Peete*, 28 Cal.2d 306, 316, 169 P.2d 924. If such evidence is determined to be relevant to prove a material fact in issue, it is for the trial court in the exercise of its judicial discretion to determine whether its probative value is outweighed by its possible prejudicial effect and to admit or exclude it accordingly, for "[t]his is a situation where the policy of protecting a defendant from undue prejudice conflicts with the rule of logical relevance, and a proper determination as to which should prevail rests in the sound dis-

cretion of the trial court, and not merely on whether the evidence comes within certain categories * * *." *State v. Goebel*, 36 Wash.2d 367, 218 P.2d 300, 306; see, also, *Adkins v. Brett*, 184 Cal. 252, 258-259, 193 P. 251; *Jackson, J.*, in *Michelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 93 L.Ed. 168; *Stone, Exclusion of Similar Fact Evidence*, 46 Harv.L.Rev. 954, 984-985; *McCormick on Evidence* (1954), § 157, pp. 332-333.

[21] The People were attempting to prove that defendant was guilty of a willful and unlawful use of force upon the person of the decedent. Pen.Code, § 242, *supra*. Defendant's intent was clearly in issue, and her treatment of the decedent on other occasions was relevant to prove the nature of her relations with the decedent and her intent at the time of the offense charged. *People v. Palassou*, 14 Cal.App. 123, 126-127, 111 P. 109; *People v. Wells*, 33 Cal.2d 330, 341-342, 202 P.2d 53. We find no abuse of discretion in the trial court's admitting the testimony to which defendant objects.

[22] Defendant also contends that the trial court erred in excluding from evidence coroner's verdicts relating to six other deaths from the aspiration of stomach contents, which occurred at the state hospital at Modesto in 1955. Defendant sought to show by these records that the other deaths occurred naturally and to prove thereby that this decedent's death was not caused by any act of defendant. The court did permit defendant to adduce testimony that mental patients suffering from involutional melancholia are predisposed to regurgitation and that the records of the Stanislaus County coroner's office disclosed six deaths in the county in 1955 from the aspiration of stomach contents, all of them occurring at the state hospital in Modesto. The court excluded the coroner's verdicts, however, on the grounds that their admission would involve inquiry into an excessive number of collateral issues, namely the circumstances surrounding each death.

It was for the trial court to determine whether the probative value of the offered evidence was outweighed by the necessity of inquiring into collateral issues. Code Civ. Proc. § 1868. We find no abuse of discretion in the exclusion of the coroner's verdicts.

Other alleged errors and defendant's contention that the district attorney was guilty of misconduct need not be considered, since the occurrences complained of are not likely to attend a new trial.

The orders denying a new trial and admitting defendant to probation are reversed.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.



49 Cal.2d 427

Virginia Baker ADAMS, Petitioner,

v.

The SUPERIOR COURT OF The State of CALIFORNIA IN AND FOR the COUNTY OF SAN BERNARDINO, Respondent.

Helen Jordan Baker, Executrix, Real Party In Interest.

L. A. 24621.

Supreme Court of California.

Nov. 22, 1957.

Mandamus proceeding brought to compel respondent court to permit will contestant to inspect certain "day books" kept by testator. The Supreme Court, Shenk, J., held that testator's "regular" pursuit of a profession is not material to determination of his testamentary incapacity, and therefore, even if contestant were successful in demonstrating decedent's professional incompetence, it would not follow that testator had lacked capacity to execute valid

will; and held that contestant, who sought to explore day books of deceased dentist for purpose of extracting therefrom instances in which decedent had so fallen below standards of professional competence in treatment of his patients that it could be inferred that he lacked testamentary capacity, had failed to make showing necessary to entitle her to the relief sought.

Alternative writ discharged and peremptory writ denied.

1. Appeal and Error ⇨87(5) Discovery ⇨85

The trial court exercises judicial discretion in acting upon motion to require production of books, documents, or papers for inspection by adverse party; and order permitting inspection is not appealable. West's Ann.Code Civ.Proc. § 2031.

2. Mandamus ⇨172

In mandamus proceeding brought to redress an alleged abuse of discretion in granting or denying application for inspection, inquiry is whether order constituted an abuse of discretion. West's Ann.Code Civ.Proc. § 2031.

3. Discovery ⇨99

Unlike taking of deposition, order requiring production of books, papers, or records is subject to limitation that inspection sought must not be so broad as to infringe upon constitutional immunity against unlawful search and seizure. West's Ann.Code Civ.Proc. § 2031.

4. Wills ⇨320

Testator's "regular" pursuit of a profession is not material to determination as to his testamentary incapacity, and therefore even if contestant were successful in demonstrating decedent's professional incompetence, it would not follow that testator had lacked capacity to execute valid will; and contestant, who sought to explore day books of deceased dentist for purpose of extracting therefrom instances in which decedent had so fallen below standards of professional competence in treatment of his patients that it could be inferred that he

lacked testamentary capacity, failed to make showing necessary to entitle her to the relief sought. West's Ann.Code Civ.Proc. § 2031.

5. Discovery ⇄97(1)

Court has no power to order production of books or papers by one party to be used as evidence for other party without affirmative and substantial showing by affidavit or otherwise that they contain evidence material to cause of action or defense of party requiring them, and a mere suspicion that books or papers contain material evidence will not warrant an order for their production. West's Ann.Code Civ.Proc. § 2031.

6. Discovery ⇄89

Relaxation of rules regulating inspection of writings does not mean that requirements that papers be identified and that they be shown to be relevant and material have been abolished. West's Ann.Code Civ.Proc. § 2031.

B. H. Findlay, Long Beach, Stuart S. Hillman and George I. Devor, Los Angeles, for petitioner.

No appearance for respondent.

John Lewis King and Stanley Mussell, Jr., San Bernardino, for real party in interest.

SHENK, Justice.

This is an application for a writ of mandate to compel the respondent Superior Court, in a proceeding to revoke the probate of the will of Herman R. Baker, to permit the contestant to inspect certain "day books" or diaries kept by the testator. An alternative writ was issued.

The testator, during his lifetime, was engaged in the practice of dentistry in Upland, California. From 1952 until his death in 1955 he kept so-called day books or diaries. Entries were made in those books by the testator and by his assistants. The contestant, the petitioner herein, sought an order from the respondent court to require

the executrix to produce those books for inspection to assist in the determination of the decedent's testamentary capacity.

An affidavit was executed on behalf of the executrix by Alberta Burge, a former assistant of the decedent, who made entries in the books in 1955. The affidavit stated that the day books contained entries in the hand of the decedent, but that the entries "* * * are substantially in the handwriting of others or herself." It further stated that "* * * many entries are privileged communications, inseparably interwoven with the names of patients in that they indicate treatment. That under the circumstances the entire appointment book or books are confidential and privileged."

The Superior Court made the following order: "Motion for inspection of the dental appointment books will be granted to the extent that Contestant may examine any entries in the appointment books for 1953 and 1954 made by Herman R. Baker himself.

"If more practical, the Executrix may, in lieu of the above, supply Contestant with photostatic copies of such pages as have any such entries thereon, after blocking out other entries and the Executrix may also block out names of any patients used, provided that initials or fictitious names be substituted for each such patient preserving thereby the identity of each such patient." The validity of the foregoing order insofar as it grants inspection for the years 1953 and 1954 is not here involved.

It will be observed that the petitioner was denied access to the day books for the years 1952 and 1955 and that it was left to the executrix to select and copy the entries made by the decedent. The will was executed in November of 1953. The entries embraced in the order therefore relate only to the year of the execution of the will and the year following.

The petitioner proceeded under Code of Civil Procedure, section 1000.¹ That section provides in its pertinent part: "Any

1. Repealed, Stats.1957, p. 3321, and superseded by section 2031 of the Code of

Civil Procedure, effective January 1, 1958.

court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein." The petitioner contends that if she is not permitted to inspect the books, and there is an adverse judgment in the trial court, the refusal to permit her to inspect all of the books will be raised by her on appeal and a reversal of the judgment based on the erroneous order would require her to incur the delay and expense of another trial. She contends that such a result would be inconsistent with the holdings of this court in *Union Trust Co. of San Diego v. Superior Court*, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259, and *McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, 159 P.2d 944.

[1,2] The trial court exercises judicial discretion in acting upon a motion to require the production of books, documents, or papers for inspection by an adverse party. *Union Trust Co. of San Diego v. Superior Court*, supra, 11 Cal.2d 449, 81 P.2d 150; *Construction Products Corp. v. Superior Court*, 103 Cal.App.2d 403, 229 P.2d 399; *McKinley v. Southern Pacific Co.*, 80 Cal.App.2d 301, 181 P.2d 899. An order permitting inspection is not appealable. *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722; *Collins v. Corse*, 8 Cal.2d 123, 64 P.2d 137. *Mandamus* has been held applicable to redress abuses of discretion in ordering the production of records for inspection (*Shell Oil Co. v. Superior Court*, 109 Cal.App. 75, 292 P. 531), and in denying an application for inspection. *Dowell v. Superior Court*, 47 Cal.2d 483, 304 P.2d 1009. In such cases, the inquiry is whether the order constituted an abuse of discretion. *Dowell v. Superior Court*, supra, 47 Cal.2d 483, 304 P.2d 1009; *Construction Products Corp. v. Superior Court*, supra, 103 Cal.App.2d 403, 229 P.2d

399; *Shell Oil Co. v. Superior Court*, supra, 109 Cal.App. 75, 292 P. 531.

[3] In *Union Trust Co. of San Diego v. Superior Court*, supra, 11 Cal.2d 449, at page 454, 81 P.2d 150, at page 153, this court stated that to support an order for the inspection of books or records, " * * * two separate, indispensable requirements must be made to appear: (1) that the books, or the paper, or the document that is sought to be inspected contains evidence that is material to an issue which is involved in the action or the proceeding with relation to which the order is proposed to be made; and (2) that the order by which such inspection may be authorized be so specific in its terms with reference to its designation or description of such book, paper, or document that it may be readily identified." Unlike the taking of a deposition, an order requiring the production of books, papers, or records is subject to the limitation that the inspection sought must not be so broad as to infringe upon the constitutional immunity against unlawful search and seizure. *McClatchy Newspapers v. Superior Court*, supra, 26 Cal.2d 386, 396, 159 P.2d 944.

The present case necessitates an examination of those requirements to determine whether the order here challenged will be allowed to stand.

The affidavit in support of the motion for inspection states: "Affiant is of the opinion that an examination of said appointment books is vitally necessary in the proof of the contestant's case to determine the competency or incompetency of said decedent to execute a will on or about November 9, 1953, in that said appointment books will determine whether or not said decedent regularly practiced his profession in the years involved and it will determine whether the persons who received treatment received proper and adequate treatment and whether said decedent was mentally capable of practicing his profession during said period of time."

[4] If the sole purpose of the inspection were to determine the regularity of the de-

cedent's practice, the affidavit would not meet the first requirement stated in the Union Trust case for the reason that the "regular" pursuit of a profession is not material to the determination of testamentary incapacity. The affiant also states that an inspection will determine whether the decedent administered proper and adequate treatment to his patients and whether he was mentally capable of practicing his profession at that time. The court reiterated the elements of testamentary capacity in *Estate of Smith*, 200 Cal. 152, at page 158, 252 P. 325, at page 328, where it was said: "A testator is of sound and disposing mind and memory, if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument." The contestant has failed to make a sufficient showing that the evidence sought is either material or relevant to the proof necessary to entitle her to the relief sought.

The books are not sought for the purpose of showing that in any particular case the decedent rendered inadequate professional service. The contestant seeks to explore the day books for the purpose of extracting therefrom instances in which the decedent so fell below the standards of professional competence in the treatment of his patients that it could be inferred that he lacked testamentary capacity. It is not averred that the testator at any time failed to render adequate treatment to any patient in his care. Moreover, even if the contestant were successful in demonstrating the decedent's professional incompetence, it would not follow that the testator lacked the capacity to execute a valid will at the time it was executed. *Rollins v. Smith*, 72 Cal.App. 773, 238 P. 171.

The search which the petitioner proposes to make is analogous to that disapproved in *Shell Oil Co. v. Superior Court*, supra, 109 Cal.App. 75, 292 P. 531, where the plaintiff,

in an action to recover damages for the breach of covenants in an oil and gas lease, moved for an order requiring the production of numerous records from the defendant Shell Oil Company. It was averred by the plaintiff that the records would "tend to prove" his case and would show "whether or not" his allegations were well founded. The District Court of Appeal there issued a writ of mandate to restrain the respondent court from ordering the wholesale production of records by the defendant on the ground that such order would constitute an unlawful search and seizure. The court emphasized that the affiant sought the records not because they were known by him to contain evidence material to the proof of his case, but in the hope that an inspection would yield evidence to support his claims.

[5] As stated in *Austin v. Turrentine*, 30 Cal.App.2d 750, at page 761, 87 P.2d 72, at page 77, 88 P.2d 178: "Nor will a mere suspicion that they [books or papers] contain material evidence warrant an order for their production. The court has no power to order the production of books or papers by one party to be used as evidence for the other party without an affirmative and substantial showing by affidavit or otherwise that they contain evidence material to the cause of action or defense of the party requiring them."

The necessity of showing that books or records contain material evidence as a foundation for an order for inspection was stated in *McClatchy Newspapers v. Superior Court*, supra, 26 Cal.2d 386, 159 P.2d 944, which arose out of an action for damages for an alleged libel. This court denied the petitioner's application for a writ of mandate to require the plaintiff to produce records from which the defendant sought facts to show the truth of the publication. It was there said at page 398 of 26 Cal.2d, at page 951 of 159 P.2d: "It may be admitted that * * * some of the records and documents would probably show those ultimate facts, but it cannot be said that they must necessarily show such facts or any of them, nor can it be said, on the basis.

of defendant's affidavit, that their relevancy and materiality clearly appear. Although it would be unjust to permit plaintiff to recover for an alleged libel by suppressing or withholding evidence which is material or vital to the action, defendant must first show the materiality of the desired evidence and cannot obtain permission to search through all of plaintiff's papers and records merely in the hope or expectation that the investigation will disclose favorable information." This court concluded that by an examination of the plaintiff on deposition the identity and contents of those papers and their materiality and relevancy could be determined so that an affidavit could be framed sufficient to obtain an order for inspection. (See also *Funkenstein v. Superior Court*, 23 Cal.App. 663, 667, 139 P. 101; *Harkelroad: The Law of Discovery in the Courts of California*, 4 So.Calif.L.Rev. 169, 181, 186, 187 (1931).)

[6] The contestant contends that the *Union Trust* case, *supra*, 11 Cal.2d 449, 81 P.2d 150, requires that the rules regulating the inspection of writings be liberally construed to permit full inspection. What was said in the *McClatchy* case as to the same contention has equal force here. It was there said 26 Cal.2d at pages 396, 397, 159 P.2d at page 950: "Petitioner contends that under the decision in *Union Trust Co. v. Superior Court*, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259, these rules must be liberally applied and that it has met the requirements there imposed. In that case after an exhaustive examination of the history and development of discovery, the court stated that 'the trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method, to the end that the trial of actions may be expedited and justice be more efficaciously and speedily administered.' 11 Cal.2d at page 462, 81 P.2d at page 157, 118 A.L.R. 259. The relaxation of the rule, however, does not mean an abolition of the requirements that the papers be identified and that they be shown to be relevant and material."

It appears from a review of the record and the foregoing authorities that the contestant's affidavit was insufficient to require production of the books for 1952 and 1955. There was therefore no abuse of discretion in denying inspection of the books for those years.

The alternative writ is discharged and the peremptory writ is denied.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



49 Cal.2d 389

Gertrude LEWIS, Plaintiff and Appellant,

v.

Ulysses LEWIS, Defendant and Respondent.

L. A. 24322.

Supreme Court of California,
In Bank.

Nov. 19, 1957.

As Modified on Denial of Rehearing

Dec. 17, 1957.

Action by wife seeking to enforce Illinois decree for arrearages for separate maintenance which was rendered subsequent to Nevada divorce obtained by her husband but which was made in an action commenced prior to latter proceeding. From judgment of Superior Court of Los Angeles County, J. F. Moroney, J., and from order denying motion to vacate judgment, wife appealed. The Supreme Court, Traynor, J., held that wife's right to support survived prior ex parte foreign decree of divorce but that husband was entitled to notice of Illinois proceeding culminating in order fixing amount of accrued arrearages and weekly support payments previously ordered by Illinois court, and because there was no evidence from which court could determine whether husband had had notice, new trial was required.

Judgment affirmed in so far as it determined that Nevada decree terminated marriage but reversed in all other respects.

Opinion, 311 P.2d 917, vacated.

1. Divorce ⇨391

When a wife has secured judgment of separate maintenance in the state of her domicile, her right to support thereunder will survive a subsequent valid, ex parte, foreign decree of divorce secured by her husband, if law of her domicile so provides.

2. Divorce ⇨396

Where wife brought action to establish Illinois judgment for support and Illinois judgment order which found husband in default as judgments in California and for amounts unpaid thereunder, contention of husband, who had obtained divorce decree in Nevada before judgment was rendered in Illinois, that wife could not enforce judgment decree, should have been invoked in Illinois proceeding, and even if Nevada decree had been pleaded as defense in Illinois proceeding and Illinois court had erroneously failed to recognize it, husband's remedy was by appeal and Illinois judgment could not be attacked in California proceeding.

3. Divorce ⇨391

Where husband established domicile in Nevada and obtained ex parte divorce decree from wife who was domiciled in Illinois, Illinois court was not obliged to recognize that part of Nevada judgment purporting to terminate wife's right to support under Illinois law, and neither was California court in which wife brought action to establish Illinois judgment, awarding her permanent support payments, and subsequent Illinois judgment order, finding husband in default in support payments, as judgments in California and for amounts unpaid thereunder. U.S.C.A.Const. art. 4, § 1; 28 U.S.C.A. § 1738; West's Ann.Code Civ.Proc. §§ 337.5, 361.

4. Divorce ⇨381

The effect of a foreign, ex parte divorce secured by husband on wife's right to support is determined by reference to law of state of wife's domicile at time of divorce.

5. Divorce ⇨396

Where wife brought action to establish Illinois judgment for support and Il-

linois judgment order finding husband in default, as judgments in California and for amounts unpaid thereunder, contention of husband, who had obtained ex parte divorce decree in Nevada before judgment was rendered in Illinois, that judgment was unauthorized by Illinois law, should have been raised in Illinois proceeding, and was res judicata in California proceeding. U.S.C.A.Const. art. 4, § 1; 28 U.S.C.A. § 1738; West's Ann.Code Civ.Proc. §§ 337.5, 361.

6. Divorce ⇨331

Under Illinois law the right to support survives a foreign ex parte divorce.

7. Divorce ⇨395(1)

As to accrued instalments not subject to modification by court rendering original order, an order for payment of money as alimony rendered by court of competent jurisdiction in one state must be recognized by all other states. U.S.C.A.Const. art. 4, § 1; 28 U.S.C.A. § 1738.

8. Divorce ⇨245(1), 261, 277

Under Illinois law, Illinois court, having acquired jurisdiction of subject matter and of parties in divorce action, retained jurisdiction to modify and enforce its support order, and had jurisdiction to enter supplemental judgment order fixing amount of accrued arrearages, but husband was entitled to notice of proceedings culminating in such order, and if no notice were given him, order would be unenforceable. S.H.A. Ill. ch. 40, § 19; ch. 68, § 22.

9. Divorce ⇨393(1)

Notice to husband of Illinois proceeding culminating in order fixing amount of accrued arrearages of weekly support payments to wife previously ordered by court need not have been made by service in technical sense to render order enforceable in California, but actual notice would be sufficient. West's Ann.Code Civ.Proc. §§ 337.5, 361; U.S.C.A.Const. art. 4, § 1; 28 U.S.C.A. § 1738.

10. Judgment ⇨934(1)

If husband had no notice of 1950 Illinois proceedings culminating in supple-

mental judgment order fixing amount of accrued arrearages under 1947 decree awarding support payments, wife's recovery in California of payments due prior to 1949 would be barred by five-year statute of limitations. West's Ann.Code Civ.Proc. § 337.5.

11. Divorce ☞395(1)

Judgment ☞934(1)

If husband received notice of 1950 Illinois proceedings culminating in supplemental judgment order fixing amount of accrued arrearages under 1947 decree awarding support payments, 1950 order would be valid judgment entitled to recognition under full faith and credit clause of United States Constitution and 10-year statute of limitations would be applicable to wife's action to enforce Illinois judgments in California. West's Ann.Code Civ.Proc. § 337.5; U.S.C.A.Const. art. 4, § 1; 28 U.S.C.A. § 1738.

Brock, Easton, Fleishman & Rykoff and Robert L. Brock, Hollywood, for appellant.

Sidney A. Cherniss, El Monte, and Louis Miller, Los Angeles, for respondent.

TRAYNOR, Justice.

The parties were husband and wife and were domiciled in Illinois. In 1944, the husband, defendant herein, brought an action for divorce in an Illinois court. The wife, plaintiff herein, answered and cross-complained for separate maintenance. Defendant answered the cross-complaint. Thereafter, he established his domicile in Nevada and, on August 27, 1947, brought an action for divorce in a court of that state, disclosing the pendency of the Illinois action and giving notice to plaintiff by serving her personally in the state of Illinois. Cf. *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 202-203, 1 L.Ed. 2d 178. She did not appear. The Illinois

court sought unsuccessfully to enjoin defendant from prosecuting the Nevada action. On September 30, 1947, the Nevada court entered its judgment granting defendant a default divorce and ordering that the parties were "* * * released from the obligations of the marriage and restored to the status of single persons."¹ Soon thereafter the divorce action in Illinois came to trial. Defendant did not pursue his complaint or defend against the plaintiff's cross-complaint. On December 30, 1947, the Illinois court entered judgment for plaintiff on her cross-complaint, making permanent its prior temporary order that defendant pay plaintiff \$18 a week for her support. By a "judgment order" entered in the Illinois action on December 12, 1950, the Illinois court found defendant in default on the weekly payments in the sum of \$3,078. Defendant remarried shortly after entry of the Nevada decree and is now a resident of California. According to his own testimony he has made no payments to plaintiff since October or November of 1947. Plaintiff resides in Illinois and has not remarried.

Plaintiff brought this action to establish the Illinois judgment of December 30, 1947 and the subsequent "judgment order" of December 12, 1950 as judgments in this state and to recover the amounts unpaid thereunder. Defendant cross-complained to establish the validity of the Nevada decree. The trial court entered judgment for defendant, concluding that the Nevada decree terminated his obligation to support plaintiff and that the Illinois judgments are "* * * invalid and unenforceable as against defendant * * * and are not entitled to recognition in this court or in this State." Plaintiff appeals.

Plaintiff contends that the Illinois court had jurisdiction to adjudicate her right to support and that the Illinois judgment of December 30, 1947, and the Illinois "judgment order" of December 12, 1950 are en-

1. The decree would terminate plaintiff's right to support if she were a Nevada domiciliary. *Summers v. Summers*, 69 Nev. 83, 85-86, 92-93, 241 P.2d 1097;

Herrick v. Herrick, 55 Nev. 59, 68, 25 P.2d 378; *Sweeney v. Sweeney*, 42 Nev. 431, 438-439, 179 P. 638.

titled to recognition in this state under the full faith and credit clause of the United States Constitution. U.S.Const. art. IV, § 1; 28 U.S.C. § 1738. Defendant contends that the Nevada decree terminated the marriage and plaintiff's right to support and left the Illinois court without a "res" upon which to act and that the Illinois judgment and "judgment order" were therefore entered without jurisdiction and are not entitled to recognition in this state. He also contends that even if the 1947 judgment is a valid adjudication of his obligation to support plaintiff, the 1950 "judgment order" is void because he was not given notice of the proceedings resulting in that order, and that recovery under the 1947 judgment for payments that became due more than five years before August 26, 1954, the date of the commencement of this action, is barred by the five-year limitation on actions on judgments found prior to 1953 in subdivision 1 of section 336 of the California Code of Civil Procedure.² Plaintiff agrees that if the 1950 "judgment order" is void, recovery of the payments due prior to August 26, 1949 is barred as defendant contends.

[1,2] Defendant acknowledges the settled rule that when a wife has secured a judgment of separate maintenance in the state of her domicile, her right to support thereunder will survive a subsequent valid, ex parte, foreign decree of divorce secured by her husband if the law of her domicile so provides. *Estin v. Estin*, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561; *Worthley v. Worthley*, 44 Cal.2d 465, 283 P.2d 19; *Pope v. Pope*, 2 Ill.2d 152, 117 N.E.2d 65. He contends, however relying on *Chirgwin v. Chirgwin*, 26 Cal.App.2d 506, 79 P.2d 772, that a wife may not enforce a support order obtained by her in the state of her domicile after the rendition of a valid, ex parte, foreign divorce decree in favor of her husband. See also *De Young v. De Young*, 27 Cal.2d 521, 165 P.2d 457; *Cardi-*

nale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351; *Proper v. Proper*, 102 Cal.App.2d 612, 228 P.2d 62; *Coleman v. Coleman*, 92 Cal.App.2d 312, 206 P.2d 1093; *Patterson v. Patterson*, 82 Cal.App.2d 838, 187 P.2d 113; *Calhoun v. Calhoun*, 70 Cal.App.2d 233, 160 P.2d 923. The first answer to this contention is that it should have been invoked in the Illinois proceeding and that even if the Nevada decree had been pleaded as a defense in that proceeding and the Illinois court had erroneously failed to recognize it, defendant's remedy was by appeal and he cannot now attack the Illinois judgment. *Treinius v. Sunshine Mining Co.*, 308 U.S. 66, 78, 60 S.Ct. 44, 84 L.Ed. 85; *Morris v. Jones*, 329 U.S. 545, 551-552, 67 S.Ct. 451, 91 L.Ed. 488; see *Rest.*, Judgments § 13. The second answer is that even if defendant could now attack the Illinois judgment, the recent decision of the United States Supreme Court in *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456, demonstrates that his contention is without merit. The husband in the Vanderbilt case secured an ex parte Nevada divorce. Subsequently, the wife brought an action against the husband for support in a New York court. In affirming an award to the wife, the court stated: "In *Estin v. Estin* * * * this Court decided that a Nevada divorce court, which had no personal jurisdiction over the wife, had no power to terminate a husband's obligation to provide her support as required in a pre-existing New York separation decree. The factor which distinguishes the present case from *Estin* is that here the wife's right to support had not been reduced to judgment prior to the husband's ex parte divorce. In our opinion this difference is not material on the question before us. Since the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish any right which she had under the law of New York to financial support from her

2. Defendant did not plead section 361 of the California Code of Civil Procedure nor the Illinois statute of limitations applicable thereunder. See *Biewend v.*

Biewend, 17 Cal.2d 108, 114-117, 109 P.2d 701, 132 A.L.R. 1264; *Bliss v. Sneath*, 119 Cal. 526, 527-529, 51 P. 848.

husband. It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. Here, the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction." 354 U.S. at page 418, 77 S.Ct. at pages 1362-1363. The court held: "Therefore, the Nevada decree, to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition." 354 U.S. at page 419, 77 S.Ct. at page 1363; see also concurring opinion in *Armstrong v. Armstrong*, 350 U.S. 568, 575, 76 S.Ct. 629, 100 L.Ed. 705.

[3, 4] In this case, therefore, the Illinois court was not obliged to recognize that part of the Nevada judgment purporting to terminate plaintiff's right to support under Illinois law, nor are we. *Chirgwin v. Chirgwin*, supra, 26 Cal.App.2d 506, 79 P.2d 772, is inconsistent with the *Vanderbilt* case and is therefore disapproved. The other California cases referred to above in connection with defendant's contention that his obligation to support plaintiff was terminated by the Nevada decree are not in point. The effect on a wife's right to support of a foreign, ex parte divorce secured by her husband is determined by reference to the law of the state of the wife's domicile at the time of the divorce, in this case the law of Illinois. See *Estin v. Estin*, supra, 334 U.S. at 544, 547, 68 S.Ct. 1213; *Sutton v. Leib*, 342 U.S. 402, 406, 72 S.Ct. 398, 96 L.Ed. 448; *Esenwein v. Commonwealth*, 325 U.S. 279, 280-281, 65 S.Ct. 1118, 89 L.Ed. 1608; *Worthley v. Worthley*, supra, 44 Cal.2d at page 468, 283 P.2d 19; *Biewend v. Biewend*, 17 Cal.2d 108, 111, 114, 109 P.2d 701, 132 A.L.R. 1264; *Vanderbilt v. Vanderbilt*, 1 N.Y.2d 342, 153 N.Y.S.2d 1, 135 N.E.2d 553, 557-558; *Morris, Divisible Divorce*, 64 Harv.L.Rev. 1287, 1302.

[5, 6] Illinois was the state of domicile of both defendant and plaintiff when the

Illinois action was brought and was the state of plaintiff's domicile when the judgment was entered. Defendant contends that the judgment was unauthorized by Illinois law, citing *Knowlton v. Knowlton*, 155 Ill. 158, 165, 39 N.E. 595 and two Illinois statutes. Ill.Rev.Stat.1953, ch. 40, § 19 (*Jones Ann.Stat. § 109.186*); Ill.Rev.Stat.1953, ch. 68, § 22 (*Jones Ann.Stat. § 109.189*). This contention should have been raised in the Illinois proceeding and is *res judicata*. Moreover, the Illinois law is now settled contrary to defendant's contention. Speaking of the *Knowlton* case, the Supreme Court of Illinois said in *Pope v. Pope*, 2 Ill.2d 152, 156, 117 N.E.2d 65, 67, "It appears * * * that the decision was not based on Illinois law but on a supposed requirement of the full faith and credit clause which may no longer exist. See *Thompson v. Thompson*, 226 U.S. 551, 33 S.Ct. 129, 57 L.Ed. 347; *Estin v. Estin*, 334 U.S. 541, 546, note 4, 68 S.Ct. 1213, 92 L.Ed. 1561." It is now definitely established that the supposed full faith and credit requirement on which *Knowlton* was based does not exist. *Vanderbilt v. Vanderbilt*, supra, 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456. Any doubt that under the law of Illinois the right to support survives a foreign ex parte divorce was laid at rest by the Supreme Court of Illinois in the *Pope* case: "A decree of divorce enables the parties to contract a new marriage; that it does not necessarily relieve them of all the obligations of the old is witnessed by the award of alimony upon, or even after divorce." 2 Ill.2d at page 157, 117 N.E.2d at page 68. "Occasional suggestions in our opinions that divorce terminates the right to support or kindred property rights [citations] must be considered as referring only to those situations where the wife has participated in the proceedings, or where a contract between the parties was construed to require this result." 2 Ill.2d at page 158, 117 N.E. 2d at page 68.

[7] The question next to be considered is whether the Illinois judgment of December 30, 1947 is entitled to recognition in California. Payments past due under an

Illinois separate maintenance decree are not subject to modification in Illinois. *Stewart v. Stewart*, 1 Ill.App.2d 283, 286, 117 N.E.2d 579 and cases there cited. As to all accrued instalments not subject to modification by the court rendering the original order, an order for the payment of money as alimony rendered by a court of competent jurisdiction in one state must be recognized by all other states under the full faith and credit clause of the United States Constitution. *Biewend v. Biewend*, supra, 17 Cal.2d at pages 110-111, 109 P.2d 701 and cases cited. Such an order is also recognized in California as to future payments. *Biewend v. Biewend*, supra, 17 Cal.2d at page 113, 109 P.2d 701; *Worthley v. Worthley*, supra, 44 Cal.2d at page 474, 283 P.2d 19.

[8,9] The final question concerns the effect to be given the supplemental judgment order of the Illinois Court of December 12, 1950. Having acquired jurisdiction of the subject matter and of the parties in the divorce action brought by defendant, the Illinois court retained jurisdiction to modify and enforce its support order. *Karr v. Rust*, 217 Ill.App 555, 561; *Adam v. Saenger*, 303 U.S. 59, 67-68, 58 S.Ct. 454, 82 L.Ed. 649; *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353, 33 S.Ct. 550, 57 L.Ed. 867; *Restatement, Conflict of Laws* §§ 76, 105. It therefore had jurisdiction to enter the supplemental "judgment order" of December 12, 1950, fixing the amount of accrued arrearages. Nevertheless, defendant was entitled to notice of the proceedings culminating in that order, and if no notice was given him, the order is unenforceable. *Griffin v. Griffin*, 327 U.S. 220, 228, 66 S.Ct. 556, 90 L.Ed. 635; *Kaufman v. Kaufman*, 279 Ill.App. 1, 4; *Cummer v. Cummer*, 283 Ill.App. 220, 235; *Worthley v. Worthley*, supra, 44 Cal.2d 465, 469, 471, 283 P.2d 19. Defendant testified and the trial court found that with respect to the 1950 proceedings defendant was not served with summons or other process and did not appear personally or by counsel. There

was no evidence and no finding as to whether service was made upon the attorney who represented defendant in the original action. See *Reynolds v. Reynolds*, 21 Cal.2d 580, 583, 134 P.2d 251. Under Illinois law, however, such service would apparently not suffice as notice to defendant. *Cummer v. Cummer*, supra, 283 Ill.App. at pages 235-237. Nevertheless, it is obvious that the finding made by the trial court is not a finding that defendant had no notice. The finding is simply that he was not served and that he did not appear. In view of the court's continuing jurisdiction over defendant in matters relating to modification and enforcement of the support order, the question is not whether he was served or appeared but whether he had notice. Service in a technical sense is not required. Actual notice is sufficient. See *Griffin v. Griffin*, supra, 327 U.S. at page 228, 66 S.Ct. 556; *Cummer v. Cummer*, supra, 283 Ill. App. at page 237; see *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 et seq., 70 S.Ct. 652, 94 L.Ed. 865; *Walker v. City of Hutchinson*, supra, 77 S.Ct. at page 202. There is no evidence from which we can determine whether or not defendant had notice. This fact can be ascertained on retrial.

[10,11] If defendant had no notice of the 1950 proceedings, the "judgment order" of December 12, 1950 is unenforceable, and plaintiff's rights must be determined under the judgment of December 12, 1947. Recovery for payments due thereunder prior to August 26, 1949, is barred by the five-year statute of limitations found prior to 1953 in subdivision 1 of section 336 of the Code of Civil Procedure. See *Chambers v. Gallagher*, 177 Cal. 704, 708-709, 171 P. 931. If defendant had notice of the 1950 proceedings, the "judgment order" of December 12, 1950 is a valid judgment entitled to recognition under the full faith and credit clause of the United States Constitution, and the applicable statute of limitations is the ten-year statute found in section 337.5 of the Code of Civil Procedure

as amended in 1953. See *Mudd v. McColgan*, 30 Cal.2d 463, 468, 183 P.2d 10.

The judgment is affirmed in so far as it determines that the Nevada decree terminated the marital status of the parties and is reversed in all other respects for further proceedings in accordance with the views expressed herein.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.



155 Cal.App.2d 234

John A. FISCUS, Petitioner and Appellant,
v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California, Defendant and Respondent.

Civ. 22279.

District Court of Appeal, Second District,
Division 3, California.

Nov. 14, 1957.

Proceedings on application for writ of mandate by protestant before Department of Alcoholic Beverage Control to review decision of department which issued liquor license to applicant. The Superior Court of Los Angeles County, John J. Ford, J., denied protestant's application and petitioner appealed. The District Court of Appeal, Vallée, J., held that where protestant had not filed appeal with Alcoholic Beverage Control Appeals Board but instead filed a petition in Superior Court for writ of mandate, petitioner had not exhausted his administrative remedies and therefore was not entitled to judicial review.

Affirmed.

1. Administrative Law and Procedure ⇨229
Intoxicating Liquors ⇨72

Protestant to granting of an application for issuance of an on-sale liquor license, who had not filed an appeal with Alcoholic Beverage Control Appeals Board

from decision of Department of Alcoholic Beverage Control which issued license to applicant, was not entitled to judicial review because he had not exhausted administrative remedies. West's Ann.Gov.Code, § 11523; West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, §§ 23080-23091, 24301.

2. Administrative Law and Procedure ⇨229

Doctrine of exhaustion of administrative remedies applies where statute provides an administrative remedy, even though terms of statute do not make exhaustion of remedy a condition of right to resort to courts and doctrine, whenever applicable, requires not merely initiation of prescribed administrative procedures but requires pursuing them to their appropriate conclusion and awaiting their final outcome before judicial intervention.

Monte C. Fiscus, Los Angeles, McIver & Green, and Robert Miller Green, Montebello, for appellant.

Edmund G. Brown, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Appeal from a judgment of dismissal following an order denying petitioner's application for a writ of mandate to review a decision of the Department of Alcoholic Beverage Control.

An application was made to the department for the issuance of an on-sale liquor license, to which petitioner filed a protest. A hearing was held before a hearing officer who overruled the protest and recommended that the license be issued. The department adopted the recommendation of the hearing officer. Petitioner did not file an appeal with the Alcoholic Beverage Control Appeals Board, but instead filed a petition in the superior court for a writ of mandate to review the decision of the department. The department opposed issuance of the writ. An order was made

denying the petition. A judgment of dismissal followed, from which petitioner appeals.

[1] The question is: Does the fact that petitioner failed to file an appeal with the appeals board preclude him from obtaining judicial review of the decision of the department?

Petitioner asserts section 11523 of the Government Code specifically authorizes him to seek judicial review without appealing to the appeals board. The department contends petitioner was required to appeal to the appeals board before seeking judicial review.

Since the briefs were filed the question has been decided adversely to the contention of petitioner in *Hollywood Circle v. Department of Alcoholic Beverage Control*, 153 Cal.App.2d 523, 314 P.2d 1007, 1010, in which the court stated:

"Referring to *Hollywood Circle's* final contention that it had the right to appeal under Government Code, section 11523, without appealing to the Appeals Board of the Department of Alcoholic Beverage Control, examination of the constitutional and code provisions as to liquor control refutes this contention. The applicable part of the Constitution is as follows:

"* * * When any person aggrieved thereby appeals from a decision of the department * * * revoking any license * * * the board shall review the decision subject to such limitations as may be imposed by the Legislature.['] Const. art. XX, § 22.

"Pursuant to this constitutional power, the legislature enacted section 23081 of the Business and Professions Code, with its requirement that an aggrieved person had forty days in which to appeal from a decision of the Department."

Prior to January 1, 1955, the agency with the power to license the sale of intoxicating liquor was the Board of Equalization. *Marcucci v. Board of Equalization*, 138 Cal.App.2d 605, 608, 292 P.2d 264. There

was no appeal from its decisions. The only remedy of an aggrieved party was to file a petition in the superior court for a writ of mandate within thirty days after the order of the board became final, seeking a review in accord with section 1094.5 of the Code of Civil Procedure. Since January 1, 1955, section 22 of article XX of the Constitution, implemented by sections 23080-23091 of the Business and Professions Code, has provided for an appeal from a decision of the department. Section 24301 of the Business and Professions Code reads:

"Subject to the provisions of Section 22 of Article XX of the Constitution, any ruling, order, or decision of the department is subject to review as provided by law in any court of competent jurisdiction in the county in which the person affected resides."

[2] "Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy must be exhausted before the courts will act. *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715. Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. *Abelleira v. District Court of Appeal*, supra, 17 Cal.2d at page 293, 109 P.2d at page 942, 132 A.L.R. 715; *United States v. Superior Court*, 19 Cal.2d 189, 194, 120 P.2d 26. The doctrine of exhaustion of administrative remedies applies where a statute provides an administrative remedy, even though the terms of the statute do not make the exhaustion of the remedy a condition of the right to resort to the courts. *First Nat. Bank of Greeley v. Board of County Com'rs*, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784, 788-789. The doctrine, whenever applicable, requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. *Home Loan Bank Board v. Mallonee*, 9 Cir., 196 F.2d 336; *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752,

767, 67 S.Ct. 1493, 91 L.Ed. 1796, 1806; Red River Broadcasting Co. v. Federal Communications Commission, 69 App.D.C. 1, 98 F.2d 282, 287, certiorari denied 305 U.S. 625, 59 S.Ct. 86, 83 L.Ed. 400." Woodard v. Broadway Fed. Savings & Loan Ass'n, 111 Cal.App.2d 218, 220-221, 244 P.2d 467, 469; Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90, 106, 280 P.2d 1.

Lynn v. Duckel, 46 Cal.2d 845, 299 P.2d 236, 238, was a suit against the director of public works of San Francisco. The plaintiff applied to the director for a permit to build a paved roadway in an alley. The director denied the application. The plaintiff did not appeal to the city's board of permit appeals, but instead instituted the lawsuit. The San Francisco Charter provided that if an application for a permit is denied, "the applicant may appeal to the board of permit appeals." The court held (46 Cal.2d at page 849, 299 P.2d at page 239):

"In view of the foregoing provisions of the city charter, it is apparent that after plaintiff was denied a permit to build a paved roadway in the alley administrative procedure required that he apply to the city's Board of Permit Appeals. This he failed to do, and the established rule is here applicable that one is not entitled to judicial relief until the prescribed administrative remedy is not only invoked but exhausted. * * *

"Hence, the trial court properly found that since plaintiff did not exhaust his administrative remedies he was not entitled to judicial relief."

Since petitioner did not exhaust his administrative remedies, he is not entitled to judicial review.

No other point for reversal is made.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Everett T. PLUMER, Petitioner,
v.

The SUPERIOR COURT of the State of California IN AND FOR COUNTY OF LOS ANGELES, Respondent,
and
Margaret L. Plumer, Real Party in Interest.*
Civ. 22554.

District Court of Appeal, Second District,
Division 2, California.

Nov. 18, 1957.

Hearing Granted Jan. 16, 1958.

Petition for writ of review to annul order of Superior Court vacating suspension of sentence for contempt for failure to make payments for support of petitioner's former wife and minor child in accordance with divorce judgment. The District Court of Appeal, Richards, J. pro tem., held that since provisions of divorce judgment for support of former wife and minor child were based on integrated property settlement agreement, obligation to make support payments was contractual and negotiated as distinguished from marital and law-imposed and hence was not enforceable by contempt proceedings in view of West's Ann.Const. art. 1, § 15, prohibiting imprisonment for debt.

Order adjudging petitioner in contempt and order vacating suspension of sentence thereon annulled.

Constitutional Law ⇐83(3)

Where provisions of divorce judgment for support of former wife and minor child were based on integrated property settlement agreement, obligation to make support payments, whether as originally agreed upon by the parties or as subsequently modified by court pursuant to terms of agreement, was contractual and negotiated as distinguished from marital and law-imposed, and hence such obligation was not enforceable by contempt proceedings in view of constitutional prohibition against imprisonment for debt. West's Ann.Const. art. 1, § 15.

James E. West, Jr., and Steven Edmondson, Santa Monica, for petitioner.

Hahn, Ross & Saunders and E. Loyd Saunders, Los Angeles, for real party in interest.

RICHARDS, Justice pro tem.

In this proceeding in certiorari, petitioner seeks annulment of an order of the respondent court vacating the suspension of a sentence for contempt for his failure to make certain payments for the support of his former wife and his child in accordance with the provisions of a judgment of divorce.

On September 22, 1954, petitioner and his former wife entered into an agreement "to effect a final and complete settlement of their respective property rights, support, alimony and custody of their child with reference to their marital status and to each other." Paragraph eight of the agreement obligates the petitioner to pay to his former wife \$200 a month "for the support, maintenance, education, care and custody of said child until he shall reach the age of majority." Paragraph nine provides that the petitioner shall pay to his former wife an additional \$200 a month "as alimony for her support and maintenance * * *." In paragraph twenty-three each party releases the other from all present and future claims and rights to support, separate maintenance, alimony, court costs, attorneys' fees, and all property rights of any kind except as provided for in the agreement. Other provisions of the agreement deal with the division of marital property, the payment of debts, future education of the child, and termination and modification of the support provisions.

On November 1, 1954, an interlocutory judgment of divorce was entered in favor of the plaintiff-wife, approving the agreement and ordering the petitioner, in accordance with the terms thereof, to pay \$200 a month for the support of the minor child of the parties. On September 28, 1955, the petitioner was found guilty of contempt in failing to comply with the order for alimony and child support and was sen-

tenced to five days in the county jail. The jail sentence was ordered suspended on condition that he maintain current the subsequently accruing payments and make an additional payment of \$10 a month to apply on the arrearage, the amount of which was stipulated.

On December 21, 1955, pursuant to application of the petitioner, an order to show cause was issued why the payments for the support of his former wife and the child should not be reduced on the ground that his income had substantially decreased. At the hearing thereof the wife moved to dismiss the order to show cause on the grounds that the payments were ordered pursuant to an integrated property settlement agreement and could be reduced only in conformity with the provisions of the agreement relating to modification and that these did not encompass a decrease in petitioner's income as a basis for modification. After referring the matter to a commissioner, who found in the wife's favor, the court dismissed the order to show cause. Petitioner appealed, contending that the agreement was not integrated and, that if it was, a material reduction in his income was a ground for modification within the express provisions of the agreement. On July 10, 1957, the Supreme Court reversed the order dismissing petitioner's application for modification. The Court held (*Plumer v. Plumer*, 48 Cal.2d 820, 313 P.2d 549) that the property settlement agreement between the parties was clearly integrated but that the order for support based thereon was subject to modification in accordance with the express terms of the agreement and that, under the terms thereof, a material reduction in petitioner's income was a ground for modification of the order for support of his former wife and his child.

During the pendency of the appeal, the petitioner returned to court several times for the purpose of determining his compliance with the terms of suspension of the contempt order. At these various hearings the petitioner produced evidence of his financial condition to show that although he was not making the support payments in

accordance with the terms of the suspension of the contempt sentence, he was complying to the best of his ability. The former wife filed exceptions to the commissioner's findings and recommendations of May 13, 1957, continuing the suspension of sentence; and, on June 13, 1957, the court vacated the suspension of sentence and ordered the same into effect forthwith. A stay of execution under said order was granted pending the determination of the within matter.

Relying upon *Bradley v. Superior Court*, 48 Cal.2d 509, 310 P.2d 634, 639, petitioner contends that to imprison him for failure to make the support payments under the decree and property settlement agreement here involved would violate the provisions of the state Constitution forbidding imprisonment for debt. Cal.Const. art. I, § 15.

In *Bradley* the Court was dealing with payments to a former wife which had been determined by a former appeal to be "an inseverable part of an integrated adjustment of all property relations of the parties and not * * * a severable provision for alimony." At page 521 of 48 Cal.2d, at page 641 of 310 P.2d the Court said: "[W]here the parties bargain with each other and agree that the terms of their contract shall thereupon and thenceforth grant, delimit and exclusively define their respective rights and obligations *inter se*, then it is to the contract alone, and to conventional civil proceedings for the enforcement of contract rights, that they must look for a remedy in the event of breach. Inclusion of such a contract in a judgment of divorce may furnish a basis for subsequent proceedings leading to issuance of a writ of execution but cannot support a commitment to imprisonment for failure to pay the judgment debt." At page 522 of 48 Cal.2d, at page 642 of 310 P.2d it is said: "[T]hat payments provided in a property settlement agreement which are found to constitute an adjustment of property interests, rather than a severable provision for alimony, should be held to fall within the constitutional proscription against imprisonment for debt. That is, if the obligation sought to

be enforced is contractual and negotiated, as distinguished from marital and imposed by law, even though the contract relates to marriage obligations, the remedy must be appropriate to the right asserted. Payments which fall into the category of law-imposed alimony or separate maintenance are based upon the statutory obligation of marital support, may be modified by the court upon a proper showing, ordinarily terminate with the death of either party, and may properly be held not to constitute a 'debt' within the meaning of the constitutional provision."

In *Plumer v. Plumer*, supra [48 Cal.2d 825, 313 P.2d 553], the Court held with respect to the agreement involved in the instant matter, "Under the foregoing rules the agreement in the present case is clearly integrated. It deals both with rights to marital property and rights to support. The parties have set forth their purpose 'to effect a final and complete settlement of their * * * rights * * * with reference to their marital status and to each other.' *They have released each other from all claims arising out of the marital relationship except as provided in the agreement.*" (Emphasis added.) The Court went on to point out that notwithstanding the conclusion that the agreement is integrated nevertheless the order for support based thereon was subject to modification by reason of the express provisions of the property settlement agreement. We think it clear, that the provisions for the support of the wife and child as set forth in the property settlement agreement in the instant matter as interpreted by the decision of the Supreme Court, do not fall within the category of law-imposed alimony but rather are contractual and therefore not enforceable by contempt. That the provisions for support are subject to modification, as determined by the Supreme Court, does not, in our opinion, affect the question of the enforcement thereof. The right to modify the support provisions, the Court held, was by reason of the express agreement of the parties in the property settlement agreement. Hence, the support obligation whether as originally agreed upon

by the parties or as subsequently modified by the court pursuant to the terms of the agreement, continues to be contractual and negotiated as distinguished from marital and law-imposed and therefore the enforcement of such payments by contempt proceedings is forbidden by the constitutional prohibition against imprisonment for debt. For the reasons above stated, the order holding petitioner in contempt is void as is the subsequent order vacating the suspension of sentence.

The order dated September 28, 1955, adjudging petitioner in contempt and the order dated June 13, 1957, vacating the suspension of sentence thereon are each annulled.

FOX, Acting P. J., concurs.



155 Cal.App.2d 383

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Robert Lee McFARREN, Defendant and
Respondent.

Cr. 3416.

District Court of Appeal, First District,
Division 2, California.

Nov. 21, 1957.

Prosecution for possession and transportation of marijuana. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., dismissed the information, and the People appealed. The District Court of Appeal, Draper, J., held that by failing to make objection to introduction of marijuana in evidence, defendant had waived his right to assert that narcotic was inadmissible because illegally obtained.

Reversed.

1. Criminal Law Ⓒ698(1)

By failing to make objection to introduction of marijuana in evidence, defendant waived his right to assert that narcotic was inadmissible because illegally obtained. West's Ann.Pen.Code, § 995.

2. Searches and Seizures Ⓒ3(1)

If weapon under front seat of defendant's automobile when he went through stop sign was concealed, so as to be within the proscription of statute, but was nevertheless seen by officer (who stopped defendant because of a traffic violation), without a search and solely in course of his checking of registration slip, search of glove compartment for further weapons was justified, and narcotics found in glove compartment were not illegally obtained. West's Ann.Pen.Code § 12025.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for appellant.

Edward T. Mancuso, Public Defender of City and County of San Francisco, Abraham Dresow, Chief Deputy Public Defender, San Francisco, for respondent.

DRAPER, Justice.

The people appeal from an order dismissing the information. Respondent was charged with possession and transportation of marijuana. The motion to dismiss (Pen. Code, § 995) was based wholly upon the ground that the marijuana introduced at the preliminary examination was found in a search of respondent's automobile made without reasonable or probable cause.

[1] No objection of any kind was made to the introduction of this marijuana in evidence. Thus respondent waived his right to assert that the narcotic was inadmissible because illegally obtained (*Robison v. Superior Court*, 49 Cal.2d 186, 316 P.2d 1, and cases cited therein). In fairness to the trial court, we point out that this decisive issue was not raised on argument of the motion. It is not even mentioned in appellant's brief in this court.

[2] Upon trial, the objection may well be made, and we feel required to comment upon the merits. Respondent went through a stop sign at 4 a. m., and was stopped by an officer in a patrol car. When one officer checked the registration slip, he saw a pistol under the front seat of respondent's car. Respondent was then arrested for violation of Penal Code, Section 12025, the glove compartment of his car was searched, and marijuana was found. If in fact the weapon was concealed, so as to be within the proscription of Section 12025, but was in fact seen by the officer without a search and solely in the course of his checking of the registration slip, we consider that a search of the glove compartment for further weapons was justified. If such facts were found, they would distinguish *People v. Molarius*, 146 Cal.App.2d 129, 303 P.2d 350.

The order dismissing the information is reversed.

KAUFMAN, P. J., and DOOLING, J., concur.



155 Cal.App.2d 334

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Martin MONCRIEF, Defendant and
Appellant.
Cr. 3357.

District Court of Appeal, First District,
Division 2, California.

Nov. 20, 1957.

Prosecution for murder. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment of conviction for included offense of manslaughter, and defendant appealed. The District Court of Appeal, Draper, J., held that evidence sustained conviction.

Judgment affirmed.

Homicide 250

Evidence sustained conviction for manslaughter.

Jane H. Van Hook, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

Defendant was tried on a charge of the murder of his wife. The jury found him guilty of the included offense of manslaughter, and he appeals from the judgment. Appellant argues only fact issues.

There was evidence that on the day of the wife's death she and her husband had two fights involving the exchange of blows. On the second of these occasions, appellant pushed off one who attempted to intervene, resumed striking his wife, and "she went out the window." The window was closed, and her body shattered the glass. She fell about 20 feet to a hard surface, and died as a result of the injuries thus incurred. There was testimony that appellant had threatened to kill her on other occasions and that, after she fell, appellant cursed her and expressed a hope for her death. There was contradictory testimony and appellant testified that decedent fell over the low window sill without being pushed or struck. We are satisfied that the record contains substantial evidence that Mrs. Moncrief was pushed through the window by appellant. The jury could have found in accordance with appellant's version, but that issue was for the jury to resolve (*People v. Newland*, 15 Cal.2d 678, 104 P.2d 778). Appellant also argues that all the eyewitnesses were intoxicated, and therefore not to be believed. But here, too, there is a conflict of evidence.

Appellant also argues that the trial judge was required to grant a new trial in the light of the evidence. The cases cited for this novel view (*In re Estate of Morey*, 147 Cal. 495, 82 P. 57, and *Bates v. Howard*, 105 Cal. 173, 38 P. 715) do not at all sup-

port it, and the latter decision is squarely opposed to appellant's argument. No appeal was taken from the order denying new trial, but the order clearly would be affirmed if appealed from.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J.,
concur.



155 Cal.App.2d 369

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Samuel Pittman JOHNSON, Defendant and
Respondent.

Cr. 5940.

District Court of Appeal, Second District,
Division 3, California.

Nov. 20, 1957.

Defendant was charged by information with unlawful possession of heroin in violation of West's Ann.Health and Safety Code, § 11500 and committed for trial. The Superior Court of Los Angeles County, Louis H. Burke, J., entered an order setting aside the information on ground that defendant had been committed without reasonable or probable cause, and the people appealed. The District Court of Appeal, Shinn, P. J., held that the evidence before magistrate, including heroin obtained from defendant's coat pocket as a result of reasonable search incident to lawful arrest, disclosed probable cause for committing defendant for trial.

Order setting aside information reversed.

1. Criminal Law Ⓒ238

Evidence which would lead a person of ordinary caution and prudence to believe

and conscientiously entertain a strong suspicion of the guilt of defendant is sufficient to constitute probable cause for committing him for trial. West's Ann.Pen. Code, § 995.

2. Criminal Law Ⓒ238

Competent and admissible evidence that defendant was unlawfully in possession of heroin is sufficient to show probable cause for committing him for trial on charge of unlawful possession of heroin, but if the only evidence produced against him is incompetent and inadmissible, probable cause is not shown and information charging such offense should be set aside. West's Ann.Health and Safety Code, § 11500; West's Ann.Pen.Code, § 995.

3. Arrest Ⓒ63(4)

Observations made by police officer, qualified to give expert testimony, that pupils of defendant's eyes were contracted, that eyes were unusually red, and that clothing gave off odor of marijuana, together with admissions made by defendant as to previous, including recent, use of marijuana and heroin, were sufficient to warrant good faith belief that defendant was addicted to unlawful use of narcotics and was committing public offense of unlawful use or addiction to unlawful use of narcotics in officers' presence and constituted reasonable cause for arrest of defendant without a warrant. West's Ann. Health & Safety Code, § 11721.

4. Poisons Ⓒ4, 9

Offense of unlawful use or addiction to unlawful use of narcotics may be committed by a user at any place and at any time so long as he retains the character of an addict and offense may be proved by any competent evidence of such unlawful use or addiction. West's Ann.Health & Safety Code, § 11721.

5. Arrest Ⓒ71

Search of defendant's person incident to lawful arrest based on reasonable cause to believe that defendant was committing public offense of unlawful use or addiction to unlawful use of narcotics in officers'

presence was reasonable and proper, and heroin found in his coat pocket was not obtained through unlawful search and seizure. West's Ann. Health & Safety Code, § 11721.

6. Criminal Law ⚖️238

Evidence before magistrate, including heroin obtained from defendant's coat pocket as a result of reasonable search incident to lawful arrest in good faith belief that defendant was committing public offense of unlawful use or addiction to unlawful use of narcotics in presence of officers, disclosed probable cause for committing defendant for trial on charge of unlawful possession of heroin. West's Ann. Health & Safety Code, §§ 11500, 11721; West's Ann. Pen. Code, § 995.

Edmund C. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan, Fred N. Whichello, Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

No appearance for respondent.

SHINN, Presiding Justice.

Samuel Pittman Johnson was charged by information with a violation of section 11500 of the Health and Safety Code, in that he willfully, unlawfully and feloniously had in his possession a preparation of heroin. It was also alleged that he had previously been convicted of a violation of section 11721 of the Health and Safety Code, a misdemeanor. Upon the preliminary hearing he was committed for trial. He made a motion to set aside the information under section 995 of the Penal Code on the ground that he had been committed without reasonable or probable cause. The motion was granted and the People appeal. No brief has been filed by or on behalf of defendant.

The evidence at the preliminary hearing established the following facts. D. W. Beckman is a police officer for the City of Los Angeles assigned to the Georgia Juvenile Division. Early in the evening of Jan-

uary 27, 1957, and also several days previously, Beckman received information that a man named Wilson was "dealing heroin" in the Rose Room, which is a bar and cafe located west of the lobby of the Morris Hotel on East Fifth Street in Los Angeles. Beckman and his partner, Officer Evans, went to the Rose Room at approximately 11:30 p. m.; they entered the cafe part of the establishment, walked to the back of the room, and turned to go into the bar. As they did so, Beckman saw defendant walking toward him in the company of another man known as "Too Sweet", whom the officer knew to be a narcotics user. Beckman did not know defendant and had never seen him before.

As defendant passed by him, the officer observed that the pupils of Johnson's eyes appeared to be pinpointed. In the officer's opinion, contraction of the pupils of the eye is a characteristic of narcotics addicts. Beckman then stopped defendant, identified himself as a police officer, and after ascertaining defendant's name, he asked Johnson "if he was using stuff". Defendant replied that "he used to use it, but he wasn't using it regularly any more, he chipped a little bit now and then." During the conversation, Beckman noticed that Johnson's eyes appeared to be unusually red and that his clothing gave off a strong and distinctive odor, which, from the officer's previous experience, he identified as possibly or probably the odor of marijuana.

The officer then asked defendant if he had been "blasting any pot" (i. e. smoking marijuana) that evening. Johnson replied that he had not blasted any pot that evening, but that he did blast a little pot the day before. Upon being asked whether he was using heroin, defendant said that he had not fixed that evening but that he had fixed on the afternoon of the previous day. The officer testified that the expression "fixed" signified the taking of heroin by injection. Beckman then asked defendant whether he had any weapons on his person and attempted to feel Johnson's pockets. Defendant said: "Man, keep your hands away from my pockets." The officer asked: "Do you have a knife in

your pocket?" Defendant replied that he had, and removed a knife from his pocket and handed it to the officer.

Upon being asked whether he had any marks defendant said that he did not have any marks and said: "I will show you my arms. You won't find any marks." Defendant took off his coat and exhibited his left arm. Beckman examined defendant's arm and noticed a red mark on the inside of the left elbow; the mark was about one inch in diameter and had a spot of blood in the center. Johnson denied having injected a narcotic into the mark that evening; he said he had "fixed there" five days previously.

The officer told defendant that he was sure he was under the influence of marijuana and placed him under arrest for illegal use of narcotics. Officer Evans then made a search of defendant and extracted from defendant's right coat pocket a paper bundle which was proved to contain heroin. The narcotic was received in evidence over defendant's objection that it had been obtained by means of an unlawful search and seizure.

[1,2] The question is whether the evidence disclosed probable cause for committing defendant for trial. There was probable cause if there was evidence which would lead a person of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. *Bompensiero v. Superior Court*, 44 Cal.2d 178, 281 P.2d 250. If the fact that defendant was unlawfully in possession of a narcotic was established by competent and admissible evidence, probable cause was shown. *Rogers v. Superior Court*, 46 Cal.2d 3, 291 P.2d 929. If the only evidence produced against him was incompetent and inadmissible, there did not exist probable cause to hold him to answer and the court properly granted his motion to set aside the information. *Badillo v. Superior Court*, 46 Cal.2d 269, 294 P.2d 23.

1. "No person shall unlawfully use or be addicted to the unlawful use of narcotics. No person shall be under the influence of narcotics except when such narcotics

[3] The People argue that the search of defendant's person was an incident to the arrest of defendant and that the arrest was valid because the officers had reasonable cause to believe that Johnson was committing a public offense in their presence. *Coverstone v. Davies*, 38 Cal.2d 315, 320-21, 239 P.2d 876. We agree.

[4] In our opinion, there was reasonable cause for the arrest of defendant. From the information they had previously received, the officers had reason to believe that illegal narcotics activities were taking place on the premises. They saw defendant in the Rose Room in the company of a man whom they knew to be a narcotics addict. Officer Beckman observed that defendant's eyes were unusually red, that the pupils of his eyes were contracted, and he also detected the odor of marijuana on defendant's clothing. These observations, if made by one qualified to give expert testimony, together with the admissions made by defendant, would have warranted a good faith belief that defendant was addicted to the unlawful use of narcotics and was at that time committing a violation of section 11721 of the Health and Safety Code, a misdemeanor.¹ The offense of the unlawful use or addiction to the unlawful use of narcotics may be committed by a user at any place and at any time so long as he retains the character of an addict and may be proved by any competent evidence of such unlawful use or addiction. *People v. Jaurequi*, 142 Cal.App.2d 555, 560, 298 P.2d 896. There was sufficient evidence of the officer's qualification to give testimony as an expert witness on the subject of narcotics addiction. It cannot be said that upon a trial a court or jury could not reasonably conclude that the testimony of the officer was sufficient to prove that Johnson, at the time of his arrest, was under the influence of a narcotic.

[5,6] We are therefore of the opinion that the circumstances justified a reasonable

have been administered by or under the direction of a person licensed by the State to prescribe and administer narcotics.

* * *

belief that Johnson was at the time an unlawful user and addicted to the unlawful use of narcotics, that the arrest was lawfully made, and that the search of defendant's person was reasonable and proper. The heroin was not obtained by the officers through an unlawful search and seizure. The evidence before the magistrate disclosed probable cause for committing defendant for trial.

The order setting aside the information is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.



155 Cal.App.2d 350

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Paul Raymond HURLEY, Defendant and
Appellant.

Cr. 6012, 6013.

District Court of Appeal, Second District,
Division 2, California.

Nov. 20, 1957.

Defendant was convicted of possession of marijuana and of furnishing narcotic to a minor with a prior conviction. The Superior Court of Los Angeles County, LeRoy Dawson, J., rendered judgments, and defendant appealed. The District Court of Appeal, Ashburn, J., held that conviction for possession of marijuana was sufficient to support prison sentence for not less than 10 years upon subsequent conviction for

furnishing narcotic to a minor, though sentences for both offenses were imposed on same day and appeal was later taken from prior conviction for possession of marijuana.

Judgment in each case affirmed.

1. Criminal Law ¶1202(1)

"Conviction" for purpose of enhancing punishment upon a subsequent conviction is the ascertainment of guilt by jury or by trial court, where jury is waived, and does not mean the judgment based upon verdict, but the verdict itself. West's Ann. Health & Safety Code, § 11714.

See publication Words and Phrases, for other judicial constructions and definitions of "Conviction".

2. Criminal Law ¶1202(1), 1211

Conviction for possession of marijuana was sufficient to support prison sentence for not less than 10 years upon subsequent conviction for furnishing narcotic to a minor, though sentences for both offenses were imposed on same day and made concurrent and appeal was thereafter taken from prior conviction. West's Ann. Health & Safety Code, §§ 11500, 11714.

Robert Winckler, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant appeals from judgment of guilty of possession of marijuana in violation of § 11500 Health and Safety Code (appeal No. 6012) and from judgment of guilty of violation of § 11714 Health and Safety Code¹ with prior conviction of §

1. § 11714. "Every person who * * * unlawfully sells, furnishes, administers, gives * * * any narcotic to a minor, is guilty of a felony punishable by imprisonment in the state prison for not less than five years.

"If such a person has been previously convicted of any offense described in this

division * * * the previous conviction shall be charged in the indictment or information and if found to be true * * * by the court * * * he shall be imprisoned in the state prison for not less than 10 years." Both sections 11500 and 11714 are within Division 10 of Health & Safety Code.

11500 thereof (appeal No. 6013). No error is claimed in No. 6012 and the only point made in support of reversal in No. 6013 is that defendant was sentenced to a ten year term instead of a five year term upon the basis of the conviction in 6012 of said violation of § 11500 which was not then final and was later made the subject of an appeal.

After a non-jury trial defendant was convicted of violation of § 11500 on April 12, 1957, and the matter was continued for a probation officer's report. It again came on for hearing on June 11, 1957, at which time probation was denied and defendant was sentenced to state prison for the term prescribed by law.

Meantime, on May 3, 1957, defendant had been charged with violation of § 11714 in two counts which specified the furnishing of a narcotic to two different minors. On May 16, before the magistrate, he pleaded guilty to count 2, count 1 was dismissed and the cause certified to the Superior Court. Thereupon an amended complaint was filed charging the former conviction of April 12, 1957, under § 11500, which charge defendant denied. Further proceedings on that issue were continued and came on for hearing on June 11, 1957; the court found the charge to be true and sentenced defendant to prison for the term prescribed by law, which, as shown by the quotation in footnote 1, *supra*, is ten years because of the previous conviction and would have been five years in the absence thereof.² On June 18, 1957, appellant filed his notice of appeal.

Counsel for appellant says: "It is appellant's contention that a defendant may not be sentenced on two offenses at the same time and have one offense treated as a prior offense within the provisions of such section." Again: "It is the contention of the defendant that the theory and reason for the increased punishment to subsequent offenders is that defendants have demonstrated that they have not profited by the lessons of the prior punishment, nor benefit-

ed by the penal rehabilitation programs, and therefore additional penalties should be invoked. In the case at bar the defendant has had no penalty and has had not benefit from any possible rehabilitation program prior to his being sentenced as a repeating offender."

[1] The Attorney General, commenting upon appellant's brief, says: "A failure to specify errors must be taken to indicate that no errors occurred and a failure to cite authorities must be taken to indicate that none can be cited." Thereupon the point is argued as if no precedents existed, none being cited by the Attorney General. However, this court has decided the point three times—in *People v. Clapp*, 67 Cal.App.2d 197, 200, 153 P.2d 758; *People v. Ashcraft*, 138 Cal.App.2d 820, 826, 292 P.2d 676; *People v. Morgan*, 140 Cal.App.2d 796, 802, 296 P.2d 75. In the *Clapp* case it was said: "Appellant contends that at the time of the filing of the information and at the time of the trial he had not been convicted because his judgment of conviction in the former case was on appeal. This contention has been disposed of repeatedly. [Citations.] The jury, or the court where a jury has been waived, convicts the accused. Pen.Code, §§ 689, 1157. Conviction does not mean the judgment based upon the verdict, but it is the verdict itself. [Citation.] It is the ascertainment of guilt by the trial court. [Citation.] A person has been convicted even though the judgment should be suspended during appeal [citation] or while the convict is on probation. [Citation.] In the case of *People v. Braun*, 14 Cal.2d 1, 92 P.2d 402, it was held that although an adverse judgment in a former case was on appeal a prior conviction might be shown for the purpose of impeachment. A judgment though not final may be proved for any purpose for which it is effectual. [Citations.] The courts of other jurisdictions have likewise upheld the practice of alleging the prior conviction even though the judgment based thereon was on appeal at the time of the trial for the second offense. [Citations.]" (67 Cal.

2. Sentences were imposed on the same day in both cases and made concurrent.

App.2d at page 200, 153 P.2d at page 760.) See, also, In re Anderson, 34 Cal.App.2d 48, 50-54, 92 P.2d 1020; McKannay v. Horton, 151 Cal. 711, 718, 91 P. 598, 13 L.R.A., N.S., 661.

[2] The foregoing authorities are conclusive. We are not confronted with any problem of the effect of subsequent reversal of the prior conviction, for the appeal in No. 6012 is only *pro forma*, no claim of error therein being asserted.

The judgment is affirmed in each case.

FOX, Acting P. J., and RICHARDS, J. pro tem., concur.



155 Cal.App.2d 344

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Thomas SOTO, Jessie Verdugo Grande,
Joseph Lawrence Fernandez, et al.,
Defendants,
Joseph Lawrence Fernandez, Defendant and
Appellant.

Cr. 5911.

District Court of Appeal, Second District,
Division 2, California.

Nov. 20, 1957.

Defendant, an 18 year old boy, was convicted of forcible rape of 14 year old girl. The Superior Court of Los Angeles County, Beach Vasey, J., entered judgment, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Ashburn, J., held that the evidence raised question for jury as to whether defendants' statement to the police was voluntary.

Judgment and order affirmed.

1. Rape ⚡51(7)

In prosecution of 18 year old boy for forcible rape of 14 year old girl, evidence

Cal.Rep. 317-318 P.2d-23

relating to identification of boy warranted conviction.

2. Rape ⚡54(1)

Corroboration of prosecutrix' testimony is not necessary in rape case.

3. Criminal Law ⚡1159(2)

The District Court of Appeal does not weigh the evidence.

4. Criminal Law ⚡412(2)

Defendant's statement to police may be voluntary even though statement is made during a period of unlawful delay in taking defendant before a magistrate. West's Ann.Pen.Code, § 825.

5. Criminal Law ⚡736(2)

In prosecution of 18 year old boy for forcible rape of 14 year old girl, evidence raised question for jury as to whether defendant's statement to police was voluntarily made. West's Ann.Pen.Code, § 825.

Gladys Towles Root, Eugene V. McPherson and Joseph A. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Herschel Elkins, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant Fernandez, aged 18, appeals from a conviction of forcible rape of a 14 year-old girl named Judy. He also appeals from an order denying his motion for new trial.

If guilty, appellant was a party to a fiendish sexual orgy in which some 15 to 18 young men, by apparent prearrangement, took Judy at night into a field of haystacks, and there gratified their lusts upon her person for a period of three or four hours. Fernandez and four co-defendants were convicted.

[1,2] Appellant claims that he did not attack Judy and was not present at the scene; that the evidence upon which he was convicted is not sufficient to support the verdict. It appears that he and Judy were acquainted prior to the series of attacks, that she identified him at the police

station as one of her violators and that she testified at the trial that she recognized him as one who raped her. The boys had covered her eyes, first with their hands and then with her pedal pushers. But as she fought her assailants she pushed the hands and the pushers off and was able to see most of them though it was dark in the field. While in custody appellant signed a paper saying that he had gone to the haystack "and saw the girl on the haystack and a lot of guys around and I attacked her and left." The prosecutrix' testimony does not require corroboration (22 Cal.Jur. § 43, p. 399; *People v. Frye*, 117 Cal.App.2d 101, 103, 255 P.2d 105) and hence the evidence is sufficient with or without the aid of the so-called confession.

[3] In addition to his own denial of guilt appellant produced considerable evidence which, upon the cold record, seems somewhat persuasive to the effect that he was not at the scene at all. But it is not our function to weigh the evidence. "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the de-

fendant will not warrant interference with the determination of the jury." *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 779.

[4, 5] Appellant contends that the statement given to the police was not voluntary. Officer Cook, to whom the writing was given after defendant signed it, testified it was made freely, voluntarily and without the making of promises or threats of any kind. The fact, if it be one, that the confession (the Attorney General says it was an admission, not a confession) was made during a period of unlawful delay in taking him before a magistrate, is not enough to control the decision as to the voluntary nature of the statement. *Rogers v. Superior Court*, 46 Cal.2d 3, 9-11, 291 P.2d 929, and *People v. Bashor*, 48 Cal.2d 763, 312 P.2d 255, so hold. The officer's testimony created a substantial conflict with that of defendant and the jurors were entitled to accept it as having the more convincing force.

Appellant argues that he was deprived of constitutional rights in that his mother was not permitted to see him until after arraignment, which was about three days after arrest; that had she done so he would have gotten a lawyer and hence have made no confession. The record indicates that appellant was arrested on Tuesday and made his statement on Wednesday; it does not disclose when he was arraigned; it may have been on Wednesday. The statute allows a maximum of 48 hours for this purpose (Pen.Code, § 825). A somewhat similar argument was thus disposed of in *Rogers v. Superior Court*, supra, 46 Cal.2d at page 10, 291 P.2d at page 933: "There is a basic distinction between evidence seized in violation of the search and seizure provisions of the Constitution of the United States and the Constitution of California and the laws enacted thereunder, and voluntary statements made during a period of illegal detention. It may be true, as petitioner contends, that had he been arraigned within forty-eight hours and advised of his rights, he would not have volunteered to say anything. Cf. *People v. Stoble*, 36

Cal.2d 615, 626, 627, 226 P.2d 330; and see, *People v. Zammora*, 66 Cal.App.2d 166, 220, 152 P.2d 180. Nevertheless, there is lacking the essential connection between the illegal detention and the voluntary statements made during that detention that there is between the illegal search and the evidence obtained thereby, or between the coercion and the confession induced thereby. The voluntary admission is not a necessary product of the illegal detention; the evidence obtained by an illegal search or by a coerced confession is the necessary product of the search or of the coercion."

The record does not disclose a miscarriage of justice in this case.

Judgment and order affirmed.

FOX, Acting P. J., and RICHARDS, J. pro tem., concur.



155 Cal.App.2d 464

K. R. NUTTING, Plaintiff, Cross-Defendant and Appellant,
v.

HULBERT & MUFFLY, Inc., a corporation,
Hulbert & Muffly, a partnership, L. A. Hulbert, L. Wayne Hulbert, G. R. Muffly, Floyd T. Bridges and Grant Bridges, Defendants, Cross-Complainants and Respondents

Civ. 9206.

District Court of Appeal, Third District,
California.

Nov. 22, 1957.

Rehearing Denied Dec. 19, 1957.

Hearing Denied Jan. 15, 1958.

Suit to enjoin trespass on lands by defendants arising out of disputed boundary line. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Warne, J., held that evidence was sufficient to support

finding that there was an agreement between plaintiff's predecessor and defendants that a fence which was erected between plaintiff's and defendants' land was to be boundary line between two tracts of land.

Judgment affirmed.

1. Boundaries ⇨37(5)

In suit to enjoin a trespass on certain portions of land by defendants arising out of boundary dispute, evidence supported finding that there was an agreement between plaintiff's predecessor and defendants that a fence, which was erected, was to be the boundary between two tracts of land.

2. Boundaries ⇨46(1)

Where there was not only an agreement between plaintiff's predecessor and defendants as to boundary line but also long acquiescence by parties that a fence was division line between two tracts of land, agreed boundary was established notwithstanding both plaintiff's predecessor and defendants knew fence did not follow true subdivisional boundary between their tracts of land.

3. Boundaries ⇨46(1)

In order to invoke doctrine of agreed boundaries, all that need be shown is lack of knowledge by both parties where boundary line should be drawn.

4. Boundaries ⇨48(1)

Fact that an accurate survey is possible is not conclusive of question of whether a doubt exists as to location of boundary; the doubt may arise from believed uncertainty which may be inferred from circumstances surrounding parties at time of an agreement to locate boundary was deemed to have been made and if in good faith the parties resolve their doubt by fixing the location of the common boundary, it will be considered the boundary called for in a deed.

Spurr & Brunner, Ukiah, for appellant.
Kasch & Cook, Ukiah, for respondents.

WARNE, Justice pro tem.

This is an appeal from the judgment in favor of respondents concerning a disputed boundary line.

Plaintiff, the record owner of Lots 2, 3 and 4 of Section 31 in Township 12 North, Range 12 West, M.D.M., in Mendocino County, brought suit to enjoin a trespass upon certain portions of said lands by the defendants. Defendants and cross-complainants denied the alleged trespass and by way of cross-complaint alleged that they were the owners of the land on which the plaintiff claimed the trespass occurred. The trial court found for the defendants and cross-complainants and also found that a fence separating the properties was an agreed boundary line, and entered judgment in favor of the defendants and cross-complainants.

Section 31 is a closing section of the township and the west boundary thereof is a correction line. The west half of the section was divided into 4 irregular lots, each bounded on the east by the center line of the section. The south quarter corner was known. However, the north quarter corner of the section had been lost for many years and was not discovered until a survey was made in 1954. The section corner common to sections 25 and 36 of Township 12 North, Range 13 West, and sections 30 and 31 of Township 12 North, Range 12 West, was known. The north quarter corner was actually some 1,100 feet further east from the common corner than called for by the Government field notes and the plat made therefrom.

Separating lands of the contestants on east and west was a wire fence fixed to posts—and in some instances to trees—which runs generally in a north-south direction. The first part or section of this fence had been in place for some 30 years except for a short distance at its southerly end where no fence existed. The second part of this fence runs in a southeasterly direction to a point on the south side of Lot 3, where it veers and runs easterly. This lat-

ter fence was erected about 20 years ago by appellant after a conversation with a Mr. Vollenweider, a predecessor in interest of appellant Nutting who agreed to its location. It joins the first part of the fence, so that the whole can be said to be one continuous fence.

Mr. Vollenweider testified that he had first leased the land in 1925 and purchased it in 1943; that during the time he owned the property he had a conversation with Mr. Hulbert about the first fence and as far as he was concerned it was agreed to be the boundary line; that he was under the impression that the property crossed the fence line in one or two places; either his property went over, or the other property came back, so it was agreed that it would be about an equal swap, so the fence was left where it was; that he knew it wasn't the true boundary but he did not know where the true boundary was. Mr. Vollenweider also testified that at the time he had this conversation with Mr. Hulbert, Hulbert and Bridges were building the second part of the fence and he asked them whether they were going to fence down the line or go down the road, and they talked things over; that he asked them to go down the road so that he would not have to erect any more gates or cattle guards. He figured that this last proposition would be about an even swap. Appellant testified that the first part of the fence was in existence in the early 1920's; that he had a conversation with Mr. Vollenweider when he was building the second part of the fence and they agreed that the fence should run along a road instead of crossing it; that the fence as built was so close to the line that it would be accepted as a give and take proposition; that at the time the fence was accepted as a boundary he did not actually know where the lines were on the easterly boundaries of Lots 1, 2 and 3, but he knew that the fence was not actually on the line and that thereafter no one except the defendants used the property east of the fence.

Appellant had the property surveyed along the north line in an endeavor to as-

certain his west boundary. The north quarter corner could not be located so they chained in from the common corner 1,549.68 feet but at the same time they endeavored to reconcile the discrepancies along the south part of the section and found that there was a discrepancy of some 500 to 600 feet between what they believed to be the west boundary of the section and the center line of the section. The discrepancy was caused by an error of some 1,000 feet in the field note calls but it was not until the actual north quarter monument was found in 1954 that the error became apparent.

The trial court found that for well over 30 years ancient fences separated the property; that from 1920 to 1943 the respective owners acquiesced in, recognized and accepted these fences as the boundaries between their properties; that the fences constituted an agreed boundary; that in 1943 Vollenweider and Hulbert, the respondent, expressly agreed that the entire north-south fence would constitute an agreed boundary; that at the time the express agreement was made the respective owners were each uncertain of the true position a surveyed boundary line would occupy on the ground; that both believed the old fence and the new fence section approximated the true position on the ground of a surveyed boundary line; and that in 1943 the fence lines were recognized as a boundary line. Appellant argues that there is no evidence whatever in the record that the second fence ever existed or was ever considered as a boundary between the lands of the two owners. We do not believe that there is any merit in this contention. Mr. Vollenweider, as previously stated, testified in very clear and understandable language that there was an agreed boundary line between the two properties. The subject of the boundary between the properties arose because respondents were building a fence along the southerly line of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and thence up to the point of the Rancheria Creek fence line where the ancient fence stopped. At that time and place a discussion and agreement was had as

to the boundary lines between Vollenweider and Hulbert. Vollenweider testified:

"It has been there so many years, as far as I was concerned it is an agreed boundary line.

"Q. You told him that fence would be the agreed boundary line between your two properties? A. Yes. * * We agreed that would be the line, and let it go at that.

"Q. Is that what you did on this occasion? A. Yes.

"Q. And after that discussion did you accept the fence line as your easterly boundary of Lots 2 and 3? * * * A. Yes. Because I was always under the impression the property crossed that fence in one or two places; either my property went over or the other property came back. So we agreed it would be about an equal swap, so we left the fence where it was."

Mr. Hulbert testified clearly that the entire fence line—the ancient Rancheria Creek fence, with the additions built in 1943—was an agreed boundary line pursuant to the discussion with Vollenweider in 1943. He testified:

"Well, it was just so close to the line that we figured that we would just accept it as a give and take proposition, a line through there as a dividing line.

"Q. Is that what was said? A. Yes.

"Q. And from that time on did you accept that as your westerly boundary? A. We did. * * * Well, we just agreed to take that as a dividing line."

Both parties were uncertain as to where the "true" line actually ran. Hulbert testified: "Well, we didn't know exactly where the true line was." And Vollenweider's testimony was: "Q. You didn't know where your east line was? A. Not down to the acre; no."

[1] This testimony is sufficient to support the finding that there was an agree-

ment that the fence was to be the boundary between the two tracts of land.

[2,3] Appellant next contends that an agreed boundary cannot be established by the agreement of two adjoining owners when both owners know the fence does not follow the true subdivisional boundary between them, except by deed. There is no merit in this contention. Here there was not only an agreement as to the boundary line but long acquiescence by the parties that the fence be the division line between the two tracts of land. "When owners of adjoining lands have acquiesced for a considerable time, at least equal to the period prescribed by the statute of limitations, in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line." *Martin v. Lopes*, 28 Cal.2d 618, 622, 170 P.2d 881, 884, citing *Sneed v. Osborn*, 25 Cal. 619, 627. Further, in *Martin v. Lopes*, supra, the statement is made that in order to invoke the doctrine of agreed boundaries all that need be shown is lack of knowledge by both parties where the fence line should be drawn.

[4] The fact that an accurate survey is possible is not conclusive of the question of whether a doubt exists as to the location of the boundary. The doubt may arise from the believed uncertainty which may be inferred from the circumstances surrounding the parties at the time the agreement was deemed to have been made and if, in good faith, the parties resolve their doubt by fixing the location of the common boundary it will be considered the boundary called for in the deed. *Mello v. Weaver*, 36 Cal.2d 456, 224 P.2d 691; *Madera School District of Madera County v. Maggiorini*, 146 Cal.App.2d 390, 303 P.2d 803.

We conclude that the judgment is supported by the evidence and the findings.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

155 Cal.App.2d 217

Victor WASSEL and Lena Wassel, Plaintiffs and Respondents,

v.

L. E. BLACK and Clara Allene Black, Defendants and Appellants.

Civ. 5512.

District Court of Appeal, Fourth District, California.

Nov. 13, 1957.

Quiet title action. The Superior Court, Riverside County, Hilton H. McCabe, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Barnard, P. J., held that evidence including undisputed testimony that defendants received a deed from common vendor mistakenly describing property as east half of a short quarter rather than as easterly 20 acres thereof, and that a plaintiff knew boundary line between remaining land of short quarter which he purchased from common vendor, and defendants' land, and fully understood that he was not buying any part of property claimed and occupied by defendants, was insufficient to sustain judgment decreeing plaintiffs were owners in fee of land claimed by defendants, by virtue of plaintiffs' deed describing such property.

Judgment reversed.

1. Trusts ⚡93

While a deed is presumptive evidence as to land conveyed therein, it is not conclusive, and it is not sufficient to establish title in a grantee who possessed such knowledge of another's rights in property as to subjugate his interests to that prior interest, or as to make the assertion of his paper title unjust in an equitable action. *West's Ann. Civ.Code*, § 2224.

2. Vendor and Purchaser ⚡244

In quiet title action, evidence, including undisputed testimony that defendants received deed from common vendor mistakenly describing property as east half of a short quarter rather than as easterly 20

acres thereof, and that a plaintiff knew boundary line between remaining land of short quarter which he purchased from common vendor, and defendants' land, and fully understood that he was not buying any part of property claimed and occupied by defendants, was insufficient to sustain judgment decreeing plaintiffs were owners in fee of land claimed by defendants, by virtue of plaintiffs' deed describing such property. West's Ann.Civ.Code, § 2224.

3. Evidence ⇨433(4)

In quiet title action, where an issue was raised as to whether a mistake had been made in that defendants received deed from common vendor mistakenly describing property as east half of a short quarter rather than as easterly 20 acres thereof, and in that plaintiffs' deed from such common vendor mistakenly described certain land of defendants, evidence tending to show such mistakes was material, and trial court erred in excluding same on mistaken theory that evidence of a mistake was not admissible unless it related to mistake occurring between plaintiffs and defendants.

Best, Best & Krieger, John D. Babbage, Riverside, John H. Barnard, So. Pasadena, for appellants.

Earl Redwine and Maurice C. Sherrill, Riverside, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment in a quiet title action. Both parties claim under deeds from the same grantor and the disputed property is a strip between the properties admittedly owned by the parties, which is 67 feet wide and contains 2.675 acres.

Mr. and Mrs. Caffey owned the Northwest Quarter of the Northwest Quarter of a certain section in the Coachella Valley. This is what is known as a "short quarter", containing 34.65 acres instead of the normal 40 acres. On January 3, 1947, the defendants agreed to purchase the easterly 20 acres of this parcel, the deal being handled

through the office of George Madden, a real estate agent. On January 4, 1947, the defendants caused a survey to be made and stakes set to mark the easterly 20 acres of the parcel. They immediately entered into possession and erected a house and garage which are situated upon the land now in dispute. They received a deed on April 5, 1947, describing the property as the east half of this short quarter instead of describing it as the easterly 20 acres thereof. The defendants did not discover this mistake until the fall of 1953.

In November, 1951, the plaintiffs purchased some land in the western part of this parcel from the Caffeys, Madden's office also acting as real estate agent in this transaction. On November 20, 1951, the plaintiffs received a deed describing the property sold as the West half of this short quarter.

Two years later, in the fall of 1953, Mr. Black discovered for the first time that his deed described less than 20 acres. He took the matter up with Mr. Madden, the real estate agent. After examining the escrow instructions in the sale from Caffey to the Wassels, Mr. Madden prepared a correction deed from the Caffeys to the Blacks describing the property as the east 20 acres of the Northwest Quarter of the Northwest Quarter of this section, and stating that it was a correction of the deed dated April 5, 1947. This deed was dated January 2, 1954, and recorded on January 28, 1954. In July, 1954, the plaintiffs brought this action to quiet title to the West Half of this short quarter. The defendants answered denying title in plaintiffs and alleging that plaintiffs had purchased this short quarter excepting therefrom the easterly 20 acres thereof, and that their deed mistakenly described the land they had purchased. Trial of the action commenced on April 30, 1956. Prior to the trial the court denied defendants' motion for leave to file a cross-complaint and to bring in new parties. During the trial the court refused to allow the defendants to amend their answer for the purpose of setting forth in more detail the defense upon

which they relied. The court found in favor of the plaintiffs, finding that the defendants have no right, title or interest in the land described in the plaintiffs' deed, that it is not true that the plaintiffs purchased from the Caffeys the Northwest Quarter of the Northwest Quarter of this section excepting therefrom the easterly 20 acres thereof, and that it is not true that at the time they purchased the property the deed mistakenly described the property which the plaintiffs had purchased. A judgment was entered decreeing that the plaintiffs are the owners in fee and entitled to possession of the West Half of this parcel; that the defendants have no right, title or interest in and to said West Half of this parcel; and that the plaintiffs be granted a writ of possession. The defendants have appealed from this judgment.

Although not separately stated, the appellants' main contention is that the evidence is not sufficient to support the findings and judgment. They also contend that the plaintiffs' deed is subject to plaintiffs' knowledge of defendants' interest in the disputed property; that the court erred in excluding evidence affecting the title and rights of the parties to the action; that the court erred in ruling that any evidence of mutual mistake affecting the deeds of the parties was not admissible unless it involved a mistake occurring between the parties to the action; that the acts and declarations of the plaintiffs' grantor while holding title to the property were admissible against the plaintiffs; and that the court abused its discretion in refusing to permit the defendants to file an amended answer. The respondents contend that the judgment is supported by substantial evidence; that it must be presumed that their deed expresses the intention of the parties to that deed; that it is for the trial court to determine if this presumption has been overcome; that this presumption was evidence, and the evidence produced by the respondents merely created a conflict; that it follows that their deed sufficiently supports the judgment; that the court properly excluded evidence of transactions between

the parties and their common grantor relating to the issue of mistake in their respective deeds, since such an issue was not sufficiently raised by the pleadings; that the court did not abuse its discretion in refusing to allow the respondents to file an amended answer during the trial; and that if any error was committed by the court it did not result in a miscarriage of justice within the meaning of Article VI, Section 4½ of the Constitution.

At the trial Mr. Wassel testified that he did not talk with Mr. Caffey or Mr. Madden prior to his purchase of the land but did talk with John Wilson, a broker (apparently one in Madden's office); that "nobody ever tells me about quarter or sections or nothing"; that "nobody represented that I am buying the East Half or the West Half or that I was buying 17 acres, a fraction over"; that he did not buy on the basis of so much per acre but he bought 17 acres; and that there was an area between his field of crops and Mr. Black's grapes, "just sort of a turn around place", which was about 20 feet wide. He was asked if he knew that he was buying the property that was to the west of this little strip and he replied "Well, that is what I thought was 17 acres". He then testified "They told me it was 17 acres up to the grapes, a fraction over 17 acres." He was then asked "That is what you were buying was up to the grapes" and he replied "17 acres, that's right". The plaintiffs then rested on that testimony and their deed which was received in evidence.

Mr. Caffey testified that he went with Mr. Wassel to the east side of the land he was selling and showed him the stakes; that he told him that the 20 acres to the east was sold to Black and that he and Black had agreed to leave 10 feet apiece for a driveway; that he showed him Black's buildings and Black's grapes which were staked and wired; that they later went to a bank and entered into an escrow; and that he told them that he was selling the remaining portion of this parcel less the easterly 20 acres which was sold to Black. The escrow instructions on the sale to Was-

sel were marked for identification but the court refused to admit them into evidence. These instructions are dated November 6, 1951, and are signed by Mrs. Caffey, who held the legal title, and by Mr. Wassel and his wife. They provide for the sale to the Wassels of the Northwest Quarter of the Northwest Quarter of this section "excepting therefrom the westerly 20 acres thereof". It is obvious that the word "westerly" was a mistake, but these escrow instructions would show that the Wassels agreed that 20 acres should be excepted from the quarter of a quarter which they were otherwise buying. The banker who prepared the escrow instructions testified that they were prepared on the basis of a discussion had while the Caffeys and Wassels were present; that there was a discussion at that time regarding the 20 acres that was to be excepted from the conveyance to the Wassels; that Mr. Caffey said he was conveying this parcel excepting the westerly 20 acres; that he knew Black had bought and was operating 20 acres of this parcel but did not then know whether it was the westerly or the easterly 20 acres; that there was no discussion about the size of the parcel to be conveyed or the price per acre; that he ordered a preliminary report from the title company; that the title company called his attention to the fact that Mrs. Caffey owned the westerly portion of this parcel and he told them to go ahead on the basis of what Mrs. Caffey still owned; that he did not know that this was a short quarter but knew, when his attention was called to it, that Mr. Black owned the easterly portion of the parcel; that Mr. Caffey told him definitely at the time that Mr. Black had 20 acres and that's why he wrote up the escrow instructions that way; and that Mrs. Caffey and Mr. and Mrs. Wassel signed the escrow instructions in his presence. A title company man testified that he changed the word "westerly" to "easterly" on the order from the bank for a preliminary report, and that he did this because it was discovered that the easterly portion of this parcel had been conveyed. The court sustained objections to other ques-

tions asked of this banker and the title man relating to how and why other changes were made, and what had led to the description actually used in the deed conveying the property to the Wassels. The only reasonable inference is that these changes were made by the banker and title man without consulting any of the interested parties.

Mr. Black testified that he bought 20 acres from the Caffeys on January 3, 1947; that he had a survey made on January 4 and stakes were set; that he started to build on January 6; that the house was about in the center of the disputed strip; that the house was occupied on February 5; and that he received his deed in April or May, 1947. He further testified that Caffey brought Wassel over and asked him to show Mr. Wassel where the line was between the two pieces of property; that he did this, and showed him that the line was "Right in the center of that driveway * * * between the two pieces of property"; and that he showed Mr. Wassel the line and the stake; that he had a conversation with Wassel sometime early in 1954 in which Wassel said that he had been informed that a deed which had been recorded covered a part of the property which had been deeded to him, and that he was going to have to do something about it with Mr. Caffey as he did not think that Mr. Caffey could give a deed to some property that had already been deeded to him. He also testified that he had received a correction deed from the Caffeys in January, 1954; that neither his deed nor his title policy said anything about acreage; and that he knew nothing about the mistake in his deed until the fall of 1953. Mr. Madden testified that a receipt he had with him dated January 3, 1947 was signed by him; that this was a receipt for \$1,000 that Black paid to him to go into escrow on the purchase of the east 20 acres of this parcel at \$400 an acre, making a total of \$8,000. The court sustained an objection to the introduction of this receipt into evidence on the ground that the Caffeys were not parties to this action.

Mr. Caffey was recalled and testified that when he made the sale to Mr. Black in 1947 he understood he was deeding Black 20 acres. He also testified that he had a conversation with Wassel in the spring of 1954 when Wassel claimed that Caffey had sold him half of a short quarter; that he then asked Wassel whether it was not true that he had shown him the property and the corners, to which Wassel replied "Yes"; that he asked Wassel whether it was not true that Black's ground was planted to grapes, staked and wired, to which Wassel replied "Yes"; that he asked Wassel "Didn't you understand Mr. Black owned this part that was in the vineyard staked and wired with the buildings on it", and Wassel replied "Yes"; that he asked Wassel if he did not understand that he was buying the remaining portion of this short 40, and Wassel replied "Yes"; that when he asked Wassel how he could claim the disputed property Wassel replied "I've got a deed to this and I am going to take Mr. Black's houses, his pipe line, his barns and so far into the street."

[1] There was no mutual mistake between the parties to this action since there had been no dealings between them. The controlling question here was not as to the existence of such a mutual mistake, but was as to whether the plaintiffs were entitled to rely on the description in this deed under the circumstances surrounding the execution and delivery of that deed. While a deed is presumptive evidence it is not conclusive, and it is not sufficient to establish title in a grantee who possessed such knowledge of another's rights in the property as to subjugate his interests to that prior interest, or as to make the assertion of his paper title unjust in an equitable action. *Lestrade v. Barth*, 19 Cal. 660; *McGuiness v. Lester*, 86 Cal.App. 454, 260 P. 925, 927; Civ.Code, Sec. 2224. In the *Lestrade* case, under somewhat similar circumstances, the court said: "The defendant was in the open, notorious and exclusive possession and occupation of the premises, having valuable and lasting improvements thereon. This possession and

occupation were sufficient to put the plaintiff upon inquiry as to the interest, legal or equitable, which the defendant held in the premises, and that inquiry should have been made of the defendant thus in possession and occupation." In the *McGuiness* case, where the parties claimed under a common grantor, it is said: "He was in no sense an innocent purchaser, but, on the contrary, he had at least constructive notice of the defendant's ownership of the land which he now claims * * *. Plaintiff's rights, therefore, are no greater than were those of his grantor." Section 2224 of the Civil Code reads in part: "One who gains a thing by * * * mistake, * * * is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

It appears here without conflict that the Caffey's intended to sell and Black intended to buy the East 20 acres of this short quarter; that Black occupied the full 20 acres for some years and placed permanent improvements thereon; that by agreement between Caffey and Black a 20-foot driveway or turning place was left between the 20 acres and the remainder of that parcel; that Wassel was shown the center of this 20-foot strip as the boundary line thus established, knew that Black claimed the property to the east of that boundary line, and saw Black's improvements thereon; that Wassel intended to buy the land to the west of that boundary line; and that Wassel signed escrow instructions providing for the purchase by him of this short quarter with the exception of 20 acres of land. While there was a mistake in these instructions in that the word "Westerly" was used instead of the word "Easterly" this mistake is not controlling. It not only conclusively appears that the Caffey's intended to sell Wassel the portion of the parcel which remained after the sale of the 20 acres to Black, but Mr. Wassel admitted at the trial that he intended to buy the property to the west of the boundary line shown him and to the west of the property he knew to be occupied and claimed by Black. He

also testified that he thought the part he was buying, the land west of the boundary line shown him, contained about 17 acres. He was mistaken as to the acreage in that part but he fully understood which land he was actually buying. By somebody's mistake, or a series of mistakes with which Black had nothing to do, the deed Wassel received covered more land than was intended by him or by his grantor. Wassel not only admitted the essential facts, but he did not deny any of the evidence to the same effect received from other witnesses. The only conflict in the evidence was that Wassel said that he had not talked with Caffey prior to his purchase of the land while Caffey testified that he had talked to Wassel. However, Wassel did not deny that he had talked to Black and did not deny any of the other facts testified to with respect to showing him the boundary line, with what occurred when the escrow instructions were signed, or as to his later conversation with Caffey. Incidentally, it appears in connection with the motion for a new trial that Caffey admitted that he had told Wassel that the remainder of the parcel contained about 17 acres, and that Caffey had offered to reimburse Wassel for any shortage that existed, which offer Wassel had not accepted. While Wassel may have a claim against the Caffeys this does not involve Black or his interest in this property, and the undisputed evidence received would not support a judgment in favor of the plaintiffs.

[2, 3] While it appears that there was a mistake in both deeds given by this grantor, to Black in 1947 and to Wassel in 1951, the controlling question here is as to the effect of the deed to Wassel. He had the burden of proof and in this equitable action he is not entitled to take advantage of a mistake in his deed when it appears, without conflict, that he knew the essential facts insofar as the rights of Black are concerned, and fully understood that he was not buying any part of the property claimed and occupied by Black. While the evidence received was not sufficient to sustain the judgment, the record also reveals se-

rious errors in the trial in that a great deal of material evidence was excluded on the mistaken theory that evidence of a mistake was not admissible unless it related to a mistake occurring between the parties to the action. The issue as to the mistake in the plaintiffs' deed, which was material here, was sufficiently raised by the pleadings. In view of the facts shown by the record, it is obvious that it cannot be said that a miscarriage of justice does not appear.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.



155 Cal.App.2d 238

Application of Martin L. CARKEEK, for a Writ of Habeas Corpus.

Cr. 2807.

District Court of Appeal, Third District,
California.

Nov. 14, 1957.

Original proceeding on petition for writ of habeas corpus by state prisoner. The District Court or Appeal, Schottky, J., held that petitioner who was adjudged an habitual criminal on assumption that he had served two prior felony convictions was entitled to have sentence corrected to eliminate adjudication of habitual criminality and to be accorded rights of one not so adjudged where petitioner was granted new trial on one of felony charges and case was subsequently dismissed after adjudication of habitual criminality.

Petition denied.

1. Habeas Corpus $\Rightarrow$ 30(3)

Habeas corpus is the proper remedy to determine whether or not the petitioner is being held under an excessive sentence

and therefore to that extent is illegally restrained of his liberty.

2. Criminal Law — 964, 1190

A reversal of a criminal conviction on appeal or the granting of a new trial or an acquittal thereafter is the same as if no conviction had ever existed.

3. Criminal Law — 1202(6)

Petitioner who was adjudged an habitual criminal on assumption that he had served two prior felony convictions was entitled to have sentence corrected to eliminate adjudication of habitual criminality and to be accorded rights of one not so adjudged where petitioner was granted new trial on one of felony charges and case was subsequently dismissed after adjudication of habitual criminality.

Martin L. Carkeek, in pro. per.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Petitioner Martin L. Carkeek filed in this court a petition for a writ of habeas corpus praying that the adjudication that he was an habitual criminal be set aside and also that it be ordered that he has fully served the time required by law on the second degree burglary charge.

The record shows that on November 9, 1938, the superior court of the county of Tuolumne entered, after petitioner entered a plea of guilty to the charge and admitted two prior felony convictions, a judgment against petitioner of burglary in the second degree with two prior convictions and adjudged him to be an habitual criminal. Petitioner was sentenced to prison for the term prescribed by law. Petitioner claims that one of the prior felony convictions on which the 1938 adjudication that he was an habitual criminal was based has since been set aside and he is therefore entitled to a determination that that portion of the judgment adjudicating him to be an habitual criminal is excessive and void.

One of the prior convictions admitted in the 1938 adjudication was for grand larceny for which petitioner served a term in the state prison at McAllister, Oklahoma. The other was for burglary for which petitioner served a sentence in the state prison at Pendleton, Indiana. In May, 1957, petitioner sought a writ of error coram nobis to the Wabash County Indiana Circuit Court challenging his conviction by that court for the crime of burglary. The writ was granted and petitioner was granted a new trial on the burglary charge. On August 16, 1957, the case against petitioner was dismissed.

[1] Habeas corpus is the proper remedy to determine whether or not the petitioner is being held under an excessive sentence and therefore to that extent is illegally restrained of his liberty. In *re Seeley*, 29 Cal.2d 294, 176 P.2d 24.

[2] The question presented is, what is the effect of an adjudication as an habitual criminal when, after that adjudication is made, one of the prior convictions on which it was based is set aside? The precise question has never been determined by the courts of this state. However, in *People ex rel. Sloane v. Lawes*, 255 N.Y. 112, 174 N.E. 80, the defendant was convicted of the crime of feloniously possessing metal knuckles and sentenced to a term of seven years. By statute in New York a person who possessed metal knuckles was guilty of a felony only if he had previously been convicted of a felony; if not, the crime was only a misdemeanor. The defendant was charged with having been convicted of grand larceny in the first degree in March, 1927, and sentenced to prison for the crime. In 1929 the grand larceny conviction was set aside and a new trial ordered which resulted in a verdict of not guilty. The defendant, however, was returned to Sing Sing to continue serving his term of imprisonment for feloniously possessing metal knuckles. He then applied to the court which convicted him to

vacate its judgment or for a new trial, which was denied. Relief was then sought in the appellate courts. The New York Court of Appeals granted a writ of mandate ordering the County Court to re-sentence the defendant. The court said, 174 N.E. at page 81:

"* * * When the County Court set aside the conviction for larceny and granted the defendant a new trial, the conviction was at an end for all purposes. The defendant was properly convicted of possessing metal knuckles, but the question at the outset was whether the crime was a misdemeanor or a felony. For the misdemeanor the prisoner could have been sentenced to the county jail, penitentiary, or state prison for not longer than one year.

* * * He has been sentenced for seven years upon the assumption that, he had previously been convicted of the crime of grand larceny. In the eyes of the law this was not the fact. It is true that at the time of sentence there was a record of such a conviction, but it has been wiped out, and the law has declared that such conviction did not exist. * * * A reversal on appeal or the granting of a new trial or an acquittal thereafter is the same as if no conviction had ever existed. The law deals with realities and not fictions; it punishes men for what they have done, not for formal entries or paper records not true in fact. It is abhorrent to our sense of justice to think of this defendant being confined for seven years because of a previous crime of which he was not guilty according to the verdict of a jury and a judgment of the court. He has been sentenced as a second offender when he was only a first offender. Sections 1941, 1942, and 1943 of the Penal Law provide that where a person has been convicted of a felony, his sentence must be increased, if he has been theretofore convicted. These sections, however, only apply to felonies, not misdemeanors. Sloane's conviction here for a felony depended not

upon these sections, but upon the peculiar wording to section 1897 which, as heretofore stated, makes the crime of carrying metal knuckles a misdemeanor, unless the defendant has previously been convicted of crime.

"The fact is, therefore, that the defendant has served in prison all the time which the law gives him for the crime he actually committed; he was convicted of carrying metal knuckles as a misdemeanor, there being no previous conviction. This is the way the matter stands at law. It is no answer to say that at the time the county judge sentenced him there was a previous conviction of record; that has been wiped out, and all the statute law provides for his punishment is at most one year in prison or a fine of \$500, or both.

"The official public records of the County Court of Westchester County show these facts—the judgment of that court resting upon the previous conviction is contrary to its own records, showing an acquittal. On such incontrovertible record evidence the courts should act."

[3] We agree with the reasoning and conclusion of the New York Court of Appeals in the cited case and believe that the rule there stated is applicable here. Petitioner was adjudged an habitual criminal on the assumption that he was convicted and had served two prior felony convictions. The record now shows that one of those convictions was set aside. The law has declared that such conviction did not exist. Under such circumstances he may not now be held as an habitual criminal under the 1938 adjudication.

It therefore follows that petitioner is entitled to have his sentence corrected to eliminate the adjudication of habitual criminality, and to be accorded the rights of one not so adjudged; and it is so ordered.

However, petitioner is not entitled to his release even though he has served the maximum sentence for burglary in the second degree on the 1938 conviction. Petitioner

was convicted of burglary in the second degree by the Superior Court of San Joaquin County in November, 1953, and he has not served the maximum time permitted under this conviction.

The order to show cause heretofore issued by this court is discharged. The petition for a writ of habeas corpus is denied.

VAN DYKE, P. J., and PEEK, J., concur.



155 Cal.App.2d 390

Allen W. WILSON, Plaintiff and Appellant,

v.

John W. WARD, Defendant and Respondent.

Civ. 22498.

District Court of Appeal, Second District,
Division 1, California.

Nov. 21, 1957.

Action for specific performance of real estate option. The Superior Court of Los Angeles County, George Francis, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, White, P. J., held that where option agreement provided that if payment was not paid or tendered on or before May 1, contract was to be void, and no such payment was ever made or tendered, offer expired at that time.

Affirmed.

1. Landlord and Tenant ¶40

Where lease of premises contained reference to real estate option which was attached to lease and option contained notice that it was subject to attached lease, the two documents would be construed together as one agreement.

2. Specific Performance ¶25

Only contracts which clearly express the intention of the parties may be specifically performed.

3. Vendor and Purchaser ¶18(4)

Where option to purchase real estate provided that if certain payment was not paid or tendered on or before May 1, contract was to be void and of no effect, and no such payment was ever made or tendered on or before that date, option being unilateral agreement binding only on the optionor, offer expired at time therein expressly provided.

James J. Baker, Alfred D. Williams,
Long Beach, for appellant.

Boone & Satchell, James T. Satchell,
Long Beach, for respondent.

WHITE, Presiding Justice.

Plaintiff has appealed from a judgment against him in his action for specific performance of a written contract and for damages and in defendant's cross-action for unlawful detainer. The judgment is that specific performance is denied, that plaintiff take nothing, and that defendant and cross-complainant recover possession of a certain vacant lot in Long Beach, and \$2,600 as damages for unpaid rent to June 11, 1956, the date of the trial, with interest thereon at 7% per annum until paid, together with his costs and disbursements.

The written agreement of which appellant seeks specific performance consists of two documents dated May 1, 1952, signed by plaintiff and defendant, one of which is as follows:

"Real Estate Option.

"Long Beach, California, May 1, 1952
Received of Allen W. Wilson, 4507 Faculty Avenue, Long Beach, California, the sum of Ten & No/100 Dollars (\$10.00), and other valuable considerations, as part payment for the following described Real Property situate in Long Beach, California, County of Los Angeles, State of California

"N. 120' of W. 234' of Lot 21, Block 22, California Co-operative Colony Tract. Said description consisting of a parcel of land approx. 120' x 234' in total area.

"The entire price to be paid for above described Real Property is (6,500.00) Six Thousand Five Hundred & No/100 Dollars, (\$6,500.00) and to be paid as follows: This option is subject to the attached Lease covering the above property. The terms of the lease set forth that Allen W. Wilson is to pay a monthly rental of \$100 for a term of Two (2) Years, and at the expiration of that date, or before, all rent money paid will be applied to the purchase price, and will be considered as the down payment, and monthly payments will be continued on the basis of \$100.00 per month, including interest of 6% on the unpaid balance with this exception: Any and all rent money paid up to and including the exercise of this option will be computed as the down payment, and the interest rate of 6% will also apply from the date of May 1, 1952, and the total amount of interest will be deducted from the amount of rent money paid, with the balance being considered the down payment. The property is now owned by John W. Ward, 5881 Cherry Ave., Long Beach, California.

"A good and sufficient Deed to be executed and delivered by the said John W. Ward, to Allen W. Wilson, or his heirs or assigns on or before the First day of May, 1954, together with a policy of title insurance, showing title from a date mutually agreed upon.

"Provided, however, that the payment of \$6,500 is tendered or paid at said date. If the said payment of \$6,500.00 is not paid or tendered on or before the First day of May, 1954, then this contract to be void and of no effect, and both parties released from all obligations herein, and in that event the said \$10.00 paid on this date is to

be retained by John W. Ward as liquidated damages.

"Dated this First day of May, 1952."

The other paper was a lease of the same property for two years at a rental of \$100 monthly, first and last month in advance, which referred to the option hereinabove quoted.

While appellant urges that he has \$2,400 paid by him during his 24 months lease, invested in this land, that is not so. The consideration for the option as therein expressed and presumed to be true was \$10.

The court found upon sufficient evidence that the fair rental value of the lot was \$100 per month. The lease was performed by plaintiff except that at the expiration of its two years term on April 30, 1954, he did not quit and surrender the premises and from that date forward he failed and refused to pay any rental.

[1] It is to be noted that the lease contains the following sentence: "(Refer to Real Estate Option dated May 1, 1952, attached to this lease.)" and the option contains the sentence: "This option is subject to the attached Lease covering the above property". The two documents must, therefore, be construed together as one agreement.

[2] Only contracts which clearly express the intention of the parties may be specifically performed. The court found that the agreement involved in the instant action was uncertain in that it is not ascertainable therefrom "how or in what manner exercise of the option or tender is to be made, whether by tendering payment of Sixty Five Hundred (\$6500.00) Dollars, or by notice written or oral, or by payment of installments of One Hundred (\$100.00) Dollars per month with or without notice of exercise of the option either orally or in writing".

Appellant in his complaint alleges:

"VII. That on or about April 15, 1954 and in pursuance of and reliance upon said option agreement, plaintiff did tender to defendant John W. Ward, full performance thereupon.

"VIII. That defendant, John W. Ward, did at said time and has since failed, refused, and neglected to accept said tender and did then and has since failed, refused and neglected to transfer and deliver to plaintiff a deed to said property or to perform his obligations under said option agreement in any manner whatsoever.

"IX. That at all times herein mentioned, plaintiff has been and is now ready, willing and able to perform upon said contract."

The court found untrue the allegations of said paragraphs VII, VIII and IX. It was further found:

"VI. * * * That after the term for exercise of the option, as provided therein had ended, and on or about May 4, 1954, plaintiff did personally and verbally offer to defendant, John W. Ward, to set up and establish an escrow for the purpose of purchasing the said above described real property.

"VII. That defendant, John W. Ward, did at said time, that is on or about May 4, 1954, refuse to accept plaintiff's offer to so establish an escrow and did then and has ever since refused to convey and deliver to plaintiff the deed to the above described real property * * *

Appellant in his opening brief contends that "time was not of the essence of the agreement" and that his offer on May 4th to set up an escrow was a due and timely exercise of his option. In this connection he cites and relies upon quotations from the decisions in *Miller v. Cox*, 96 Cal. 339, 31 P. 161; *Voswerk v. Nolte*, 87 Cal. 236, 240, 25 P. 412, and *Katemis v. Westerlind*, 120 Cal.App.2d 537, 543, 545, 261 P.2d 553. The cited cases involve bilateral agreements for the sale and purchase of land and are not applicable to the situation now engaging our attention which concerns only an option to purchase land.

"The nature of such an option is too well settled to require much discussion. It is a unilateral agreement. The op-

tioner offers to sell the subject property at a specified price or upon specified terms and agrees, in view of the payment received, that he will hold the offer open for the fixed time. Upon the lapse of that time the matter is completely ended and the offer is withdrawn. If the offer be accepted upon the terms and in the time specified, then a bilateral contract arises which may become the subject of a suit to compel specific performance, if performance by either party thereafter be refused. It is futile to discuss, as appellant does discuss, the question as to whether or not the written option contained anything indicating that time was of the essence thereof. *Such considerations have nothing to do with options.*" (Emphasis added.) *Auslen v. Johnson*, 118 Cal.App.2d 319, 322, 257 P.2d 664, 666.

The proposal was revoked by the lapse of the time prescribed. Civil Code, Sec. 1587(2).

In appellant's reply brief, he states that "in January the seller went to the buyer and asked him if he was going to exercise the option to purchase the property. The buyer stated 'Yes * * * he intended to purchase the land' * * *. Every \$100.00 monthly payment made thereafter, was a payment on the purchase price on an instalment basis just exactly as the agreement contemplated * * *. Appellant was performing his covenant to pay the purchase price in the manner intended and had been doing so for several months prior to May 1, 1954, but despite this performance, the respondent seller failed and refused to perform his side of the contract by failing and refusing to deliver a deed or to deliver a policy of title insurance."

It is the contention of appellant in his reply brief that his demand for a deed and title policy on May 3rd or 4th was not a belated attempt to exercise the option (which he claims had been exercised by him in January), but merely a demand for performance on the part of the respondent seller, who was then in default.

In this contention, appellant cites and relies upon the cases of *Cates v. McNeil*, 169 Cal. 697, 703, 704, 147 P. 944, 946, and *Murfee v. Porter*, 96 Cal.App.2d 9, 17, 18, 214 P.2d 543. The *Cates* and *Murfee* cases, *supra*, both hold that an option agreement, like any other contract, may be enforced in accordance with the intent of the parties as evidenced by the terms of the agreement. The lease considered in the *Cates* case provided that the lessee (optionee) "after having paid the rent on said premises for the term of ten years, shall *then* have the right and option to purchase said property * * *." The court there found timely service of written notice that the optionees "hereby exercise their option to purchase and are ready and willing to purchase the land in said lease described at the said price * * *" and demand that deed be placed in escrow with the bank, title company, or individual selected by the optionor, and statement that "we will at once deposit therewith the full amount of such purchase price * * *."

In the *Murfee* case, *supra*, the option period expired on June 20, 1947, and the court found that sufficient notice of intention to exercise the option had been served prior to that date. The payment and conveyance were also handled through escrow.

In neither the *Cates* nor the *Murfee* case is payment made an essential condition to the exercise of the option to buy, and in them "all that was necessary * * * to do as far as the terms of the option are concerned in order to constitute a binding contract for the sale and purchase of the premises was to give notice of their acceptance of the right. This they did * * *."

[3] We cannot reconcile the holdings of those two cases, or either of them, with the facts of the instant action. Here the option agreement provided that "If the said payment of \$6,500 is not paid or tendered on or before the First day of May, 1954, then this contract to be void and of no effect, and both parties released from all

obligation herein." No such payment was ever made or tendered.

An option being a unilateral agreement binding only the optionor, it is only fair that the offer therein contained expire at the time therein expressed unless previously exercised in the manner provided. The option in the instant action was not exercised.

The judgment is affirmed.

FOURT, J., and DRAPEAU, Justice pro tem., concur.



155 Cal.App.2d 335

HOME ESCROW SERVICE CORP., a California Corporation, Plaintiff and Respondent,

v.

COUNTY OF LOS ANGELES, Defendant and Appellant.

Civ. 22205.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1957.

Action by taxpayer against county to recover tax allegedly improperly assessed against plaintiff. From adverse judgment of the Superior Court, Los Angeles County, Mildred L. Lillie, J., the county appealed. The District Court of Appeal, Fox, Acting P. J., held that under statutes requiring for every person to file a property statement with the assessor showing all taxable property owned, claimed, possessed, controlled, or managed by person making statement, plaintiff, who was required by escrow agreement to deposit funds received in escrow transactions in plaintiff's own name in trust account, "owned", "possessed" and "controlled" solvent credit in account with in meaning of statute, and was properly assessed as owner of such fund upon failure

to inform assessor as to who were beneficial owners of deposit on assessment date.

Judgment reversed with directions.

1. Taxation ⇨83

Under statutes requiring every person to file a property statement with assessor showing all taxable property owned, claimed, possessed, controlled, or managed by person making statement, plaintiff, who was required by escrow agreement to deposit funds received in escrow transactions in plaintiff's own name in trust account, "owned", "possessed" and "controlled" solvent credit in account within meaning of statute, and was properly assessed as owner of such fund upon failure to inform assessor as to who were beneficial owners of deposit on assessment date. West's Ann. Financial Code, § 17409; West's Ann. Rev. & Tax. Code, §§ 441, 442, 1056, 1058.

See publication Words and Phrases, for other judicial constructions and definitions of "Controlled", "Owned" and "Possessed".

2. Taxation ⇨83

Where escrow agreement required funds received by plaintiff in escrow transaction to be deposited in plaintiff's own name in trust account, and plaintiff claimed it was unable to determine beneficial ownership of deposited funds, funds in account could be assessed to plaintiff either on theory that it was trustee of solvent credits in question for persons known to have interest therein, or a trustee of such property for other persons who had an interest therein but who were unknown to assessor. West's Ann. Financial Code, § 17409; West's Ann. Rev. & Tax. Code §§ 441, 442, 1056, 1058.

3. Courts ⇨107

The language used in any opinion is to be understood in light of facts and issues then before court.

4. Taxation ⇨47(1)

Where escrow agreement required that funds received by plaintiff in escrow transactions be deposited in plaintiff's own name in trust account, and plaintiff failed to in-

form assessor as to who were beneficial owners of deposit on assessment date, and plaintiff had absolute control over deposit, assessment of plaintiff as owner of property did not discriminate against plaintiff as compared with banks and did not result in unconstitutional double taxation. West's Ann. Financial Code, § 17409; West's Ann. Rev. & Tax. Code, §§ 441, 442, 1056, 1058.

Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, Los Angeles, for appellant.

Samuel A. Greenburg, Alhambra, Adrian A. Kragen, Los Angeles, for respondent.

O'Melveny & Myers, Sidney H. Wall, Philip F. Westbrook, Jr., Los Angeles, amici curiae.

FOX, Acting Presiding Justice.

Plaintiff's demand for a tax refund having been denied, it brought this action to enforce repayment. Upon judgment being rendered for plaintiff, the County appealed.

[1] Plaintiff is engaged in the business of handling escrow transactions involving the sale or encumbrance of both real and personal property. In the course of these escrows funds are delivered to the plaintiff to be used in connection with the particular transaction. The escrow instructions provide that "all funds deposited in this escrow shall be placed by you in a trust account in your name in a Chartered Bank designated by you." Financial Code, section 17409 provides that all escrow funds shall be deposited in a bank and kept separate from funds belonging to the escrow agent. The section further provides that such funds, when so deposited, are to be designated as "trust funds," or "escrow accounts," or under other appropriate designation indicating that the funds are not the funds of the escrow agent. See, also, Title 10, Administrative Code, § 1737. In accordance with the agreement of the parties and the statutory direction, plaintiff deposited all funds from its several escrows in separate bank accounts. The deposits were made in

plaintiff's name and were designated "Trust Account."¹

In making its property statement to the county assessor, plaintiff gave the total of its bank deposits that consisted of escrow funds. Plaintiff indicated its inability to identify on the taxing date the parties who were the several owners of or entitled to the funds involved in the respective escrows. It did offer, however, "to give to the agents of defendant a list of its pending escrows upon the assessment date, together with the names and addresses of the parties thereto and the amounts of money on deposit in each escrow," and "to open all its books and records to the defendant." In this factual setting the tax assessor levied an assessment against plaintiff on the solvent credits growing out of the above mentioned bank deposit. Plaintiff paid the tax thus assessed² under protest, filed a claim for refund, which was denied, and then brought this action to recover such payments on the theory that the "plaintiff was not the owner of the moneys upon which said solvent credits tax was levied"; that "the money upon which it was based was money belonging to various buyers and sellers of real property who had employed plaintiff as escrow holder to hold such deposited sums for them pending completion of clearing title to the real property and for business properties being purchased. That said money was the property of said depositors and was assessable to said depositors and not to this plaintiff."

The trial court concluded that plaintiff in the circumstances "is not a trustee nor an agent, but is solely a stakeholder. That escrow funds on deposit with plaintiff escrow holder are taxable, but they are assessable as solvent credits of the parties to and having an interest in the escrow and were not solvent credits owned, controlled or possessed by the plaintiff so as to be subject to solvent credits tax."

In arriving at a decision in this case it is important to bear in mind the character

of property that was assessed for taxes. The crucial question then is: What was plaintiff's relationship to that property?

The property here assessed is not the funds in the hands of plaintiff that have been turned over to it by the various escrow parties. Those funds were not in plaintiff's possession on the assessment date (the first Monday in March) for they had been deposited in the bank in its name in a trust account in accordance with the agreement of the parties to the escrow and in harmony with statutory regulations. Upon the deposit in the bank by plaintiff of the funds the parties to the several escrows had delivered to it, a debtor-creditor relationship arose between the bank and plaintiff. The bank was of course the debtor. Plaintiff, having made the deposit, was the creditor. The credit (generally referred to as a "solvent credit") thus arising from the deposit, is a species of property, an intangible, is subject to taxation (*Pacific Coast Sav. Soc. v. City & County of San Francisco*, 133 Cal. 14, 65 P. 16) and is the particular property that was assessed and taxed to plaintiff in this case.

Every person is required to file a property statement with the assessor (Rev. & Tax.Code, § 441) showing "all taxable property owned, claimed, possessed, controlled, or managed" by the person making the statement (Rev. & Tax.Code, § 442). "The situs of intangibles for taxation is the domicile of the owner or claimant * * *." Rev. & Tax.Code, § 1056. "Intangibles held in trust * * * in this State are taxable solely to the trustee." Rev. & Tax.Code, § 1058.

Under the escrow agreement between plaintiff and the other parties thereto it was expressly provided that the funds delivered to plaintiff would be deposited by plaintiff in its name in a bank in a trust account. Upon those funds being so deposited plaintiff became the owner of the solvent credits thus created. But plaintiff was not the beneficial owner thereof since by

1. Plaintiff had such "trust account" for each of its branches.

2. The tax here involved was for the years 1951, 1952 and 1953.

the agreement of the parties such clearly was not intended. Plaintiff's ownership of the solvent credits was as a trustee for the benefit of the persons who ultimately would be entitled to the money which the solvent credits represented. Regardless, however, of the right of any party to the escrow to require plaintiff to pay over funds upon performance of the terms and conditions specified in the escrow agreement, it is apparent that while the funds were on deposit in plaintiff's name in the bank such party did not have title to them and was not an owner thereof. The bank had title and was the owner for it was a debtor by reason of their deposit in it. As trustee of these solvent credits plaintiff held title thereto and was owner thereof within the meaning of section 442 of the Revenue and Taxation Code and was properly assessed as the owner of the property in question.

Plaintiff also came within the purview of section 442 on the theory that it "possessed" and "controlled" these solvent credits. The bank deposits were in plaintiff's name. It had possession of the documents the bank issued as evidence of the transaction. As above pointed out, plaintiff held title to these solvent credits as trustee. They came into existence by the act of plaintiff in making the deposits, pursuant, of course, to the agreement of the escrow parties. Plaintiff has done nothing to dissociate itself from these property rights. In these circumstances it may fairly be said that these solvent credits are "possessed" by plaintiff.

That plaintiff "controlled" these solvent credits does not seem debatable on any realistic basis. As the person in whose name the bank deposits were made, it follows, as the day the night, that it was on plaintiff's order and plaintiff's order alone that the bank paid out any funds in this trust account. The bank had no knowledge of whom the ultimate beneficiaries might be or when or under what circumstances such parties might become beneficiaries or to what extent; and of course the bank did not have and would not have any authority to honor a check

from any such party. It is crystal clear that since only on plaintiff's order could funds be withdrawn from its trust account in the bank, that plaintiff "controlled" such account and thus "controlled" the solvent credits flowing from the deposits plaintiff, from time to time, made in such account. It is control of the account and the solvent credits created thereby and not control of plaintiff as depositor or trustee of the solvent credits that is here decisive.

Our analysis and conclusion find support in *Title Guaranty & Trust Co. v. Los Angeles County*, 3 Cal.App. 619, 86 P. 844. That case is strikingly similar in its facts to the case at bar. It was a suit by an escrow holder to recover taxes levied against it as a result of escrow funds it had deposited in a bank. The facts, as stated by the court, were: "A verified statement of property for taxation for the year 1904, showing deposits to the amount of \$3,650, and no more, had been given in to the assessor by the plaintiff; and afterward there was included in the plaintiff's assessment by the assessor the following item: 'Escrow money in Merchants' National Bank, \$55,000.' The latter amount was held by the plaintiff as agent or trustee for the owners and purchasers of various tracts of land (22 in number) whose titles it had been employed to pass upon, and was to be paid to the owners or returned to the purchasers (with deduction of charges), according to the result of the search. The question involved is whether this property was assessable to the plaintiff; and this question, we think, must be answered in the affirmative." The court pointed out (3 Cal.App. at page 621, 86 P. at page 845) that *the property assessed "was a fund consisting of credits due from the bank to the plaintiff, over which it had in fact absolute control as agent or trustee of the parties interested in the fund."* (Emphasis added.) This court, in *Bank of America Nat. Trust & Savings Ass'n v. Board of Supervisors*, 93 Cal.App.2d 75, at page 77, 208 P.2d 772, at page 773, in commenting on the *Title Guaranty* case, stated: "Upon deposit of

the funds there was a debt owing to the title company by the bank and thus there was a solvent debt owing to the assessee which was properly taxed as a solvent credit." The court further observed in the Title Guaranty case that "Its [plaintiff's] obligation to the various parties interested in the fund was not that of debtor, but of agent or trustee. Hence, had the facts been disclosed to the assessor by the plaintiff, as under the provisions of section 3629 they should have been, the assessment should have been made to it as agent or trustee of the various parties interested in the fund. Pol.Code, § 3639. But in the absence of this information, the assessor had no other resource than to assess the property to the plaintiff, as required by section 3628, as agent or trustee of parties unknown to him which he in effect did."

[2] It is apparent in the cited case that the plaintiff, as in the instant case, failed to inform the assessor as to who was the beneficial owner of the deposits on the assessment date. Hence, says the court, it was proper to assess the property to the plaintiff "as agent or trustee of parties unknown" to the assessor. Here plaintiff seeks to obviate this difficulty by disclaiming its ability to determine who are the beneficial owners of the fund on the first Monday in March and by making its escrow files available to the assessor for his determination of such ownership. Plaintiff's president estimated that 40,000 escrows had been handled under his supervision, but asserted that he was unable to determine the beneficial ownership of the deposited funds on the taxing date. Yet, plaintiff expects the assessor and his deputies to determine these matters when those working daily in the business are unable to do so. This borders on the absurd. If, on the other hand, the facts regarding the deposit of the escrow funds had been disclosed to the assessor by plaintiff, as they should have been pursuant to the statute, "the assessment," says the court, "should have been made to it as agent or trustee of the various parties interested in the

fund." Thus, under the authority of the Title Guaranty case, the assessment in the instant case against plaintiff was proper either on the theory that it was trustee of the solvent credits in question for the persons known to have an interest therein, or a trustee of such property for other persons who had an interest therein but who were unknown to the assessor. The Title Guaranty case is cited and quoted at length in *S. W. Straus & Co. v. Los Angeles County*, 128 Cal.App. 386, 17 P.2d 757 (hearing denied); see, also, *S. & G. Gump Co. v. City & County of San Francisco*, 18 Cal.2d 129, 131, 114 P.2d 346, 135 A.L.R. 595.

Finally, any question regarding the propriety of the assessment herein is put to rest by the specific provisions of section 1056 of the Revenue and Taxation Code. The solvent credits here assessed are intangibles. They are held in trust by plaintiff, which is a corporation operating and domiciled in this state. Hence under the express terms of the cited code section, they are "taxable solely to the trustee," i.e., to the plaintiff.

Plaintiff relies principally on *Bank of America Nat. Trust & Savings Ass'n v. Board of Supervisors*, 93 Cal.App.2d 75, 208 P.2d 772. That case is not here applicable. The distinction is clear cut and decisive. In that case the bank handled escrow transactions, as does the plaintiff here. In such transactions the bank, upon funds being paid into the escrow, "*credited the funds to a deposit account in the name of the party depositing the money.*" 93 Cal. App.2d at page 82, 208 P.2d at page 776. As the court described the *modus operandi* earlier in the opinion (93 Cal.App.2d at page 77, 208 P.2d at page 774), "There was a separate deposit liability ledger account for each party depositing funds in an escrow transaction, the deposit being credited directly to the account of the party making the deposit." The bank thus became the debtor and the escrow party who had furnished the funds and in whose name they were deposited was the creditor. The depositor was the owner of the sol-

vent credit that was created by the deposit of the funds in the bank in his name. The bank did not own the solvent credit. It owned the money; it was a debtor. Consequently there was no solvent credit growing out of such a transaction on which it could be assessed and taxed. Here, however, plaintiff deposited the escrow funds *in its own name* in a trust account—not in the name of the escrow party who provided them. As previously pointed out, the debt created by this bank deposit was owing to plaintiff and was properly taxed to plaintiff as a solvent credit. *Bank of America Nat. Trust & Savings Ass'n v. Board of Supervisors*, supra, 39 Cal.App.2d at page 77, 208 P.2d at page 773. It is thus obvious that plaintiff's relation to the solvent credits involved in the instant matter is entirely different from the bank's relation to such credits in the *Bank of America* case.

[3] Plaintiff relies on *Weyse v. Crawford*, 85 Cal. 196, 24 P. 735, 737, where the plaintiffs, owners of a warehouse, gave the assessor a statement of the taxable property belonging to them and a description of the property stored with them but explained that they had issued negotiable warehouse receipts therefor and they could not give the assessor the names of the persons to whom the stored property belonged for the reason that they had no way of determining the owners. The court held that plaintiffs were but naked bailees and that possession in such capacity did not justify assessment against them. Plaintiff here relies particularly upon the comment that "To make the party liable to assessment his 'possession' must be one that carries with it the usual marks and indications of ownership." Of course, "it is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court." *Eatwell v. Beck*, 41 Cal.2d 128, 136, 257 P.2d 643, 648; *De Monbrun v. Sheet Metal Workers*, 140 Cal.App.2d 546, 565, 295 P.2d 881. The *Weyse* case dealt with the assessment of tangible personal property which, in the absence of knowledge

of its ownership, could be assessed to unknown owners, seized and sold by the assessor and the tax thereon realized. On the other hand, the property here subject to assessment consisted of solvent credits over which plaintiff had absolute control. It was upon this basis that the court, in the *Title Guaranty* case, distinguished *Weyse v. Crawford*. Further, it is to be noted that in the situation involved in the *Weyse* case, the plaintiffs would be required to surrender possession of the property in their warehouse to any person presenting a proper warehouse receipt. In the instant case, however, plaintiff alone could withdraw the funds deposited in the trust account in the bank. It is thus apparent that the observation in the *Weyse* case with respect to "possession" is wholly inapplicable here.

[4] Plaintiff contends that the imposition of the tax upon it is both inequitable and discriminatory. It asserts that it is in competition with banks engaged in the business of acting as escrow holders, and that the procedure followed by any bank so engaged is identical in effect to that followed by plaintiff. Noting the tax consequences in the *Bank of America* case, plaintiff concludes that achieving a different tax result depending solely on the form of the organization engaged in carrying out the transaction is inequitable and discriminatory. But plaintiff overlooks the fact that it is the owner of solvent credits deposited in the bank. As such it is subject to a tax assessment upon those solvent credits. In the *Bank of America* case the bank was in the position of debtor and not the owner of the solvent credits—they were owned by the depositors to whose accounts the funds were credited. It is therefore apparent there is no discrimination between banks and escrow companies since, in every case, it is the owner of the solvent credit who is assessed. Moreover, it should be noted that the fact that plaintiff will have to pay the tax and then pass it on to the proper party to the escrow by means of increased charges (as provided in the escrow agreement) will not place it

at a competitive disadvantage with banks engaged in the escrow business. When a bank acts as an escrow holder the proper party to the escrow directly bears the tax. Thus, the equitable owner of the money in escrow ultimately pays the tax in each situation. Hence, no inequity results.

Plaintiff's contention that imposition of the tax upon it would result in unconstitutional double taxation is likewise without merit. As noted above, the only assessment levied is that upon the owner of the solvent credit created by the deposit in the bank.

The judgment is reversed with directions to enter judgment for defendant.

ASHBURN, J., concurs.



155 Cal.App.2d 319

Robert ROSE, dba Robert Rose Realty,
Plaintiff and Respondent,

v.

James T. HUNTER, Sr., et al., Defendants,
James T. Hunter, Sr., Oliver I. Anderson,
James T. Hunter, Jr., Boyd E. Merrill,
Defendants and Appellants.

Civ. 17609.

District Court of Appeal, First District,
Division 2, California.

Nov. 19, 1957.

Action for broker's commission against sellers of motel and buyers who negotiated among themselves and effected sale of motel and for conspiracy to eliminate broker from negotiations and avoid paying commission. The Superior Court, Santa Clara County, Curtiss E. Weller, J., entered judgment in favor of buyers and against sellers. The sellers appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to support the trial

court's determination that broker was procuring cause of the sale.

Affirmed.

1. Brokers ⇨84(1)

In absence of special contract, a broker who seeks to recover a commission must establish that he was the procuring or inducing cause of the sale or transaction.

2. Brokers ⇨53

In determining whether a broker was the procuring or inducing cause of a sale or transaction, the term "procuring cause" means the cause originating a series of events that, without break in their continuity, resulted in accomplishment of the prime object of employment.

See publication Words and Phrases, for other judicial constructions and definitions of "Procuring Cause".

3. Brokers ⇨53

In determining whether broker was the procuring or inducing cause of a sale or transaction, the originating cause which ultimately led to the conclusion of the transaction is the procuring cause.

4. Appeal and Error ⇨1011(1)

Trial court's finding on conflicting evidence as to procuring cause in action for broker's commission will not be disturbed on appeal.

5. Brokers ⇨88(3)

In nonjury action for broker's commission, question whether broker was procuring cause of sale of motel was for trial court.

6. Brokers ⇨84(1)

In action for broker's commission, broker who was, in fact, the procuring cause of sale or transaction did not have to prove that he was the first one to bring to the attention of the purchaser the fact that the property in question was for sale.

7. Brokers ⇨86(4)

In action for broker's commission, evidence was sufficient to support trial court's determination that broker was procuring cause of sale of defendants' motel.

8. Appeal and Error ⇨533(1)

The opinion of the trial judge is properly a part of the record on appeal. West's Ann.Rules on Appeal, rule 5(a, b).

9. Appeal and Error ⇨717

The opinion of the trial judge cannot be used on appeal to contradict findings made by the trial judge but such opinion may be considered for the purpose of discovering the process by which the trial judge arrived at his conclusions, or when the opinion furnishes the basis of the court's action in its decision of the case.

10. Appeal and Error ⇨1071(6), 1122(1)

Judgment awarding commission to broker would not be reversed on technical ground that essential finding of procuring cause was lacking where trial judge's opinion established that question of procuring cause was crucial question and that trial judge decided case on basis of his determination that broker was procuring cause of the sale, but District Court of Appeal would make the finding necessary to support the trial court's judgment. West's Ann.Code Civ.Proc. § 956a.

11. Brokers ⇨57(2)

Ordinarily, the price at which a broker is authorized to sell property is considered merely an asking price to guide the broker in his negotiations with prospective purchasers and if the broker procures a purchaser willing to pay a lower price, the owner cannot deprive the broker of his commission by conducting the final negotiations himself and selling at a lower figure to the purchaser procured by the broker.

12. Brokers ⇨57(2)

Where motel owners authorized broker to show motel to qualified buyers with provision that no trades for motel would be considered, motel owners who conducted their own negotiations which resulted in exchange of property with buyer who had been procured by broker were liable to broker for commission.

13. Brokers ⇨44

A seller of property cannot escape his liability to the broker where he revokes the

broker's authority, after a prospective purchaser for the property has been procured, in bad faith and for purpose of avoiding payment of agreed commission.

14. Brokers ⇨57(2)

Where the seller of property voluntarily engages in an exchange of properties, instead of a sale, with prospect procured by seller's broker, the broker's right to a commission is not affected.

15. Brokers ⇨88(14)

On appeal from judgment awarding commission to broker, trial court's findings that buyer carried out negotiation with sellers of motel to exclusion of broker and that buyer was not party to conspiracy to deprive broker of his commission were not inconsistent.

16. Evidence ⇨178(6)

In action for broker's commission, admission of copy of letter from broker putting seller on notice of broker's rights in event of sale of property to prospective purchaser procured by broker was not error where original letter could not be produced.

17. Evidence ⇨178(6)

Where the original letter is lost, a copy can be introduced on proof of mailing the original.

18. Evidence ⇨220(8)

In action for broker's commission, letter from broker putting seller on notice as to broker's rights in event of sale to prospective purchaser procured by broker when coupled with failure of seller to reply thereto was admission against seller's interest, and letter was admissible as such.

Noland, Hamerly & Etienne, Salinas, for appellant.

Dennis L. Woodman, Redwood City, for respondent.

DOOLING, Justice.

Defendants appeal from a judgment awarding plaintiff, a licensed real estate broker, a commission for procuring the sale of a motel near Palo Alto to one

Schmidt. In February 1955 appellant Hunter, Jr., authorized respondent to sell this property for \$197,500. On April 28, 1955 one Spratt, a salesman for respondent, showed the motel to Schmidt. On April 29, 1955, Spratt notified Hunter, Jr., by letter that information concerning the motel had been furnished to Schmidt. The letter stated: "This letter is being sent to you to put you on notice that this office was the procuring agent and that all brokerage rights are being claimed and in the event of a sale to Mr. Schmidt a 5% brokerage commission of the sale price will be due Robert Rose Realty Company." No reply was made to this letter. On May 5, 1955, Hunter, Jr., sent a letter to respondent advising him that the motel was "off the market." On May 31, 1955, another letter was sent to respondent informing him that he could again show the motel to qualified buyers. A postscript to this letter stated: "No trades considered." In the meantime Schmidt had continued to negotiate with appellants and in July, 1955, the motel was sold to Schmidt for \$165,000 which included the transfer of real property belonging to Schmidt at an agreed value of \$30,000.

The complaint joined Schmidt and his brother, named as First Doe, as defendants as well as the appellants. It was in two counts, the first charging that after plaintiff had brought the motel to Schmidt's attention and notified appellants of that fact, the parties had negotiated between themselves to the exclusion of plaintiff and had effected the sale of the property. The second count charged a conspiracy among defendants to eliminate plaintiff from the negotiations and avoid paying him the commission earned by him. The trial court found the allegations of the first count to be true, and on the second count found a conspiracy among appellants as alleged but found that the Schmidts were not parties to such conspiracy. Judgment was against appellants and in favor of the Schmidts.

[1] Appellants' primary contentions are that there is no evidence to support a finding that respondent was the procuring

cause of the sale and that in any event no such finding was made by the trial court and hence the findings fail to support the judgment. "In the absence of a special contract, a broker must be the procuring or inducing cause of a sale or transaction in order to be entitled to commissions thereon." 9 Cal.Jur.2d Brokers, § 80, p. 242.

The defendants and their witnesses testified that Schmidt already knew of appellants' motel and was negotiating for its purchase when he was first shown the property by respondent's salesman. In this respect Schmidt and Hunter, Sr., both testified that when Spratt went to show the motel to Schmidt in the presence of Hunter, Sr., who was on the premises, Spratt was told that Schmidt had already met Hunter, Sr. and had negotiated for the property. Spratt denied this conversation and testified that when he introduced Schmidt to Hunter, Sr., they gave no evidence of having previously met. There was evidence also of one Holderbein that he had called Schmidt's attention to this motel in September 1954. The trial judge filed a memorandum in which he reviewed the evidence. He said in part: "Plaintiff did not participate in the closing of this deal and had no notice of it at the time; he claims, however, to have been the procuring cause of the sale. To determine the matter, it is necessary to go somewhat into the background as developed by the defendants." After a résumé of the evidence the memorandum states the court's conclusions:

"If the plaintiff's salesman did in fact write Plaintiff's Exhibit 1 [the letter of April 29, 1955 from Spratt to Hunter, Jr.], and the Court finds that he did, then the conduct of the defendants is inexplicable. Certainly, no owner is about to ignore the fact that a real estate broker claims commissions on a sale to a certain prospect with whom negotiations are pending, when in fact such negotiations had been initiated before the authorization to the broker. Neither is an owner, who is trained in real estate trans-

actions, likely incorrectly to notify the broker that the property concerned is off the market * * *

"Everything considered, it appears that the plaintiff has made his case against defendants Hunter, Sr., Anderson, Hunter, Jr., and Merrill * * *."

[2-6] "'Procuring cause' has been defined as the cause originating a series of events that, without break in their continuity, result in the accomplishment of the prime object of the employment." 9 Cal. Jur.2d Brokers, § 80, pp. 242-243. "Where several agencies have been active in bringing about a sale * * * the crucial question is, which was the predominating efficient cause?" *Sessions v. Pacific Improvement Co.*, 57 Cal.App. 1, 17, 206 P. 653, 659. "The word 'procure' does not necessarily imply the formal consummation of an agreement. * * * In its broadest sense, the word means to prevail upon, induce or persuade a person to do something. * * * The originating cause, which ultimately led to the conclusion of the transaction, is held to be the procuring cause. [Citation.] * * * And where the evidence is conflicting, the conclusion as to the procuring cause is one for the trial court and will not be disturbed on appeal." *Willson v. Turner Resilient Floors*, 89 Cal. App.2d 589, 595, 201 P.2d 406, 409; *Brea v. McGlashan*, 3 Cal.App.2d 454, 465-466, 39 P.2d 877. If the broker is, in fact, the procuring cause "it is unnecessary for the broker to prove that he was the first one to bring to the attention of the purchaser the fact that the property in question was for sale * * *." *Webster v. Parra*, 72 Cal.App. 639, 648, 237 P. 804, 808.

[7] Weighing the whole course of conduct of the parties and the reasonable inferences to be drawn therefrom the evidence is sufficient to support the determination of the trial court that respondent was the procuring cause of the sale.

[8-10] The quoted language from the trial court's memorandum shows that he considered and decided in respondent's favor the question of procuring cause. The

findings of fact, however, were framed by reference to the pleadings which contained no express allegation of procuring cause. The opinion of the trial judge is properly a part of the record on appeal. Rules on Appeal, rule 5(a) and 5(b). This opinion cannot be used to contradict the findings but "may be considered for the purpose of discovering the process by which the trial judge arrived at his conclusions, or when the opinion furnishes the basis of the court's action in its decision of the case." *Inskeep v. Bear Creek Co.*, 54 Cal.App.2d 723, 729, 129 P.2d 401, 404; *In re Oster*, 135 Cal. App.2d 769, 775, 287 P.2d 859; *Kallmeyer v. Poore*, 52 Cal.App.2d 142, 152, 125 P.2d 924. It is clear from this opinion that the trial judge fully realized that the question of procuring cause was the crucial question in the case and decided the case on the basis of his determination that respondent was the procuring cause of the sale. It would serve no purpose to reverse the case on the purely technical ground that an essential finding is lacking when we know from the trial judge's opinion that upon reversal he would make the necessary finding to support his judgment and we have the power to make that finding. Code Civ. Proc. § 956a.

The exact terms of the listing with respondent were never proved. At the opening of the trial counsel for respondent asked counsel for appellants of it would be stipulated "that Robert Rose had sufficient authority to satisfy the statute of fraud [sic]" and counsel for appellants replied: "Yes. I would stipulate to that." It was testified that the listing was at a price of \$197,500 and nothing further as to its terms was established.

[11] "Ordinarily, the price at which a broker is authorized to sell property is considered merely an asking price to guide the broker in his negotiations with prospective purchasers. See Rest. Agency, § 447, Comment b. If the broker procures a purchaser willing to pay a lower price, the owner cannot deprive the broker of his commission by conducting the final nego-

tiations himself and selling at a lower figure to the purchaser procured by the broker. See 128 A.L.R. 430; *Leicht-Benson Realty & Construction Corp. v. J. D. Stone & Co.*, 138 Va. 511, 121 S.E. 883, 43 A.L.R. [1100] 1103." *Palmtag v. Danielson*, 30 Cal.2d 517, 521, 183 P.2d 265, 267; *Filante v. Kikendall*, 134 Cal.App.2d 695, 286 P.2d 448; *Baker v. Curtis*, 105 Cal.App.2d 663, 234 P.2d 153; *Rutherford v. Berick*, 82 Cal. App.2d 331, 186 P.2d 23.

[12-14] Appellants, however, argue that having terminated the agency by their letter of May 5, 1955, and by their letter of May 31, 1955, having given authority to sell but not to negotiate an exchange of properties (by the postscript language: "No trades considered"), the respondent failed to find a buyer in accordance with his authorization because an exchange of property at an agreed price of \$30,000 was a part of the final transaction. The principal cannot escape his liability to the agent where he revokes the agent's authority, after a prospective purchaser for the property has been procured, in bad faith and for the purpose of avoiding the payment of the agreed commission. *Heffernan v. Merrill Estate Co.*, 77 Cal.App.2d 106, 117, 174 P.2d 710; *Walter v. Libby*, 72 Cal.App.2d 138, 144, 164 P.2d 21. It is equally clear that he could not put a new limitation on his broker's authority for the same purpose. Here the trial court expressly found that appellants " * * * did conspire * * * to eliminate plaintiff from said negotiations and transaction and thereby avoid paying plaintiff the brokerage commission earned by him * * *." This the law will not permit them to do. Where the owner as here voluntarily engages in an exchange of properties instead of a sale, with the prospect procured by his broker the broker's right to a commission is not affected. *Bail v. Glantz*, 78 Cal.App. 49, 56, 248 P. 258.

[15] There is no inconsistency between the finding that Schmidt carried out the negotiations with appellants to the exclusion of respondent and the finding that the Schmidts were not parties to the conspiracy to deprive respondent of his commission. The fact that the negotiations were carried to a conclusion without respondent's participation does not compel a finding that the Schmidts were consciously parties to a scheme to deprive respondent of his commission.

[16-18] The admission of a copy of the letter of April 29, 1955, from Spratt to Hunter, Jr., was not error. When the copy was produced counsel for respondent asked counsel for appellants if they had a copy of the letter. Counsel for appellants answered: "We don't have a copy of the letter * * *." Where the original is lost a copy can be introduced on proof of mailing the original. *Hughes v. Pacific Wharf & Storage Co.*, 188 Cal. 210, 205 P. 105. Counsel's statement that they did not have the letter shows that a more formal demand to produce it would have been futile and it was therefore unnecessary. The letter coupled with the failure of appellant Hunter, Jr., to reply thereto could be, as it was, construed by the trial court as an admission against interest. *Simpson v. Bergmann*, 125 Cal.App. 1, 8, 13 P.2d 531.

The findings of fact are ordered amended by adding thereto the following: "The court further finds that plaintiff was the procuring cause of the sale of said motel by defendants James T. Hunter, Sr., Oliver I. Anderson, James T. Hunter, Jr., and Boyd E. Merrill to said Walter Schmidt." The judgment is affirmed.

KAUFMAN, P. J., and DRAPER, J.,
concur.

155 Cal.App.2d 396

**Audrey G. MENEFEE, Plaintiff and
Respondent,**

v.

**Winnifred R. CODMAN, Defendant and
Appellant.**
Civ. 9080.

District Court of Appeal, Third District,
California.

Nov. 21, 1957.

Rehearing Denied Dec. 13, 1957.

Hearing Denied Jan. 15, 1958.

Libel action. The Superior Court, Sacramento County, J. O. Moncur, J., entered judgment for plaintiff on one count and granted new trial on remaining two counts and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that publication concerning newspaper woman and teacher regarding her Paris trip questioning who covered newspaper woman while she covered Paris waterfront and containing statement to effect that surely she didn't slip along uncovered and containing a reference to a movie and attached advertisement which showed a woman scantily clad was libelous on its face and newspaper woman was not required to plead explanatory circumstances and special damage.

Judgment and order affirmed.

1. Libel and Slander ⚭16, 17

To ascribe to an individual the sexual deviation described in psychology textbooks as constituting narcissism, whatever the degree of such deviation, is to expose that person to hatred, contempt, ridicule, obloquy, and to cause him to be shunned or avoided.

2. Libel and Slander ⚭81, 86(2)

Publication to effect that plaintiff should have been named "Narcissus" and directing reader to hunt up psychology textbooks with reference to term was libelous on its face and did not require plaintiff to plead explanatory matters such as inducement, innuendo, or other extrinsic fact. West's Ann.Civ.Code, § 48a, subd. 4.

3. Libel and Slander ⚭100(1)

Where a publication has been determined to be libelous on its face, fact that explanatory matter, such as inducement, innuendo, or other extrinsic fact is pleaded, is immaterial and may be disregarded as surplusage. West's Ann.Civ.Code, § 48a, subd. 4.

4. Libel and Slander ⚭81, 89(1)

Publication concerning newspaper woman and teacher questioning her Paris trip and containing statement questioning who covered newspaper woman while she covered Paris waterfront and statement to effect that surely she didn't slip along uncovered and containing a reference to a movie and attached advertisement which showed a woman scantily clad was libelous on its face and newspaper woman was not required to plead explanatory circumstances and special damage. West's Ann.Civ.Code, § 48a, subd. 4.

5. Libel and Slander ⚭16, 17

Publication which was subject to reasonable construction that newspaper woman wore an old blouse and dirndl along Paris waterfront and that she was thus unsuitably clad and that her husband should have furnished her with proper clothes for trip, that is, expensive nightgowns and negligees, exposed newspaper woman to contempt, ridicule, obloquy and avoidance and was libelous on its face. West's Ann.Civ.Code, § 48a, subd. 4.

6. Libel and Slander ⚭112(2)

In action for libel, evidence supported finding that defendant had been motivated by express malice in her writings concerning plaintiff as to count based on statement that plaintiff should have been named Narcissus and directing reader to hunt up psychology textbooks in reference to the term.

7. Libel and Slander ⚭100(1)

Pleading extrinsic facts by way of innuendo, colloquialism, and inducement does not constitute waiver of right to recover general damages or, if malice be present, exemplary damages where defamatory

statements are libelous per se. West's Ann. Civ.Code, § 48a, subd. 4.

8. Libel and Slander ⇨123(2)

In action for libel, instruction to effect that even though word Narcissus meant a flower and that it was not ordinarily libelous to refer to a person, particularly a woman, as a flower, but that defendant's readers had been directed to hunt up psychology textbooks in reference to use of word Narcissus and if jury found from evidence that special meaning of Narcissus as defined in psychology textbooks referred to a person afflicted with abnormal self-love then publication, if untrue and unprivileged, was libelous, was proper. West's Ann.Civ. Code, § 48a, subd. 4.

9. Libel and Slander ⇨33

Actual, that is general, damage is presumed from libel per se and jury may make a reasonable award in such a case without further proof.

10. Libel and Slander ⇨6(1)

Libel as a matter of law is what is meant by libel per se.

11. Appeal and Error ⇨1064(1)

In action for libel, although instruction regarding reiteration of libelous statements was not justified, instruction did not amount to prejudicial error.

12. Libel and Slander ⇨52

One cannot justify his conduct in assailing reputation of another by saying that he acted merely in jest unless it is perfectly manifest from language employed that it can in no respect be regarded as an attack on person to whom it relates; nor is publication of a statement reflecting on plaintiff rendered any the less libelous by fact that defendant circulated statement merely to amuse her readers.

13. Appeal and Error ⇨1068(1)

Where appellate court determined that defendant's publications were libelous per se, no detriment could have been suffered by defendant by trial court's instruction in allegedly submitting issue of libel per se to jury.

Dan L. Garrett, Jr., San Francisco, William B. Boone, San Francisco, of counsel, for appellant.

Pierce & Brown, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a money judgment on one count of respondent's complaint and from an order granting a new trial on the remaining two counts as to which the jury had returned defense verdicts. The action was for libel.

Respondent is a resident of Fair Oaks community, near Sacramento. Since 1948 her husband has published a weekly newspaper for which respondent wrote a column dealing with shopping news and her personal thoughts and observations. The Menefees had four young children. In addition to her household duties and her work on the newspaper, respondent also taught psychology part time at Sacramento State College. She participated actively in community affairs and bore an excellent reputation as housewife, mother, church attendant, teacher and writer.

Appellant is a long-time resident of Fair Oaks community. She is descended from a pioneer family, is a member of the Daughters of the American Revolution, owns property in excess of \$100,000, and has long interested herself in community affairs, in which she generally takes strong partisan positions and concerning which she has a penchant for public utterances, both verbal and in the form of long letters to the editors of newspapers. She sometimes publishes and circulates tracts of her own. She is an influential member of her community.

Count I of the complaint herein charged that appellant wrote and published of respondent the following:

"Seems strange that such an obscure little person as 'plain Audrey' should assume such a responsibility. ('How one small head * * *'. * * * Some of us here think that plain audrey * * * should have been named 'Nar-

cissus'. Hunt up your psychology textbooks for that one—* * *.)

"Will plain Audrey's 'Operation Europe' or 'Mission to Europe' include other activities besides Telling the World how to become popular in a small town (or is Audrey really qualified to advise them?) and how to run a rural newspaper?"

The second count averred that appellant wrote and published of respondent the following:

"Plain Audrey's Trip to Europe still is causing a lot of local yokel comment whenever mentioned. We see a late movie advertised—could that have been the real reason Plain Audrey went to Europe? The movie is titled 'Under the Paris Sky'—at the Guild Theatre, 35th and Broadway. The gal on the advertisement looks as though she wore a dirndl. When we come across Plain Audrey's column on Paris, where she tells about her trip to the water front, then we'll know. Meanwhile Plain Audrey's water front 'coverage' will intrigue us. But what we all want to know is, *who* covered Audrey while Audrey covered the water front? Surely Audrey didn't slip along uncovered—no, she told us she wore a dirndl and an old blouse. Oh, well, we were just reminded of that old game about who took care of the caretaker's daughter. We just changed the wording."

By the third count, respondent alleged that appellant wrote and published of and concerning her, the following:

"The San Juan Record's Associate Editor, no less! reported on her recent trip to Europe that she wore an old blouse and dirndl (was it? or slacks?) along the Paris waterfront. We presume she was 'covering the waterfront'? We feel sorry indeed that she didn't have proper clothes for this assignment, and we venture to suggest that the Editor, Boss, Dear Selden or what-you-prefer open a charge account at I. Magnin's (that is, if his credit

rates that good), and then his hard-working liddle wife won't have to slink along the waterfront in an outdated dirndl (if that's what she wore?).

"Sample Magnin advertising leaflet attached—it says, 'A fulfillment of your most luxurious dreams'—and these dreams go as high as \$69.95 for a 'permanently pleated' gown. Time O'Day indicated in advertisement."

It was alleged that there was attached to said writing, and addressed and mailed therewith, an advertisement for nightgowns and negligees. The advertisement contained pictures of ladies in various and sundry types and designs of nightgowns, negligees or other bedroom attire.

Alleging in each count that she had been an instructor and during a part of the years of 1951 and 1952 had been engaged in the occupation and profession of Associate Professor on a part-time basis at the Sacramento State College, that she had for several years been engaged in the occupation of Women's Editor and Associate Editor of a newspaper of general circulation, to-wit, the San Juan Record, that at all times she possessed and enjoyed a good name and reputation and a wide following of readers in Sacramento County, respondent asserted that as a natural and proximate result of the alleged publications she had been greatly injured and prejudiced in her reputation, in her calling, occupation and profession as an instructor, editor and columnist, and had lost, and would continue to lose, gains and profits which otherwise would have accrued to her in her said calling, occupation and profession to her damage in the sum of \$15,000. Respondent further alleged in each count that by reason of the publications she had been caused to suffer grievous mental suffering and humiliation to her damage in the further sum of \$15,000, and that the publications had been made maliciously with the intent to injure her; wherefore she demanded exemplary and punitive damages.

Appellant demurred generally to the pleading, contending that the alleged defam-

atory publications were each not libelous per se or libelous on the face; that only general damages, as opposed to special damages, were pleaded and, therefore, that no cause of action was stated. The demurrers were overruled. Throughout the trial this contention of appellant was asserted by her and it here constitutes one of the major issues on appeal.

In 1944, there was published in the Southern California Law Review, Volume 17, Page 347, an article by Professor Charles E. Carpenter, the first paragraph of which reads as follows:

"The well established historical distinction between libel and slander is already, by reason of its artificial, illogical and unsound character, sufficiently confusing. But the existing confusion has been increased by the wholly unwarranted doctrine of 'libel per se,' which has recently arisen in California and several other States. This doctrine is to the effect that, if the publication is defamatory on its face—that is if extrinsic circumstances are not necessary to reveal its defamatory character—it is 'libelous per se' and an action may be maintained without alleging or proving special damages. If the defamatory character of the publication is not obvious on its face but is hidden and requires inquiry into extrinsic circumstances to make it so, then it is not actionable unless special damages are alleged and proved. A peculiarity of the situation is that the parents of this odd creature—the courts—do not realize, despite the labor pains of its birth, that they have brought forth a child. This article is written for the benefit of lawyers and courts of the States that have produced the new offspring, so that they may see that it is a new creature, and that it is ugly and illegitimate and ought promptly to be strangled."

As though fearful that the attack of Professor Carpenter and other law writers upon the misbegotten infant's right to live might result in judicial filicide, the Legis-

lature in 1945 legitimated the child by enacting Chapter 1489 of the statutes of that year. Therein it declared that a libel which is defamatory without the necessity of explanatory matter, such as inducement, innuendo, or other extrinsic fact, is said to be a libel on its face; that defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof; that special damage consists of all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other. Respondent contends that the defamatory words pleaded in each count are libelous per se and further contends that if this be not true then she has sufficiently pleaded and proved special damages as that term is statutorily defined. If she is right in her first contention, then we do not reach the second, for if a publication is libelous on its face then all damages—general, special or exemplary—properly pleaded under applicable rules of pleading may be recovered according to the proof.

[1-3] The sting of the charge in Count I of the complaint is found in the matter we have quoted: "Seems strange that such an obscure little person as 'plain Audrey' should assume such a responsibility. ('How one small head * * *'. * * * Some of us here think that plain audrey * * * should have been named 'Narcissus'. Hunt up your psychology textbooks for that one.')" The Greek myth centering around Narcissus and his affair with Echo is commonly known and understood. While to state that a person ought to have been named, that is that a person resembled, Narcissus could scarcely be called complimentary, it would not, however, be a statement libelous on its face. But a different connotation entirely is brought in by the direction: "Hunt up your psychology textbooks for that one", for it was shown that from the myth of Narcissus there has

stemmed a term commonly used in psychology to classify, with respect to adults, a definite pathology called narcissism or narcissism. When appellant instructed her readers to hunt up their psychology textbooks to discover what she meant by saying respondent ought to have been named Narcissus, she made it plain that she was not referring to anything innocent in nature. Even the dictionary uses the term "narcissism" as meaning, psychologically speaking, "Erotic feeling aroused by one's own body and personality, regarded by Freud as a normal state in sexual development; pathologically, fixation at, or regression to this stage." There was definite proof as to what appellant's readers would have found had they obeyed her admonition. A qualified witness, a professor of psychology from Boston University, testified that the word "Narcissus" has a special meaning to a psychologist in the field of abnormal psychology; that it refers to abnormal self-love; that is to a form of self-love in which a person falls in love with himself as a man might fall in love with a woman; that it is an abnormal psychological characteristic or trait; that there are degrees of this trait as of any trait; that the term would not be used to refer to normal behavior; that it would only be used to refer to psychopathic or abnormal behavior; that the degrees would extend all the way from a person who did not engage in any overt sexual practices related to himself to a person who also engaged in masturbation and other forms of abnormal sexual behavior to a very excessive extent and to the exclusion of sexual relations with members of the opposite sex; that one suffering from narcissism would find it impossible to have normal sexual relations with a member of the opposite sex; that while it is not common for psychologists to refer to a person suffering from narcissism as a Narcissus he could be so called and there would be no mistaking what was meant; that the terms defined had no other meaning in psychology textbooks except the abnormal condition above described, and that every textbook on abnormal psychol-

ogy described narcissism as did all textbooks on general psychology which contained a section on abnormal psychology. By directing her readers to texts on psychology, appellant plainly indicated that she was not dealing with the innocuous Greek myth, but with something they would find related to that myth in psychology textbooks. It cannot be properly argued with respect to the pleading in Count I that there is any ambiguity in the publication by reason of which an innocent and non-libelous meaning could fairly be ascribed thereto. To ascribe to any individual the sexual deviation described in psychology textbooks as constituting narcissism, whatever the degree of such deviation, is to expose that person to hatred, contempt, ridicule, obloquy, and to cause him to be shunned or avoided. And certainly such a publication has a tendency to injure him in his occupation. Particularly is this true when spoken of a teacher or a writer. We hold that the publication stated in Count I of respondent's complaint was libelous on its face and, therefore, did not require the pleading of explanatory matters such as inducement, innuendo, or other extrinsic fact. Of course, the fact that such matters were pleaded is immaterial here for if matter libelous on its face be shown, a pleading of explanatory matter may be disregarded as surplusage. *Bates v. Campbell*, 213 Cal. 438, 2 P.2d 383.

By the second allegedly libelous publication appellant told her readers: "Plain Audrey's Trip to Europe still is causing a lot of local yokel comment whenever mentioned. We see a late movie advertised—could that have been the real reason Plain Audrey went to Europe? The movie is titled 'Under the Paris Sky'—at the Guild Theatre, 35th and Broadway. The gal on the advertisement looks as though she wore a dirndl. When we come across Plain Audrey's column on Paris, where she tells about her trip to the water front, then we'll know. Meanwhile Plain Audrey's water front 'coverage' will intrigue us. But what we all want to know is, *who* covered Audrey while Audrey covered the water front?

Surely Audrey didn't slip along uncovered —no, she told us she wore a dirndl and an old blouse. Oh, well, we were just reminded of that old game about who took care of the caretaker's daughter. We just changed the wording."

Appellant argues that the foregoing publication was not libelous on its face because from the whole publication it is apparent that what is said is fairly susceptible of an innocent and non-defamatory meaning. She cites 30 California Jurisprudence 2d 742-743 and *Babcock v. McClatchy Newspapers*, 82 Cal.App.2d 528, 533, 186 P.2d 737.

[4] Respondent asserts that in this publication the sting of the charge is in the question, "*who* covered Audrey while Audrey covered the water front?", insisting that the words are used in the sexual sense and pointing to the dictionary definition appearing in Webster's New International Dictionary wherein the verb "cover" is defined inter alia as "to copulate with (a female); to serve; as, a horse covers a mare." Respondent points to testimony that gossiping groups discussing this letter considered that appellant was accusing respondent of street-walking in Paris to cover the expenses of her European trip. Appellant cites the numerous definitions of the word "cover" to be found in dictionaries and insists that the words she used are to be construed according to innocent meanings. Her own testimony was that by the word "cover" she meant "watched by government agents" lest respondent engage in subversive activities of the communist variety. The question then in construing the pleading is whether or not the publication as pleaded is libelous on its face. If the words used are reasonably susceptible of non-defamatory construction, then Count II does not state a cause of action unless it includes, as respondent contends it does, a proper pleading of special damage within the terms of the statute. It is difficult to ascribe an innocent meaning to this publication. The use of the verb "cover" as meaning copulation is as indicated by the dictionary definition generally

connected with the breeding of animals; it might be described as a barnyard colloquialism but appellant asserted that plain Audrey's trip to Europe was causing a lot of local yokel comment whenever mentioned and city folk often refer to the farm population as "local yokels". Then comes the reference to the movie and the attached advertisement which shows a woman scantily clad in what appears to be a negligee, a brassiere, and little else. The title of the movie is given in the advertisement as "Under the Paris Sky." The foregoing preface is followed by the words "Meanwhile Plain Audrey's waterfront 'coverage' will intrigue us. But what we all want to know is, *who* covered Audrey while Audrey covered the water front?" The implication is plain that somebody covered Audrey while she was on the waterfront, and the query is who was it that did so. "Surely", appellant continued, "Audrey didn't slip along uncovered," all of which appellant asserted reminded her "of that old game about who took care of the caretaker's daughter." Is all of this reasonably susceptible of an innocent construction? Isn't it plain that appellant is here seeking to expose respondent to ridicule, if no worse? We think the only reasonable construction of the whole publication is that upon its face it does expose respondent to ridicule. That much we think is certain even if it can be reasonably argued that the publication does not charge respondent with prostitution. But if the publication did expose respondent to ridicule, and such we think is its fair meaning, then it was libelous, and it was unnecessary, in stating a cause of action, to plead explanatory circumstances and special damage.

[5] The third count presents little difficulty. The libelous matter reads: "The San Juan Record's Associate Editor, no less! reported on her recent trip to Europe that she wore an old blouse and dirndl (was it? or slacks?) along the Paris waterfront. We presume she was 'covering the waterfront'?" We feel sorry indeed that she didn't have proper clothes for this assignment, and we venture to suggest that the

Editor, Boss, Dear Selden or what-you-prefer open a charge account at I. Magnin's (that is, if his credit rates that good), and then his hard-working lille wife won't have to slink along the waterfront in an outdated dirndl (if that's what she wore?) Sample Magnin advertising leaflet attached—it says, 'A fulfillment of your most luxurious dreams'—and these dreams go as high as \$69.95 for a 'permanently pleated' gown.' Attached to the writing and published with it as a part thereof was an advertisement for nightgowns and negligees. Here the reasonable construction of the entire publication is that respondent wore an old blouse along the Paris waterfront and that she was thus unsuitably clad; that her husband should not have condemned her to slink along the waterfront in such clothing and should have furnished her with proper clothes for her trip along the waterfront, that is, with expensive nightgowns and negligees. Fairly construed, the publication, taken as a whole, exposed respondent to contempt, ridicule, obloquy and avoidance. It also had a clear tendency to injure her in her occupation as teacher and writer. It was libelous on its face.

[6] Although appellant contends that respondent failed to prove a cause of action, it is apparent that the contention is concerned with the necessity of pleading and proving special damages, which contentions we have already treated. It could not be claimed that the evidence was insufficient to support the verdict of the jury as to Count I, nor insufficient to have supported verdicts on Counts II and III had the jury ruled in favor of respondent on those counts, for it was substantially shown that there was much talk and comment among people living in the Fair Oaks community after the various libelous publications were made, the comment ranging all the way from ridicule to assertions that appellant was charging respondent with sexual misbehavior of a gross nature. There was testimony also that respondent did suffer general damage as defined by Civil Code Section 48a, Subdivision 4, that

is, loss of reputation, shame, mortification, and hurt feelings. There was substantial support also for the jury's finding as to Count I that appellant had been motivated by express malice in her writings concerning respondent. In short, the record fully supports the jury's finding that as to Count I respondent had been generally damaged in the sum of \$100 and that she was entitled to exemplary damages in the sum of \$5,000. The jury found in appellant's favor on Counts II and III, but had their verdicts been otherwise reasonable awards of general and exemplary damages would have been supported.

[7] Appellant contends that the case was pleaded, tried and submitted to the jury on the theory that the publications were not libelous per se, and, consequently, respondent, having recovered a judgment based upon the testimony of her witnesses as to the meaning of the language used, it does not now lie in her mouth to claim that the language was not subject to varying interpretations. This contention is not sound. Pleading extrinsic facts by way of innuendo, colloquialism, and inducement does not constitute a waiver of a right to recover general damages or, if malice be present, exemplary damages where the defamatory statements are libelous per se. *Bates v. Campbell*, supra, 213 Cal. at page 443, 2 P.2d 383.

[8] Appellant argues there were various prejudicial errors committed by the trial court in instructing the jury. The first assignment of error has to do with an instruction addressed to the first count. The court read the publication charged to be libelous, as set forth in Count I, and then continued by telling the jury that a narcissus is a flower; that it is not ordinarily libelous to refer to a person, particularly a woman, as a flower; that that use of the word narcissus would ordinarily be a term which could have an innocent meaning and which, therefore, would not be libelous on its face. The court continued to say, however, that when in the same publication, which admittedly referred to respondent, appellant had said "Hunt up

your psychology textbooks for that one", that the appellant was clearly instructing her readers that the meaning she intended to convey was a special one and was to be found in psychology textbooks; that, therefore, if they found from the evidence that the special meaning of "Narcissus" as defined in a psychology textbook referred to a person afflicted with abnormal self-love, then the publication if untrue and unprivileged was libelous. In view of what we have already said in discussing the contention that the publication referred to was not libelous on its face, we think no further discussion of this assignment of error is necessary. We hold the instruction stated the law. Appellant further contends that several instructions were given at the request of respondent to the effect that if the publications were made maliciously respondent could recover punitive damages without regard to proof of actual damage or "the existence of libel." The reference is to instructions such as the following:

"The question as to whether or not you should allow exemplary or punitive damages in addition to the compensatory damages allowed, if any, turns upon the question of whether or not such publication was made maliciously. You are entitled to add such sum by way of exemplary or punitive damages and to award the same to the plaintiff in addition to the actual or compensatory damage against the defendant, if you find the defendant was actuated by malice in fact towards the plaintiff; * * *

[9,10] By this instruction, says appellant, the jury were told that respondent was entitled to punitive damages upon the mere proof of malice without any necessity of finding any further facts, such as whether or not respondent had been libeled and whether or not she had suffered any actual damage. But there was libel as a matter of law. That is what is meant by libel per se. It was for the court in this case to settle that issue. 30 Cal.Jur.2d p. 726; Peabody v. Barham, 52 Cal.App. 2d 581, 584, 126 P.2d 668. The second

part of the challenge cannot be sustained because proof of actual damage in the sense of money loss in this case was unnecessary to the recovery of general damages, and, if malice was present, to the recovery of exemplary damage. Actual, that is general, damage is presumed from libel per se and as we have said there was direct proof of such damage. A jury may make a reasonable award in such a case without further proof just as the jury may award a reasonable sum in other tort cases on proof of pain and suffering wrongfully inflicted.

[11] The court advised the jury in considering whether the defendant was guilty of malice in fact it was proper to consider, among other things, "Any repetition of the libelous statements made in the answer filed by the defendant, if you find from the evidence that such repetition was in bad faith." The court further instructed the jury:

"You are instructed that where a defendant reiterates libelous charges in her answer and offers no evidence to prove their truth and you are satisfied that such charges were made with knowledge of their falsity and maliciously and not in good faith, such plea, if so made, is an aggravation of the wrong done to the plaintiff and may be considered by you in assessing exemplary damages."

Appellant asserts, as is true, that she did not plead the defense of truth or justification and that the only reiteration of libelous matter occurred in the answer when she quoted fully what she had written because respondent in her complaint had omitted something. The matter omitted and filled in by the answer appears to have been of little moment. It neither added to nor detracted from the libel. Appellant's argument is that the instruction is inaccurate in that there had been no reiteration of libelous statements and the court indirectly told the jury that there was. The jury ought not to have been instructed on the subject of reiteration of libelous statements in the absence of material reiteration, but

the court did not, in fact, tell the jury that there had been reiteration and we cannot assume that the jury so understood. While we cannot justify the giving of the instruction, we do not believe that any prejudice resulted therefrom.

[12] The court instructed the jury that:

"* * * [O]ne cannot justify his conduct in assailing the reputation of another by saying that he acted merely in jest unless it is perfectly manifest from the language employed that it can in no respect be regarded as an attack upon the person to whom it relates. Nor is the publication of a statement reflecting on the plaintiff rendered any the less libelous by the fact that the defendant circulated the statement merely to amuse her readers."

In her testimony the appellant had taken the stand that she, in what she said, was merely "poking fun" at the respondent; that she was jesting and was not dealing seriously with the subject matter of her statements. The instruction was proper under the circumstances and in view of appellant's testimony. 53 C.J.S. Libel and Slander § 9, p. 46.

[13] Appellant asserts it was error for the court to submit the issue of libel per se to the jury, asserting that it is the exclusive function of the court to determine whether a publication is libelous per se. *Peabody v. Barham*, supra. However, we fail to see, in view of our holding that the publications were libelous per se, that any detriment could have been suffered by appellant from the court's instructions.

With respect to her appeal from the trial court's order granting respondent a new trial on the second and third counts of her complaint, it is claimed that the order is not supported by the pleadings or the proof. First, the same attack that was made as to Count I is reiterated as to Counts II and III, that is, that the publications were not libelous per se and, therefore, since special damages were not pleaded or proved, the court erred in granting new trials. We have already discussed this assignment. Respondent asserts further in reply to the attack upon the order granting new trial that she did, in fact, plead and prove special damages as that term is defined in the code sections. We think it unnecessary to discuss this contention. We have already held that respondent could recover on these counts without pleading or proving special damages as so defined. If she seeks to recover special damages, and her pleading thereof is imperfect, she can apply to the trial court upon retrial for leave to amend. Among other grounds, the new trial as to Counts II and III was granted upon insufficiency of the evidence. In the state of the record presented here, this was a matter within the discretion of the trial court according as it weighed the evidence and no attempt is made to argue that upon that ground the court acted in abuse of discretion.

The judgment and the order appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.

CALIFORNIA REPORTER

318 PACIFIC REPORTER

SECOND SERIES

CALIFORNIA REPORTER

318 PACIFIC REPORTER

SECOND SERIES



49 Cal.2d 397

Julian LEIN, Plaintiff and Appellant,

v.

Roy PARKIN, Defendant and Respondent.

L. A. 24663.

Supreme Court of California,
In Bank.

Nov. 19, 1957.

Action by automobile passenger against driver of automobile for personal injuries. The Superior Court, Los Angeles County, Frederick F. Houser, J., entered judgment for driver and passenger appealed. The Supreme Court, Spence, J., held that trial court improperly considered question of plaintiff's assumption of risk when defendant had not pleaded either that defense or defense of contributory negligence and neither defense had been discussed prior to time that the trial court made its finding of assumption of risk, even though passenger introduced evidence that after he became aware of driver's negligent manner of driving, he nevertheless elected to continue with trip.

Judgment reversed; purported appeal from order denying motion for new trial dismissed.

Opinion, 311 P.2d 76, vacated.

1. Appeal and Error Ⓒ110

Order denying motion for new trial is not appealable and therefore attempted appeal therefrom must be dismissed. West's Ann.Code Civ.Proc. § 956.

2. Appeal and Error Ⓒ883

Where automobile accident occurred in New Mexico, but trial was conducted as if

California law applied and briefs on appeal were also predicated on applicability of California law, both plaintiff and defendant were deemed to have agreed to have issues determined pursuant to California law and issues would be resolved according to California law.

3. Automobiles Ⓒ244(56)

In action by automobile passenger against driver for personal injuries sustained as result of accident, evidence was sufficient to support finding that passenger had assumed risk in that, after passenger became aware of driver's negligent manner of driving, passenger elected to continue to ride in automobile.

4. Trial Ⓒ396(5)

Under certain circumstances, findings outside issues made by pleadings can be appropriate where the evidence supporting findings has been introduced without objection.

5. Automobiles Ⓒ243(3)

An automobile passenger could introduce evidence of specific acts of negligence on part of automobile driver in addition to evidence which might give rise to res ipsa loquitur inference.

6. Trial Ⓒ396(2)

In action by automobile passenger against driver for personal injuries sustained as result of accident, trial court improperly considered question of passenger's assumption of risk when defendant had not pleaded either that defense or defense of contributory negligence and neither defense had been discussed prior to time that trial judge made finding concerning passenger's assumption of risk, even though passenger introduced evidence that after he became

aware of driver's negligent manner of driving, he nevertheless elected to continue with trip.

7. Appeal and Error ◊883

In action by automobile passenger against driver for personal injuries sustained as result of accident, passenger was not estopped to challenge trial court's finding that passenger had assumed risk, on theory that unpleaded issue of assumption of risk was actually tried where evidence relied upon to justify trial court's consideration of unpleaded issue of assumption of risk was relevant to pleaded issue of defendant's negligence.

Pestana & Kidwell, Hollywood, and Hugh R. Manes, Los Angeles, for appellant.

Hill, Farrer & Burrill, Kenneth J. Murphy and Henry E. Kappler, Los Angeles, for respondent.

SPENCE, Justice.

[1] Plaintiff appeals from a judgment entered in favor of defendant in a personal injury action. Plaintiff also purportedly appeals from the order denying his motion for a new trial. The latter order is not appealable and the appeal therefrom must be dismissed. Code Civ.Proc. § 956; *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 308 P.2d 713.

The trial court, sitting without a jury, found that plaintiff was a "passenger" in defendant's automobile and that defendant's negligence had caused the injury. However, the court entered judgment for defendant, based upon its finding that plaintiff had assumed the risk of defendant's negligence.

[2] The only issues presented upon this appeal are (1) whether the trial court properly considered the question of plaintiff's assumption of risk when the defendant had not pleaded either that defense or the defense of contributory negligence, and neither defense had been discussed prior to the time that the trial court made its find-

ing of assumption of risk, and (2) whether there was substantial evidence to support the finding of assumption of risk. These issues may be resolved according to California law although the accident occurred in New Mexico. The trial was conducted as if California law applied and the briefs on appeal are also predicated on the applicability of California law. We may therefore conclude that both plaintiff and defendant have agreed to have the issues determined pursuant to the law of California. Cf. *Lubin v. Lubin*, 144 Cal.App.2d 781, 786, 302 P.2d 49.

In support of the judgment, defendant contends that certain evidence introduced by plaintiff constitutes substantial evidence to sustain the trial court's finding of assumption of risk. Plaintiff testified, on direct examination, that in June 1953, he and defendant were traveling from Los Angeles to New York under an agreement to share the driving of defendant's 1950 Studebaker and the expenses of the trip. Plaintiff stated that defendant had had no prior experience in driving upon desert roads that are frequently covered with sand and dirt, yet he continually drove at speeds above seventy-five miles per hour over such roads. Defendant was "always in a hurry" and had announced that he intended to reach New York in three or four days. Plaintiff frequently admonished defendant to drive more slowly while, on the other hand, defendant asked plaintiff to drive more rapidly whenever plaintiff was driving. After they had been driving continuously for eighteen hours, plaintiff convinced defendant that they should stop overnight at a motel in Albuquerque, New Mexico. They left that city at 4 o'clock the next morning. Plaintiff testified that he later went to sleep in the back of the automobile, and that he was still asleep when it ran off the side of the road.

[3] The evidence above summarized is sufficient to support the finding of assumption of risk, if such a finding is otherwise proper. The trial court could find and conclude therefrom that defendant was driving in a negligent manner, that plaintiff was

well aware of defendant's negligence, and that despite this knowledge he chose to continue with defendant although it would have been more reasonable to have left defendant at Albuquerque. See *Bassett v. Crisp*, 113 Cal.App.2d 295, 308, 248 P.2d 171; *Anderson v. Hawkins*, 100 Cal.App.2d 490, 494, 223 P.2d 857; *Van Fleet v. Heyler*, 51 Cal.App.2d 719, 733-734, 125 P.2d 586.

[4] As ground for reversal, however, plaintiff contends that the finding of assumption of risk was improper because it went beyond the scope of the issues presented by the pleadings. Defendant, on the other hand, claims that this argument is without force because plaintiff himself introduced the pertinent evidence. We have heretofore recognized that in certain situations, findings outside the issues made by the pleadings can be appropriate where the evidence supporting these findings has been introduced without objection. We considered this problem recently in *Miller v. Peters*, 37 Cal.2d 89, 230 P.2d 803, 806. In that case defendant had pleaded that only one plaintiff was contributively negligent. The evidence introduced in support of this allegation, however, was sufficient to prove that both plaintiffs were contributively negligent. We nevertheless reversed the judgment, holding that defendant's introduction of such evidence, although without objection, did not authorize the giving of an instruction indicating that the second plaintiff could also be found contributively negligent.

In reaching this decision, we reasoned that "it is settled law that where the parties and the court proceed throughout the trial upon a theory that a certain issue is presented for adjudication, both parties are thereafter estopped from claiming that no such issue was in controversy even though it was not actually raised by the pleadings. [Citations.] But such principle of estoppel operates only where it appears 'from the record on appeal * * * that the issue was actually and intentionally tried by the introduction of pertinent evidence, and that the party against whom the estop-

pel is invoked consciously participated or acquiesced in such trial, as if the issue had been made by the pleadings * * *'. *Ortega v. Cordero*, 88 Cal. 221, 227, 26 P. 80, 82; see 2 Cal.Jur. § 69, p. 239, and cases there cited." We also reiterated the proposition that "'* * * evidence which is relevant to an issue actually raised by the pleadings cannot be considered as authorizing the determination of an issue not presented.' *Freeman v. Gray-Cowan, Inc.*, 219 Cal. 85, 87, 25 P.2d 415, 416." 37 Cal.2d at page 93, 230 P.2d at page 806. See also *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 171, 135 P. 502. There is no reason to depart from these principles when evidence relating to a possible affirmative defense is introduced by plaintiff, as in the present case, rather than by defendant, as in the *Miller* case.

[5] Defendant claims that an estoppel or waiver must be found in the present case because plaintiff's evidence relating to assumption of risk does not bear upon any of the issues made by the pleadings. According to defendant, the only issue under the pleadings that this evidence might concern would be the question of defendant's negligence. But defendant maintains that the evidence cannot be relevant to that issue since the doctrine of *res ipsa loquitur* was applicable and was sufficient to prove that defendant was negligent. This argument assumes that plaintiff could not introduce evidence of specific acts of negligence in addition to the evidence which might give rise to the *res ipsa loquitur* inference. We are not aware of any rule that requires a plaintiff to rely upon *res ipsa loquitur* rather than proof of specific acts of negligence.

[6, 7] It thus appears that all evidence upon which defendant relies to justify the consideration by the trial court of the unpleaded defense of assumption of risk was evidence relevant to the pleaded issue of defendant's negligence. We therefore conclude that plaintiff is not estopped to challenge the action of the trial court in making a finding upon assumption of risk, as it cannot be said that the unpleaded issue

of assumption of risk was "actually and intentionally tried" or that plaintiff "consciously participated or acquiesced in [the] trial, as if the issue had been made by the pleadings." *Miller v. Peters*, supra, 37 Cal.2d 89, 93, 230 P.2d 803, 806.

The purported appeal from the order denying a motion for a new trial is dismissed. The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.



49 Cal.2d 423

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Leroy CARSKADDON, Defendant and
Appellant.
Cr. 6140.

Supreme Court of California,
In Bank.

Nov. 19, 1957.

Defendant was convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., for violating Penal Code section proscribing annoyance or molestation of children, and he appealed. The Supreme Court, Spence, J., held that the evidence would not sustain the conviction.

Reversed.

Opinion, 312 P.2d 261, vacated.

1. Statutes $\Rightarrow$ 241(1)

Penal provisions are to be construed according to fair import of their terms, with a view to effect their objects and to promote justice. West's Ann.Pen.Code, § 4.

2. Vagrancy $\Rightarrow$ 1

The primary purpose of statute, providing that every person who "annoys" or

"molests" any child is a vagrant, is protection of children from interference by sexual offenders, and apprehension, segregation and punishment of the latter; and the quoted words relate to offenses against children with connotation of abnormal sexual motivation on part of offender. West's Ann. Pen.Code, §§ 4, 647a(1).

See publication Words and Phrases, for other judicial constructions and definitions of "Annoy" and "Molest".

3. Vagrancy $\Rightarrow$ 1

Annoyance or molestation which is forbidden by statute, providing that every person who annoys or molests any child is a vagrant, is not concerned with state of mind of child but with objectionable acts of defendant; and if his conduct is so lewd or obscene that normal person would unhesitatingly be irritated by it, such conduct "annoys or molests" within purview of statute. West's Ann.Pen.Code, § 647a(1).

4. Vagrancy $\Rightarrow$ 3

In prosecution under statute, providing that every person who annoys or molests any child is a vagrant, evidence would not sustain conviction. West's Ann.Pen.Code, § 647a(1).

5. Statutes $\Rightarrow$ 241(1)

Penal statutes will not be given application beyond their plain intent, and such acts include only those offenses coming clearly within import of language. West's Ann.Pen.Code, § 4.

Robert O. Fort, Sacramento, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., for respondent.

SPENCE, Justice.

Defendant appeals from a judgment of conviction for violation of section 647a, subdivision (1), of the Penal Code. He contends that the evidence is insufficient to sustain his conviction. The evidence is uncontradicted and although we have viewed it in

the light most favorable to the prosecution (*People v. Moore*, 137 Cal.App.2d 197, 200, 290 P.2d 40), we have nevertheless concluded that defendant's contention must be sustained.

On April 19, 1956, at Southside Park in Sacramento, Anthony Bakazan stopped his automobile at a street curb to eat lunch in his car. He saw defendant take a little girl, aged six, and a little boy, aged four, underneath a large tree about thirty feet inside the park. They sat there a short time; then Bakazan saw the boy leave while the girl remained. As Bakazan walked back and forth a few times, watching defendant, the latter would sometimes so move that the tree briefly obscured Bakazan's view. However, Bakazan managed to keep ten to thirty feet distant from defendant and the girl, and he had a full view of defendant for all but about a minute of the ten minutes that they stayed under the tree. Bakazan did not see defendant touch the girl.

After some ten minutes under the tree, defendant and the girl walked to a concession stand where defendant bought the girl an ice-cream bar. Bakazan followed, keeping the two under observation at all times. He never spoke to defendant. Defendant and the girl proceeded up the street in a direction away from the park and toward the Sacramento River. Bakazan continued to follow and to watch, until a motorcycle officer came along. Bakazan called the officer's attention to defendant and the girl. The officer turned his motorcycle and approached defendant. Defendant saw the officer and started to walk ahead of the girl when the officer stopped him. In response to the officer's queries, defendant stated that the girl was not his but that she was lost and he was taking her home, after which he intended boarding a bus to another part of the city. In defendant's presence, the officer then asked the girl if defendant was taking her home. The officer testified that she replied, "No, he was taking her down the river to show her—" The officer's testimony was interrupted at this point, and he did not complete his recital of the girl's statement. The officer did not see defend-

ant make any motions with his arms or any other part of his body toward the girl but only observed them "walking side by side down the street."

[1] Section 647a, subdivision (1), of the Penal Code provides, as here pertinent: "Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable * * *." Penal provisions are to be construed according to the fair import of their terms, with a view to effect their objects and to promote justice. Pen.Code, § 4; *People v. Valentine*, 28 Cal.2d 121, 142, 169 P.2d 1; *Ex parte Galivan*, 162 Cal. 331, 333, 122 P. 961; *Downing v. Municipal Court*, 88 Cal.App.2d 345, 349-350, 198 P.2d 923.

[2, 3] The primary purpose of the above statute is the "protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter." *People v. Moore*, supra, 137 Cal.App.2d 197, 199, 290 P.2d 40, 41; *People v. Pallares*, 112 Cal.App.2d Supp. 895, 900, 246 P.2d 173. The words "annoy" and "molest" are synonymously used (Vol. 27, Words and Phrases, Molest, p. 430); they generally refer to conduct designed "to disturb or irritate, esp. by continued or repeated acts" or "to offend" (Webster's New Inter. Dict., 2d ed.); and as used in this statute, they ordinarily relate to "offenses against children, [with] a connotation of abnormal sexual motivation on the part of the offender." *People v. Pallares*, supra, 112 Cal.App.2d Supp. at page 901, 246 P.2d at page 177. Ordinarily, the annoyance or molestation which is forbidden is "not concerned with the state of mind of the child" but it is "the objectionable acts of defendant which constitute the offense," and if his conduct is "so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would 'annoy or molest' within the purview of" the statute. *People v. McNair*, 130 Cal.App.2d 696, 697-698, 279 P.2d 800, 801.

[4] Applying these principles to the record here, we find no evidence to support a finding that defendant had committed any

objectionable act which would unhesitatingly irritate a normal person. The cases of *People v. McNair*, supra, 130 Cal.App.2d 696, 279 P.2d 800, and *People v. Moore*, supra, 137 Cal.App.2d 197, 290 P.2d 40, are therefore distinguishable. In each of those cases defendant committed a lewd and obscene act either in front of the child or with the child. No act of that type is shown by the present record. Rather it only appears that defendant was in the company of a six-year-old girl and a four-year-old boy in a public park, that he walked down a public street with the little girl by his side, and that when stopped and queried by the officer, defendant stated that the girl was lost and he was taking her home. It is true that the girl's mother testified as to their home address, which apparently was not in the direction in which defendant and the girl were walking. But such circumstance alone does not show that defendant was not innocently befriending the girl nor indicate that he did not intend later to take the girl home unharmed after going to "the river to show her—" The statement of the girl was not completed in the officer's testimony and the record does not disclose the reason for the interruption.

[5] In short, there is no substantial evidence of anything more than friendly non-criminal activity on the part of defendant toward the girl. Any mere suspicion that defendant might have intended to annoy or molest the girl at a later time would rest wholly in the realm of conjecture and would be insufficient to sustain a conviction of the offense with which he was charged. As was said in *DeMille v. American Federation of Radio Artists*, 31 Cal.2d 139, at page 156, 187 P.2d 769, at page 780, 175 A.L.R. 382: "Penal statutes will not be given application beyond their plain intent. Such acts include only those offenses coming clearly within the import of the language."

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

155 Cal.App.2d 448

JACQUES, Incorporated, a corporation,
Petitioner and Appellant,

v.

STATE BOARD OF EQUALIZATION OF
The State of CALIFORNIA, George R.
Relly, James H. Quinn, Paul R. Leake,
William G. Bonelli, and Robert C. Kirk-
wood; and Department of Alcoholic Bev-
erage Control of the State of California,
Respondents.

Everett E. HOWARD, Petitioner and
Appellant,

v.

STATE BOARD OF EQUALIZATION OF
The State of CALIFORNIA, George R.
Relly, James H. Quinn, Paul R. Leake,
William G. Bonelli, and Robert C. Kirk-
wood; and Department of Alcoholic Bev-
erage Control of the State of California,
Respondents.

Civ. 9134.

District Court of Appeal, Third District,
California.

Nov. 22, 1957.

Rehearing Denied Dec. 19, 1957.

Hearing Denied Jan. 15, 1958.

Proceeding on petition for peremptory writs of mandate praying that board of equalization be commanded to annul its decisions revoking liquor licenses. The Superior Court, Sacramento County, J. O. Moncur, J., denied petitions, and appeal was taken. The Third District Court of Appeal, Schottky, J., held, in part, that evidence sustained finding that owners of stock of corporation which held liquor license were promoting and conducting professional gambling operations on premises owned by one of them and justified conclusion that participation by owners in gambling offenses were contrary to public welfare and morals and constituted ground for revocation of license.

Affirmed.

1. Intoxicating Liquors ⇐ 108(10)

Mandamus ⇐ 168(4), 187(8)

Board of equalization with respect to its function in controlling and regulating sale and use of intoxicating beverages is constitutional agency, and scope of review

of its decisions is limited to determining whether there is substantial support therefor to be found in record, and both superior court in mandate proceedings brought before it, and district court of appeal, upon appeal, are without authority to reweigh the evidence. West's Ann.Const. art. 20, § 22.

2. Administrative Law and Procedure ⇨749 Intoxicating Liquors ⇨108(10)

On review of decision of board of equalization with respect to its functions in controlling and regulating sale and use of intoxicating beverages, all conflicts in evidence must be resolved in favor of board's determination and all legitimate and reasonable inferences must be indulged in in its support. West's Ann.Const. art. 20, § 22.

3. Intoxicating Liquors ⇨108(10)

In hearing before board of equalization, to determine whether liquor license should be revoked, weight to be given evidence was for board. West's Ann.Bus. & Prof.Code, § 24200(d).

4. Intoxicating Liquors ⇨108(5)

In proceeding to review revocation of liquor license, evidence supported finding of board of equalization that park owner, who held liquor license, participated in procuring, counseling and assisting lewd shows held at park. West's Ann.Bus. & Prof.Code, § 24200(d); West's Ann.Pen.Code, § 311.

5. Intoxicating Liquors ⇨106(1)

The board of equalization has broad discretion, to determine what constitutes good cause for suspension or revocation of a liquor license, and has power to determine when continuance of license would be contrary to public welfare and morals, and board's powers, are not limited to statutory provisions but also come from Constitution. West's Ann.Bus. & Prof.Code, § 24200(d); West's Ann.Const. art. 20, § 22.

6. Intoxicating Liquors ⇨106(2)

Board of equalization had power to determine that conduct of owner of park,

with reference to holding lewd performances there, was of such nature as to make his holding of an on sale liquor license in connection with another establishment contrary to public welfare or morals. West's Ann.Bus. & Prof.Code, § 24200(d); West's Ann.Pen.Code, § 311.

7. Intoxicating Liquors ⇨58, 106(2)

Good moral character of a liquor licensee is always material, and many times crucial, in determining whether or not a person should be issued a liquor license or allowed to continue as a licensee. West's Ann.Bus. & Prof.Code, § 24200(d).

8. Intoxicating Liquors ⇨108(5)

In proceeding to review revocation of liquor license, evidence supported finding, of equalization board, that operators of business which held liquor license were promoting and conducting professional gambling operations on premises owned by one of them. West's Ann.Bus. & Prof.Code, § 24200(d); West's Ann.Pen.Code, §§ 330, 331.

9. Intoxicating Liquors ⇨106(4)

Finding of board of equalization that operators of business which held liquor license were promoting and conducting professional gambling operations on premises owned by one of them, justified conclusion of board that participation by operators in gambling offenses, and their convictions of violations of statute relating to gambling, were contrary to public welfare and morals and constituted ground for revocation of liquor license. West's Ann.Bus. & Prof.Code, § 24200(d); West's Ann.Pen.Code, §§ 330, 331; West's Ann.Const. art. 20, § 22.

10. Intoxicating Liquors ⇨108(5)

In proceeding to review revocation of liquor license, evidence supported finding of equalization board that sole owners of stock of corporation, which was licensee, at all times had sole and complete direction and control of activities of corporation, that corporation was alter ego of owners, and that owners were persons who were operating the on sale liquor business under the license. West's Ann.Bus. & Prof.Code, § 24200(d).

11. Intoxicating Liquors Ⓒ106(1)

Where corporation which held liquor license was alter ego of owners of its stock, and equalization board found that because of acts of owners the continuance of license would be contrary to public welfare or morals, revocation of corporation's license was not an abuse of discretion. West's Ann.Bus. & Prof.Code, § 24200(d).

12. Estoppel Ⓒ62(2)

Even if equalization board for many years had taken position that gambling by a liquor licensee off premises was not ground for revocation of liquor license, board was not estopped to revoke liquor licenses on such ground although it gave no notice of change of position to holders of liquor license. West's Ann.Bus. & Prof.Code, § 24200(d).

13. Estoppel Ⓒ62(1)

A governmental agency may not be prevented from taking action by its past conduct where public welfare is involved.

14. Intoxicating Liquors Ⓒ58

It is policy of state that there be strict regulation of business of selling alcoholic beverages, and good moral character of licensees is extremely important in such regulation. West's Ann.Bus. & Prof.Code, § 24200(d); West's Ann.Const. art. 20, § 22.

McGilvray, McGilvray & Cameron, John P. Carson, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., E. G. Funke, Asst. Atty. Gen., William T. Chidlaw, Dep. Atty. Gen., for respondents.

SCHOTTKY, Justice.

This is an appeal from two judgments of the Superior Court denying the appellants' petitions for peremptory writs of mandate praying that respondent State Board of Equalization be commanded to annul its decisions revoking the liquor licenses of appellants and to restore said liquor licenses to appellants.

Everett E. Howard and Carl R. Howard, brothers, were on January 29, 1954, the sole owners of all the shares of stock of a California corporation, Jacques, Incorporated, which in turn held an on-sale general alcoholic beverage license for the premises known as the Showboat. Everett E. Howard also held an on-sale general license for his premises known as the Tower Club. In accusations filed in March of 1954, these brothers were charged with having violated section 24200(d) of the Alcoholic Beverage Control Act, Business and Professions Code, § 24200(d) and certain Penal Code sections which prohibit lewd and obscene conduct, conducting and participating in gambling and permitting gambling on one's owned or rented property. It was further charged, in general, that the conduct of these brothers was such as to make the continuance of the two liquor licenses contrary to public welfare and morals. In a subsequent amendment to the accusation against Jacques, Inc., it was further charged that Everett and Carl Howard had "procured, counseled, and assisted in the exposing and exhibiting of female entertainers," as alleged in the original accusation for the one date of January 29, 1954, continuously throughout the years 1951, 1952, 1953 and 1954, and particularly November, 1952, December 19, 1952, July or August, 1953, October and November, 1953, and November 6, 1953. In an amendment to the accusation against Everett Howard regarding his license at the Tower Club, the same additions were made insofar as the lewd shows were concerned as in the amendments to the Jacques, Inc., accusation. Everett Howard was further charged, however, with conducting gambling operations of the same type alleged in the original accusations continuously throughout the years 1951, 1952, 1953 and 1954.

A consolidated hearing was held on the accusations and a proposed decision rendered by the hearing officer assigned to hear the cases. The hearing officer in both cases found that Everett and Carl Howard were the sole owners of all the shares

of stock of Jacques, Inc., and that they were both convicted of violating section 330 of the Penal Code for unlawfully gambling at premises known as Helvetia Park. It was also found that the two brothers, as sole stockholders, had the "sole and complete direction and control of the activities of the above-entitled corporation."

In connection with the lewd show on January 29, 1954, the hearing officer found that Everett and Carl Howard did "procure, counsel, and/or assist four female entertainers or performers in exposing and exhibiting themselves to public view [at Helvetia Park], * * * and that such exposure and exhibition upon the part of these females was offensive, indecent, and lewd, and designed to excite vicious or lewd thoughts upon the part of the patrons there assembled." It was further found that said show was given on premises owned and controlled by Everett Howard and that such conduct upon the part of these brothers was contrary to public welfare and morals and constituted a violation of section 311 of the Penal Code.

The charges contained in the amendments to the original accusations were designated as Count III in the proposed decision. As to those charges the hearing officer found that Everett Howard "did, during the month of October, 1953, and on three occasions during the month of November, 1953, procure, counsel and assist in the exposing and exhibiting of female entertainers to public view in violation of the provisions of Article XX, Section 22 of the California Constitution and of section 311 of the Penal Code," such conduct being contrary to public welfare and morals and said exhibitions being similar to those referred to in Count II of the accusations. The hearing officer found that there was not sufficient evidence to support the charges of similar conduct on other dates in regard to the promotion of lewd shows at Helvetia Park.

In the Determination of Issues, the hearing officer found that there had been violations of sections 330 and 331 of the Penal

Code relating to gambling but that such conduct occurred off the licensed premises and did not warrant suspension or revocation of the licenses. He further found that violation of Penal Code section 330 did not constitute a crime involving moral turpitude. However, as to Count II of the accusations he found violations of section 311 of the Penal Code and determined that the continuance of the licenses would be contrary to public welfare and morals. A similar determination was made as to Count III of the accusation.

In his recommendation of the penalty to be imposed the hearing officer felt that Count I should be dismissed but that both Counts II and III individually constituted good cause for revocation of the licenses.

The proposed decision of the hearing officer was not adopted by the Board of Equalization but instead the Board ordered a hearing at which the transcript of the hearing by the hearing officer was considered and counsel for both sides presented oral argument. The decisions of the Board varied from the proposed decisions of the hearing officer only insofar as Count I was concerned. Like the hearing officer, the Board found that the brothers had conducted, participated in and allowed gambling on premises owned by Everett Howard and that they had been convicted under the applicable Penal Code statutes. The Board itself further found that the offenses relating to the gambling operation did not constitute crimes involving moral turpitude. However, the Board did determine, unlike the hearing officer, that the actions of these brothers were contrary to public welfare and morals and constituted grounds for the revocation of the two licenses within the meaning of Article XX, Section 22, of the California Constitution.

The Board found, as did the hearing officer, that Everett Howard participated in procuring, counseling and assisting the lewd shows at Helvetia Park that were charged in Counts II and III and further determined that such participation was contrary to public welfare and morals and

constituted grounds for the revocation of the two liquor licenses. The Board ordered that each of the licenses be revoked for the facts found to be true as to Counts I, II and III in each accusation separately and severally.

Appellants contend most vigorously that there is no substantial evidence to support the decision of the respondent Board and the judgment of the court. They contend also that the respondent Board erred in disregarding the corporate entity of appellant Jacques, Incorporated.

[1] Both appellants and respondent agree that the law as to the scope of review to be applied in this case is as stated by this court in *Marcucci v. Board of Equalization*, 138 Cal.App.2d 605, at page 608, 292 P.2d 264, 265:

"The respondent board with respect to its functions in controlling and regulating the sale and use of intoxicating beverages is a constitutional agency. Art. XX, sec. 22, Calif. Const., prior to its amendment in 1954. The scope of review of its decisions is, therefore, limited to determining whether or not there is substantial support therefor to be found in the record and both the superior court in mandate proceedings brought before it and this court upon appeal are without authority to reweigh the evidence. *Covert v. State Board of Equalization*, 29 Cal.2d 125, 131-132, 173 P.2d 545; *Moore v. State Board of Equalization*, 76 Cal.App.2d 758, 762-763, 174 P.2d 323. See, also, *Boren v. State Personnel Board*, 37 Cal.2d 634, 234 P.2d 981. In determining whether or not there is substantial evidence in support of the administrative decision, conflicts in the evidence must be resolved in favor of that decision and all legitimate and reasonable inferences must be indulged in its support. [Citing cases.]"

[2] Before discussing the contentions of appellants we shall give a brief summary of the evidence, bearing in mind that all

conflicts in the evidence must be resolved in favor of respondent Board's determination and all legitimate and reasonable inferences must be indulged in in its support.

The evidence in this case shows without conflict, and it was so found by the Board, that at Helvetia Park, on at least four occasions in October and November of 1953 there were lewd, obscene and immoral shows presented and movies shown to large audiences. That acts of sexual intercourse between men and women were shown in person on the stage and depicted in movies. That nude women performed lewd, obscene and immoral dances before audiences at the times mentioned. That in both the movies and in person acts of perversion were performed before the gatherings of men.

During the periods of time involved here-in Everett Howard and his wife owned and controlled the premises known as Helvetia Park and on at least several occasions Everett Howard was present while the above-mentioned shows were being presented and did nothing to stop them.

On the evening of January 29, 1954, nine special agents of the Department of Justice of the State of California spent a period of three and one-half to four hours in attendance at what was referred to as a "stag" show at Helvetia Park. These agents observed two lewd and obscene performances by four different women, and during the period when the performances were not being given, the agents engaged in and observed gambling activities in a room set up for that purpose. The agents stated that they each had paid \$1.00 admission to gain admittance to the premises and that there were approximately 300 men present.

The agents testified that both Carl and Everett Howard were present during the evening and that also present was a man named Chester Howard, a cousin of the Howard brothers and the caretaker of Helvetia Park. Everett Howard was seen both in the room in which the lewd performances by the women were given and in

the gambling room. Carl Howard was a dealer at one of the blackjack tables. The testimony indicates without contradiction that in the room set aside for gambling were two crap tables, two blackjack tables, and a chuck-a-luck table. Both chips and money were used in the gambling in this room. The testimony further indicates that operating these various games were people who had formerly worked in commercialized gambling establishments in Nevada and elsewhere. The agents testified that Everett Howard was in the gambling room during most of the evening, circulating around among the various games and appeared to be in charge of this gambling operation. Furthermore, Everett Howard admitted in effect that he was in charge of the gambling. The following testimony by Agent White, found on page 105 of the transcript of the hearing of April 20, 1954, shows that Everett Howard admitted he was in charge together with his brother Carl. Agent White testified as follows, referring to Everett Howard:

"He was kind of sore about it I think for the moment, and he says, 'If you want to raid something, why don't you come over to Woodland next Saturday night. We're going to put on the same kind of a show for the Elks over there.'"

"That's about all the conversation there was, except that I did ask him, I said, 'Who's in charge of the gambling operation here?'"

"He said, 'We are,' and I asked him how—'Who do you mean by "we," and just exactly what his answer was, I don't recall.

"He says, 'My brothers and I,' or, 'I and my brothers, I and Carl.' I'm sure he mentioned Carl, but whether he mentioned Chester I'm not sure, that he mentioned Chester's name.

"Q. But he did say he and Carl were in charge of the gambling? A. As I recall, yes."

Everett Howard's vital concern with the gambling operation is further illustrated in

the following testimony of Agent Franke, found on page 38 of the transcript of the hearing on April 20, 1954:

"Well, on one occasion, as I was counting the money at one of the tables, Mr. Everett Howard asked me what I was going to do with the money. I said it was being confiscated as evidence, and would be turned over to the Sheriff for safekeeping, and he asked me whether he could get it back, and I said, 'Well, I don't know.' * * *"

In connection with the lewd and obscene performances of the four women that night, there was testimony that Everett Howard was in the room in which these performances were given and made no effort to stop them. Chester Howard, the caretaker of Helvetia Park who worked for Everett Howard and who was present that evening, at one point in the second performance by the women that evening got on the stage and attempted to quiet the male spectators in order that the show might continue.

The type of show put on at Helvetia Park this night is clearly shown by testimony of the Department of Justice agents. A detailed description of the lewd and obscene acts of these women on the stage at Helvetia Park on January 29, 1954, appears in the voluminous transcript consisting of more than 350 pages of testimony. These immoral performances continued until the announcement by the agents that the premises were being raided.

It was stipulated at the hearing that the Howard brothers owned all of the shares of stock in Jacques, Inc., the holder of one of the on-sale general liquor licenses at the time the activities of January 29, 1954, occurred. In respect to the gambling activities on the night of January 29, 1954, Carl and Everett Howard were convicted of violating the state gambling laws. The girls who participated in the lewd show on January 29, 1954, were convicted of violating Penal Code section 311 relating to lewd shows.

Appellant Everett Howard denied any responsibility for or participation in the

lewd performance or the gambling operations on the Helvetia Park premises. He testified that the park was rented to a veterans' organization for that date, for a "smoker," at a rental of \$125 or one-half of the gross proceeds, and that he was on the premises that night so that he would get his rent as he might not get it otherwise. He testified that the man who called him about renting Helvetia Park for the night in question was Elby Smith who had been in business with him in Nevada and had worked as a gambler there. He testified further that he spent practically all of his time on the premises in the small room where gambling was conducted and that he did not go into the main dance hall where the lewd performances were conducted and did not observe the performances. However, the following appears in his testimony:

"Q. Now, we've got you going in and out of this room when the show had not progressed to its point of extreme lewdness, and you still say you weren't in the room when the show was being given in its entirety? A. Not that I can remember.

"Q. Well now, just a minute ago you were positive about it. Now you can't remember. Now which is it. Is it possible you might have been in that room? A. Well, it could be possible, but I don't remember at any time that I was in there when—

"Q. So if I say you did or you were, you couldn't under oath tell me I was wrong? A. No, I don't remember.

"Q. I say if I said that you were in that room, you under oath couldn't tell me that I'm wrong? A. Well, like I say, I'm in and out—I'm through there—I could have been through there at the time and not even paid any attention to the show. There's quite a gathering of men around the stage which if you didn't go right up I imagine to the stage I couldn't see what was going on anyway. I could have went through the building or—at the time through the hall, I don't remember.

"Q. Now, if you have no interest in the show other than getting the rental from it or the gambling, why are you even present that night? A. To get my money. If I don't get my money that night I never get it.

"Q. You make the profit, I take it, from these shows? A. I wouldn't say the show. From the rental of the park. They rent the whole park. The whole complete park, and I'm there to receive my rent.

"Q. And you receive the money from the man who engages your property to put on these shows? A. I wouldn't say put on these shows; I receive the money from anyone that rents the property."

[3,4] There was other testimony tending to support the testimony of appellant Everett Howard but such evidence merely created a conflict. The weight to be given to the evidence was for the respondent Board to determine. We think there is substantial evidence to support the finding that appellant Everett Howard did participate in procuring, counseling and assisting the lewd shows at Helvetia Park. From his admitted knowledge that lewd performances had been given at Helvetia Park on several past occasions, from his former association with the man who rented the park from him, from his failure at any time to do anything to stop the lewd performances, and from the fact that because of the rental terms he was to some extent a partner in the enterprise, it was entirely reasonable for the respondent Board to conclude that he participated in procuring, counseling and assisting the lewd shows. It requires little stretch of the imagination to infer that the lewd shows were used as a magnet to attract a large group of men for the benefit of the gambling operations and there can be no doubt as to the connection of appellants with the gambling operations.

Appellant Everett Howard contends that the respondent erred in finding that his conduct with reference to the hereinbefore described lewd performances on premises

other than the licensed premises was contrary to the public welfare and morals and constituted a ground for the revocation of the liquor license for the Tower Club.

[5] Respondent points out that section 22 of Article XX of the Constitution of California granted to the Board of Equalization the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this state, and the power " * * * in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." The Board was given broad discretion under the Constitution to determine what constitutes good cause for the suspension or revocation of a license, that is, the power to determine when the continuance of the license would be contrary to public welfare and morals. *Moore v. State Board of Equalization*, 1946, 76 Cal.App. 2d 758, 174 P.2d 323, and *Hansen v. State Board of Equalization*, 1941, 43 Cal.App. 2d 176, 110 P.2d 453. These cases point out that the Board's powers are not limited to the statutory provisions but also come from the Constitution.

[6, 7] We believe that it was within the power of respondent Board to determine that the conduct of appellant Everett Howard with reference to said lewd performances was of such a nature as to make his holding of an on-sale liquor license contrary to the public welfare or morals. Such conduct certainly cannot be reconciled with good moral character and that the good moral character of a liquor licensee is always material and many times crucial in determining whether or not a person should be issued a liquor license or allowed to continue as a licensee is not open to serious question.

[8, 9] Appellants do not contend that the finding of respondent Board that appellants had conducted, participated in and allowed gambling on premises owned by appellant Everett Howard and had been found guilty of such offenses is not amply supported by

the record but do contend most earnestly that the offenses relating to gambling do not involve moral turpitude, and could not constitute grounds for the revocation of the liquor licenses. They point to the finding by respondent Board that the offenses relating to the gambling operations did not constitute crimes involving moral turpitude. However, the Board also found that appellants "did * * * open and cause to be opened and conducted unlawful games of chance and gambling, and in particular games of Twenty-one, banking and percentage games played with dice, contrary to and in violation of sections 330 and 331 of the California Penal Code." This finding, which is amply supported by the record, indicates that both appellants were in effect promoting and conducting professional gambling operations on premises owned by one of them, and supports and justifies the conclusion of respondent Board "that the participation by said Howards in the gambling offenses as found herein, and their convictions of violations of section 330 of the Penal Code, were and are contrary to public welfare and morals, and constitute grounds for the revocation of respondent's license within the meaning of section 22 of article XX of the California Constitution."

Appellants make the further contention that the liquor license held in the name of Jacques, Incorporated, could not be revoked for the illegal conduct of appellants who were the sole stockholders of the licensed premises. Appellants argue that the acts of appellants for which the license was revoked were committed off the licensed premises and were unrelated to the corporate purpose. We believe that this contention is fully and correctly answered in the memorandum opinion of the learned trial judge, as follows:

"As to the corporation's license, it is contended by petitioners that petitioner Jacques being a corporation and the license standing in the name of the corporation, the acts of the owner of the stock could not be made a basis for revocation of the corporation's liquor license. The evidence discloses that

Everett E. Howard and his brother, Carl Howard, were the owners of all of the capital stock of the corporation, and that while the liquor license was held by the corporation, all of the rest of the property known as the Show Boat, and which was the premises for which the liquor license was issued, was held by the said two brothers as individuals.

"It appeared from the evidence that while the corporation may have had a minute book, yet no minutes were kept; no meetings were held; so far as the evidence disclosed, no directors had been elected; that no meetings were held either by the stockholders or by any officers of the corporation; that they had a bookkeeper who attended to tax and other routine matters; that the Howards considered themselves as the only owners, and that they could do as they pleased in the management and control of the licensed business and of the property used in connection with the purposes of the liquor license.

"In the case of *Maxwell Cafe v. Department of Alcoholic Beverage Control*, 142 Cal.App.2d 73, 298 P.2d 64, the question as to whether a corporation may be considered in law as the alter ego of the persons composing it was involved, and, in 142 Cal.App.2d at page 78, 298 P.2d at page 68 of the decision the Court said:

"Generally a corporation is a distinct legal entity separate from its stockholders and from its officers. There are circumstances in which the corporate entity will be disregarded and the corporation will be considered in law as the *Alter ego* of the persons composing it, as when the corporation is but the instrumentality through which one or more persons, the sole owners of the capital stock, for convenience transact their business and injustice to third persons results from the double relationship. * * * There must be affirmative proof or direct

inference from proof that there is such unity of interest and ownership as indicates a cessation of the individuality and separateness of the individuals and the corporation.'

"* * * * *

"Under the views as shown by the evidence in this case, and the application of these facts to the principles of law stated in the *Maxwell* case, I am of the opinion that Everett Howard and Carl Howard were the real parties involved and were the alter ego of the corporation, and that their acts were the acts of the corporation also."

[10, 11] We are satisfied that there is ample evidence to support the finding of respondent Board that appellants as sole owners of all the stock of *Jacques, Incorporated*, the corporate licensee, at all times had "the sole and complete direction and control of the activities of said corporation." Under the evidence shown by the record, and hereinbefore detailed, *Jacques, Incorporated*, was the alter ego of appellants Everett Howard and Carl Howard, and said appellants were the persons who were operating the on-sale liquor business under said license. Therefore, when the respondent Board found that because of the acts of appellants, as hereinbefore set forth, the continuance of the license which was owned and controlled by them would be contrary to public welfare or morals, we do not believe that said appellants may avoid the penalty of their acts by seeking to hide behind the corporation. For as stated in *Ballantine on Corporations*, at page 293:

"* * * [B]ut, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." See also *Taylor v. Newton*, 117 Cal.App.2d 752, 257 P.2d 68.

And as stated in *Ciro's of San Francisco v. State Board of Equalization*, 142 Cal. App.2d 636, at page 640, 299 P.2d 703, 706,

"* * * It requires no extended argument to prove that premises licensed to dispense alcoholic beverages should not be operated by law violators, * * *. Even though there was no evidence in this case of questionable activities at Ciro's, the flouting of the law by petitioner, the importance of a strict enforcement of the law as to the character of the persons to be permitted the privilege of liquor licenses, the danger to the public welfare and morals to which the corporation subjected the public by employment in the capacities here shown of men with prohibited backgrounds, and the circumstances of this case, negative any contention of abuse of discretion in the penalty imposed."

[12] Appellants make the further contention that respondent Board for many years took the position "that gambling by a licensee off-premises was not grounds for revocation, and because of the reliance upon that position by the appellants, the Board was estopped to revoke the licenses herein on such grounds, until notice of a change of position, by rule or resolution, was given to the appellants."

There is no merit in this contention, for, as pointed out by respondent, this point has been raised in many cases involving governmental agencies in the past. However, the rule is clear as is set forth in 2 Cal.Jur.2d, Administrative Law, in section 74:

"In exercising its sublegislative powers, an administrative agency may not circumscribe or restrict the power and authority conferred upon it by the legislature. And, except in exceptional circumstances, estoppel may not be invoked to limit administrative power. Hence statements of policy, or administrative opinions interpreting laws or regulations, will not prevent the agency from taking subsequent action inconsistent therewith."

This principle is further illustrated in the following quotation from 1 American Law Reports 2d, at page 341, the section dealing with estoppel against governmental bodies:

"The principles of equitable estoppel cannot be applied to deprive the public of the protection of a statute because of the mistaken action or lack of action on the part of public officials."

[13] The general rule is that a governmental agency may not be prevented from taking action by its past conduct where the public welfare is involved, as in the present case. In *San Diego County v. California Water & Telephone Co.*, 30 Cal.2d 817, at page 826, 186 P.2d 124, 130, 175 A.L.R. 747, the court illustrated this when it said:

"* * * It is clear, however, that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public."

See also *United States Fidelity & Guaranty Co. v. State Board of Equalization*, 47 Cal.2d 384, 303 P.2d 1034.

No other points raised require discussion.

[14] In summary we conclude that the record supports the findings of respondent Board and that the Board did not abuse its discretion in revoking the liquor licenses of appellants. As hereinbefore pointed out, respondent Board was given the power under our state constitution to determine what is good cause for the suspension or revocation of a liquor license, that is, the power to determine when the continuance of the license would be contrary to public welfare and morals. It is of course true that it is the policy of the state, as shown in the constitution and statute, that there be strict regulation of business of selling alcoholic beverages, and the good moral character of licensees is

extremely important in such regulation. As stated by the United States Supreme Court in *Crowley v. Christensen*, 137 U.S. 86, 11 S.Ct. 13, 15, 34 L.Ed. 620, quoted with approval in *Ritz v. Lightston*, 10 Cal. App. 685, 688, 103 P. 363, 367:

"* * * There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority."

We cannot hold that the conclusion of respondent Board that these appellants are not fit and proper persons to engage in the retail liquor business is not supported by the record, nor can we hold that the revocation of appellants' liquor licenses is not within the power and discretion of respondent Board. We believe it was within the power of respondent Board to conclude that in the view of the acts and conduct of appellants, as shown by the record in the instant case, they were not fit and proper persons to engage in the retail liquor business, since such business is so surrounded by law and by restrictive provisions of the Alcoholic Beverage Control Act and various rules and regulations. While it may be conceded that not every violation of the penal statutes of this state would constitute a good cause for revocation of a liquor license, the conduct of the licensees of this case has been such that it is difficult to imagine that anyone could say that acts done by these licensees did not reflect and very forcefully demonstrate that they are not persons of good moral character.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J., pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

155 Cal.App.2d 627

Joseph P. DUVAL, Plaintiff and Appellant,

v.

James D. DUVAL, Defendant and Respondent.

Civ. 5570.

District Court of Appeal, Fourth District, California.

Nov. 27, 1957.

Action by father against son for declaratory judgment that son who had been deeded real property by father held title to such real property in trust for all of father's children. From adverse judgment entered in Superior Court, Orange County, Raymond Thompson, J., father appealed. The District Court of Appeal, Mussell, J., held that father's remaining children were not necessary or indispensable parties and failure to join them as parties was not reversible error notwithstanding that remaining children might have been joined as proper parties plaintiff.

Affirmed.

1. Trusts ⚡373

In action by father against son for declaratory judgment that son who had been deeded real property by father held title to such real property in trust for all of father's children, questions whether there was an agreement between father and son or a promise on the part of the son to deed the property to the other children were for trier of fact.

2. Appeal and Error ⚡1010(1)

On appeal, a trial court's findings which are substantially supported by the record cannot be disturbed by the District Court of Appeal.

3. Declaratory Judgment ⚡296, 393

In action by father against son for declaratory judgment that son who had been deeded real property by father held title to such real property in trust for all of father's children, father's remaining

children were not necessary or indispensable parties and failure to join them as parties was not reversible error notwithstanding that remaining children might have been joined as proper parties plaintiff. West's Ann.Code Civ.Proc. § 389.

4. Parties ⇨18, 29

Those who may be proper parties to an action are not always necessary or indispensable parties. West's Ann.Code Civ. Proc. § 389.

5. Parties ⇨18, 29

The equity rule that necessary parties normally should be joined in one action in order to carry out the policy of complete determination and avoidance of multiplicity of suits is limited and qualified by considerations of fairness, convenience and practicability. West's Ann.Code Civ. Proc. § 389.

6. Appeal and Error ⇨1071(5)

Where issues raised by pleadings were adequately covered by findings and supported trial court's judgment adverse to plaintiff, the fact that trial court erroneously held that all necessary parties were not before the trial court would be disregarded on plaintiff's appeal.

7. Trial ⇨397(2)

When matters covered by the findings defeat a plaintiff's right of recovery, the trial court is not required to make additional findings upon other issues.

8. Appeal and Error ⇨843(2)

If a judgment is amply supported by findings sustained by sufficient evidence, questions relative to other findings become immaterial on appeal and may be disregarded.

T. L. DeBord, Barstow, for appellant.

Riedman, Dalessi & Shelton, Long Beach, for respondent.

MUSSELL, Justice.

This is an action by a father against his son in which plaintiff seeks a judgment declaring that the defendant holds title to certain real property in trust for all of

the children of the plaintiff. The trial court rendered judgment against the plaintiff and he appeals therefrom.

It is alleged in the complaint, in substance, that on or about January 1, 1951, plaintiff and his wife owned certain unimproved real property in the city of Anaheim; that a confidential relation existed between plaintiff and defendant and on or about February 8, 1951, plaintiff executed and delivered a deed to said property conveying it to the defendant; that plaintiff delivered the possession of said deed to the defendant with instructions to convey an equal interest in said property to each of the other children of plaintiff upon their return from service in the United States Army; that plaintiff promised to comply with this request; that the consideration of said deed was the trust and confidence the plaintiff reposed in defendant and the belief that he would comply with said request and desire that defendant and his four brothers should share equally in said property. The prayer of the complaint was that the court adjudge that defendant holds said property in trust for all of the children of plaintiff; that defendant be required to convey said property to said children; and that title be quieted in them.

Plaintiff testified at the trial that the property involved consisted of approximately ten acres of unimproved land upon which there was a sand pit; that he and defendant operated the said sand pit for approximately two years, when it was closed down by the city of Anaheim in 1951; that at about that time he and his wife started a divorce action and a property settlement agreement was executed in which it was agreed that the property involved would go to defendant. (This agreement apparently was in writing but it is not set forth in the record herein.); that the property involved was owned jointly by plaintiff and his wife; that he discussed the said sand pit with the defendant and defendant stated that he would convey an interest in the property to plaintiff's other children and that plaintiff relied upon this promise when he conveyed the property to defendant; that it was

agreed that if defendant sold the property involved "he was supposed to divide it up with the children."

Margaret Wagner, plaintiff's former wife, testified that she had discussed the property involved with the plaintiff when they were discussing the property settlement agreement and at that time she suggested that plaintiff deed the property to all of the boys; that he said, "No, he would deed it to Jim but not to all of them, so I agreed to that."

Defendant, when questioned as to conversations with his father concerning the property, testified as follows:

"By Mr. Shelton: Q. Jim, do you recall any conversation with your father shortly before January of 1951, the substance of it having to do with your holding the property for all the children?

"Witness: A. No, I don't.

"Q. Did you ever talk to your father about this property that was deeded to you? A. No, not that I remember.

"Q. Did you work with him down there in the sand pit? A. Yes, I did.

"Q. Did he ever tell you that he was going to deed the property to you and he wanted you to hold it for all the children? A. No, not that I remember."

The trial court found that it was not true that the most confidential relations existed between plaintiff and defendant; that it was not true that it was the desire of plaintiff that the said property should belong to all of his children in equal proportions; that it was not true that plaintiff delivered said deed to defendant with instructions to convey an equal interest to each of the other children upon their return from service; that it was not true that defendant promised to convey an equal interest in said property to each of plaintiff's other children; that it was not true that the only consideration for said deed was the trust and confidence that plaintiff reposed in defendant and the belief that de-

fendant would comply with the request and desire of plaintiff that all of his children should share equally in said property; that it was not true that defendant fraudulently induced plaintiff to believe that his request would be complied with and that it was not true that defendant violated the trust and confidence reposed in him by plaintiff; that it was not true that defendant refused to convey any interest in said property to plaintiff's other children. The court then concluded that defendant was entitled to judgment against the plaintiff.

[1, 2] There was a conflict in the testimony as to whether or not there was an agreement between plaintiff and defendant or a promise on the part of the defendant to deed the property to the other children of plaintiff and no evidence was introduced indicating fraud. These were questions of fact for the trial court, and since the findings made are substantially supported by the record, they cannot be here disturbed.

[3] Plaintiff argues that the judgment must be reversed because the brothers of the defendant were not made parties to the action.

Section 389 of the Code of Civil Procedure provides that "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saying their rights; but when a complete determination of the controversy can not be had without the presence of other parties, the court must then order them to be brought in, * * *." In *Bowels v. Superior Court*, 44 Cal.2d 574, 583, 283 P.2d 704, it was held that under section 389 of the Code of Civil Procedure it is error, reversible on appeal, to fail to join a necessary party, and that there is a distinction between necessary and indispensable parties.

[4, 5] In the instant case it appears that the defendant's brothers were not necessary or indispensable parties to the action. The controversy was between plaintiff and defendant as to whether there was or was not an agreement or understanding that defendant would subsequently deed an interest in

Joseph PROFETA, Plaintiff and Appellant,

v.

SEARS, ROEBUCK & COMPANY, a corporation, Defendant and Respondent.

Civ. 22254.

District Court of Appeal, Second District,
Division 3, California.

Nov. 22, 1957.

the property involved to his brothers and whether or not defendant was guilty of fraud in the transaction. There was a complete determination of the controversy between plaintiff and defendant without prejudice to the rights of defendant's brothers and the record does not indicate that they were interested in the action. They had no interest in the property involved by deed or otherwise and while they might have been joined as proper parties plaintiff, those who may be proper parties are not always necessary or indispensable parties. *Jones v. Feichtmeir*, 95 Cal.App.2d 341, 345, 212 P.2d 933. In *Bank of California, National Ass'n v. Superior Court*, 16 Cal.2d 516, 523, 106 P.2d 879 it was held that "necessary" parties normally should be joined in an action and that the court, following the equity rule, will usually require them to be joined, in order to carry out the policy of complete determination and avoidance of multiplicity of suits. But, since the rule itself is one of equity, it is limited and qualified by considerations of fairness, convenience, and practicability.

[6-8] The trial judge indicated in his remarks at the close of the trial that all the necessary parties were not before him and that he thought he would decide the case mainly on that basis. However, the issues raised by the pleadings were adequately covered by the findings and support the judgment. In *Aguirre v. Fish & Game Commission*, 151 Cal.App.2d 469, 311 P.2d 903, 906, it was held that "when matters covered by the findings defeat a plaintiff's right of recovery, the trial court is not required to make additional findings upon other issues. [Citing] *Vidler v. DeBell*, 125 Cal.App.2d 326, 333, 270 P.2d 120, and cases therein cited." In *Bohn v. Watson*, 130 Cal. App.2d 24, 41, 278 P.2d 454, it was held that if a judgment is amply supported by findings sustained by sufficient evidence, questions relative to other findings become immaterial on appeal and may be disregarded.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.

Action by patron against store for injuries allegedly resulting from fall which occurred when patron allegedly stepped on candy on top plate of escalator as he was about to descend on escalator. From adverse judgment of the Superior Court, Los Angeles County, Wm. P. Houghton, J., the patron appealed. The District Court of Appeal, Parker Wood, J., held that requested instruction by defendant to effect that jury might consider fact that attention of persons who visit public stores is attracted ordinarily by display of wares offered for sale and they may be more or less absorbed by transactions which they have in mind was properly refused.

Judgment affirmed.

1. Carriers ⇨316(1)

In action by patron against store for injuries allegedly resulting from a fall which occurred when plaintiff allegedly stepped on candy on top plate of escalator as he was about to descend on escalator, burden was upon patron to prove his allegations of negligence on part of store.

2. Carriers ⇨320(1)

Evidence ⇨594

In action by patron against store for injuries allegedly resulting from a fall which occurred when defendant stepped on candy on top plate of escalator as he was about to descend, credibility of witnesses and weight to be accorded to their testimony were matters for determination of jury, which was not required to accept statement of witnesses as true, even though statements were not contradicted.

3. Carriers ⇨318(1)

In action by patron against store for personal injuries allegedly resulting from a fall which occurred when patron allegedly stepped on candy on top plate of escalator as he was about to descend, evidence was sufficient to support a verdict in favor of store.

4. Carriers ⇨347(1)

In action by patron against store for injuries allegedly resulting from fall which occurred when patron allegedly stepped on candy on top plate of escalator as he was about to descend on escalator, evidence that plaintiff was about two or three feet behind person in front of him and saw only a portion of top plate as he approached escalator raised a question of fact as to whether patron was guilty of contributory negligence.

5. Carriers ⇨348(1)

In action by patron against store for injuries allegedly resulting from fall which occurred when patron allegedly stepped on candy on top plate of escalator as he was about to descend, requested instruction by patron to effect that jury might consider fact that attention of persons who visit public stores is attracted ordinarily by display of wares offered for sale and they may be more or less absorbed by transactions which they have in mind, was properly refused.

Harold W. Svenson and John F. Garvin, Jr., Van Nuys, for appellant.

John L. Wheeler, John J. McCue and Theodore G. Morris, Los Angeles, for respondent.

PARKER WOOD, Justice.

In this action for damages for personal injuries allegedly resulting from slipping and falling while in defendant's store, the jury returned a verdict in favor of defendant. Plaintiff appeals from the judgment entered upon the verdict.

Appellant contends that the evidence was insufficient to support the verdict.

On May 4, 1954, plaintiff, accompanied by his friend Mr. Ferris, went to the second

floor of defendant's store for the purpose of buying a mirror. The mirror was not available, and plaintiff and Mr. Ferris went toward the escalator, intending to go to the first floor and leave the store. As they approached the escalator plaintiff was following Mr. Ferris, and just before plaintiff stepped onto the stationary metal plate, at the entrance to the escalator, Mr. Ferris was about two or three feet in front of plaintiff. Plaintiff testified that when he got hold of the moving handrail of the escalator he slipped and fell; the lower part of his back came in contact with a moving step; with the help of Mr. Ferris plaintiff got up when they were near the bottom of the escalator; when they arrived at the bottom of the escalator plaintiff leaned against a nearby counter, and Mr. Ferris went to get help; While Mr. Ferris was gone a woman, Mrs. Leigh, whom he had not known, spoke to him relative to his condition; she told him that she had seen some chocolate on the top plate of the escalator; then plaintiff lifted his foot, and Mrs. Leigh said that she believed that is "the same chocolate that was up on the top plate of the escalator"; he looked at his right shoe and saw a spot of brown on it which looked like chocolate; Mr. Ferris returned and assisted plaintiff in going to plaintiff's automobile. He testified further that there was a candy counter across from the escalator but he did not remember whether it was the up or down escalator. On cross-examination, he said that while he was following Mr. Ferris and approaching the escalator he could see a portion of the iron plate at the top of the escalator.

Mr. Ferris testified that as he approached the escalator he saw a brown or chocolate-like substance, which appeared to be candy, on the bright metal plate at the top of the escalator; he stepped over the substance and onto the escalator; plaintiff was behind him; after he (witness) was on the escalator and the escalator had gone three or four steps, the plaintiff bumped Mr. Ferris in the back of his legs; he (witness) turned and saw plaintiff in a kind of crouch, and he grabbed plaintiff's arm and helped

him up; when they arrived at the bottom of the escalator plaintiff leaned on a nearby counter; then plaintiff said he had slipped on the plate at the top of the escalator and he believed that he had some substance on his shoe; plaintiff lifted his foot, and Mr. Ferris saw on plaintiff's shoe a smeared brown substance that looked like chocolate; then he (witness) went to find a doctor but he did not find one; he returned to plaintiff and assisted him in going to the automobile; then the witness went back to the store to get help and thereafter a nurse and a man went to the automobile. On cross-examination Mr. Ferris said that the substance which he saw on the top plate was about three inches wide and was toward the front of the escalator.

Mrs. Leigh testified that on May 4, 1954, about 2 p. m., while she was on the second floor of defendant's store, she saw some candy and popcorn on the stationary part (top plate) of the down escalator; the substance (candy and popcorn) was "chocolate-y," and was three or four inches wide and looked like a candy bar that had been mashed; she told one of the clerks about it and he said he would have it cleaned up; the clerk was wearing a badge marked "Sears"; she stepped over the substance and went down the escalator; about 30 minutes later she saw plaintiff leaning against a counter and holding his back; she asked him if he was sick; he said that he had fallen on the escalator—that his foot had stuck to some candy; he showed the bottom of his shoe and she saw candy on it; she told him that she was just up there and had told the clerk that there was candy on the escalator; plaintiff took her name and address; she did not know plaintiff before that day.

Mr. Rowland, called as a witness by defendant, testified that he was the security superintendent of the store involved here; it was his duty to patrol the store, observe hazards and protect the store; on said May 4 he was in the store and he heard the gong, which called him to the telephone; upon answering the telephone he was told that there had been an accident; he went to

a certain place and met Mr. Ferris and a nurse, and then the three of them went to an automobile where the plaintiff was; plaintiff said that when he was getting on the escalator he twisted his back, and that he had slipped on some candy or something; the witness, after staying at the automobile about five minutes, went into the store and inspected the down escalator and found it to be clean and free of extraneous matter; he did not see any extraneous matter on the top plate or on any of the steps of the escalator; he asked the employees in the adjoining divisions if they had seen an accident on the escalator or had seen anything that could have caused an accident; those employees replied in the negative; he asked two porters if they had cleaned the escalator within the last two hours; they replied in the negative; his inquiries were directed to 25 or 30 clerks. On cross-examination, he said there was no schedule for routine checking of the escalators by the porters; about 10 minutes elapsed from the time he heard the gong until he inspected the plate at the top of the escalator (it took him two or three minutes after the gong to get to the automobile—he stayed at the automobile about five minutes—it took him about three minutes to go from the automobile to the top plate).

[1-4] Appellant's argument, regarding insufficiency of the evidence, is that there was no substantial evidence to support the verdict in that: the testimony of Mr. Rowland, the security superintendent of the store, did not create a conflict with the testimony on behalf of plaintiff; the superintendent's inspection of the top plate was made about 25 minutes after the accident and meanwhile a clerk or shopper might have removed the substance from the plate; the superintendent did not know the positions of the various clerks (whom he questioned) at the time of the accident; there was no evidence that he questioned all the clerks in the sections adjoining the escalator. It is obvious that many questions of fact were presented by the evidence. Some of those questions were: Did plaintiff slip and fall? Was there any foreign sub-

stance on the top plate? Was a foreign substance on the plate by reason of a negligent act of defendant? Was such a substance on the plate by reason of an act of a third person? If such substance was on the plate by reason of an act of a third person, did the defendant know, or should the defendant have known, of its presence in time to remove it before the accident occurred? The burden of proof was upon plaintiff to prove his allegations of negligence on the part of defendant. The credibility of the witnesses and the weight to be accorded to their testimony were matters for the determination of the jury. The jury was not required to accept as true the statements of the witnesses, even though the statements were not contradicted. *Carson v. Vinding*, 130 Cal.App.2d 652, 655, 279 P.2d 604. The argument of appellant with respect to the superintendent's testimony seems to be that even if full credence be given to his testimony regarding his inspection of the escalator and his inquiries of clerks and porters, the accident could have occurred in the manner related by plaintiff. The fact that the defendant did not produce direct evidence that a foreign substance was not on the top plate at the time of the alleged accident would not warrant a conclusion that an accident occurred in the manner related by plaintiff. The testimony of the superintendent pertained to the clean condition of the plate about 25 minutes after the alleged accident, and to the lack of information on the part of nearby employees as to the happening of the accident and the presence of a foreign substance on the plate. Such circumstances were proper matters to be considered by the jury in determining the facts. As above indicated, many questions of fact were involved in the issues presented by plaintiff, and the burden of proof was upon plaintiff regarding those issues. Furthermore, there was a question of fact as to whether plaintiff was guilty of contributory negligence. There was evidence to the effect that plaintiff was following Mr. Ferris closely, and that plaintiff saw only a portion of the top plate as he approached the escalator. The

evidence was sufficient to support the verdict.

[5] Appellant contends further that the court should have given an instruction requested by him to the effect that the jury might consider the fact that the attention of persons who visit public stores is attracted ordinarily by the display of wares offered for sale and may be more or less absorbed by the transactions which they have in mind. (The instruction so requested was No. 213-E in book referred to as Book of Approved Jury Instructions.) The court did not err in refusing to give the requested instruction. Other instructions which were given were adequate.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



155 Cal.App.2d 541

Luther H. LINCOLN and Helen M. Lincoln,
his wife, Plaintiffs and Respondents,

v.

Fred E. REED, Defendant and Appellant.
No. 17360.

District Court of Appeal, First District,
Division 1, California.

Nov. 27, 1957.

Action by owners of parcel of land against selling agent to have contract between parties declared null and void. The Superior Court, County of Alameda, Ralph E. Hoyt, J., rendered judgment for owners, and agent appealed. The District Court of Appeal, Fred B. Wood, J., held that where contract declared time of the essence of agreement whereby selling agent was to make subdivision studies of owners' property with aid and assistance of civil engineering company, even if agent made numerous studies, his failure to collaborate with civil engineering company and to sub-

mit plans of subdivision until after owners filed suit more than nine years after signing of contract, constituted failure to perform.

Affirmed.

1. Brokers ⇨29

Where contract declared time of the essence of agreement, whereby selling agent was to make subdivision studies of owners' property with aid and assistance of civil engineering company, even if agent made numerous studies, his failure to collaborate with civil engineering company and to submit plans of subdivision until owners filed suit more than nine years after signing of contract, constituted failure to perform.

2. Brokers ⇨29

Where contract between selling agent and owners of parcel of land provided that selling agent would continue subdivision studies of property until plan of subdivision had been determined upon, acceptable to owners, oral demand by owners that agent go ahead with subdivision plans was sufficient, and no written demand was necessary.

3. Cancellation of Instruments ⇨50

In action by owners of parcel of land to have contract with selling agent, who had agreed to make subdivision studies of property until plan of subdivision had been determined upon acceptable to owners, declared null and void, question whether owners waived their right to timely performance was question of fact, in view of agent's repeated assurances.

4. Brokers ⇨29

Where selling agent agreed to make subdivision studies of owners' property, and contract was modified four years later to allow owners to withdraw their homesite from agreement, even if modification was waiver of past delay of agent, as long as demands of owners that agent go ahead with subdivision plans were sufficient to apprise agent that performance was expect-

ed of him after modification, agent was not privileged to disregard them.

Huovinen & Ahrbeck, Oakland, for appellant.

Houlihan & Brown, Oakland, for respondents.

FRED B. WOOD, Justice.

This action for declaratory relief involves the rights of the parties under a contract of August 13, 1945. It recited that the plaintiffs had purchased or were about to purchase a certain parcel of land, that the defendant had performed certain studies of the land in connection with its future subdivision for residential and business property development, and that the plaintiffs desired defendant to continue with such studies and to aid in the future marketing of homes and business properties to be erected thereon.

It was agreed that following the purchase of the land defendant "will continue subdivision studies of said property with the aid and assistance of J. W. Wilson Co., Civil Engineers of Oakland * * * until a plan of subdivision has been determined upon, acceptable to the" plaintiffs. Plaintiffs agreed to construct on this land "architecturally proper homes costing Ten and Twenty Thousand Dollars each," the plans for all homes to be approved by defendant before construction. Plaintiffs agreed to employ defendant as exclusive selling agent. The agreement was to continue in effect "until the residential portion of the property shall have been fully developed, and the homes erected thereon are sold." Time was declared the essence of the agreement.

The trial court found (1) that from and after the date of the contract¹ defendant did not perform any subdivision studies of the property nor prepare a plan of subdivision thereof nor propose a plan of subdivision to plaintiffs for their acceptance;

1. The amended complaint was filed in November, 1954; the answer, in April, 1955.

(2) plaintiffs made demand upon defendant to perform the terms of the contract but defendant did not prepare or propose any plan of subdivision for presentation to the plaintiffs within a reasonable time; (3) that except as otherwise specifically found all of the allegations of the complaint were true and none of the allegations of the answer were true. The court concluded and gave judgment that the contract is null and void and of no effect and that defendant has no rights under it.

[1] (1) *The evidence supports the finding that defendant failed to perform.*

He did testify that he had made numerous studies of the area all during the time in question but, even if such testimony be taken at face value, those studies did not culminate in collaboration by the defendant with the J. W. Wilson Co. nor in the submission to plaintiffs of any plan of subdivision until after suit was filed,—more than nine years after the signing of the contract. Defendant admitted on the witness stand that he never asked J. W. Wilson Co. to prepare a preliminary map of subdivision for filing with the City Planning Commission.

[2] (2) *Concerning demand for performance*, plaintiff Luther Lincoln testified that he repeatedly asked defendant to go ahead with the subdivision plans and that defendant never submitted a plan of subdivision for the property to the plaintiffs. No written demand was necessary. Oral demand was sufficient under this contract.

(3) *Defendant asserts that plaintiffs waived their right to timely performance* by their conduct and thereafter were entitled to performance only after the giving of "definite notice to perform."

[3] The question of waiver, at least under the circumstances of this case, is a question of fact. It is significant that plaintiff Luther Lincoln testified that the defend-

ant "assured me always that the development was imminent," that defendant "always assured me that this [development] was the next one". In the light of these assurances, it can not be said by us that plaintiffs waived their right to insist upon performance. See *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 523-525, 153 P. 951; *Wilkinson & Co. v. McKinley*, 84 Cal. App.2d 100, 104-105, 190 P.2d 35.

[4] Defendant also invokes a modification of the contract which was made under date of July 7, 1949. This modification allowed plaintiff to withdraw his home site from the agreement and stated that "[u]pon later subdivision of the original property" plaintiff would modify the lines of the site to conform to the subdivision lines. Even if this modification was a waiver of past delay, more than five years elapsed between that modification and the filing of suit. In *Woodard v. Glenwood Lumber Co.*, supra, 171 Cal. 513, 153 P. 951, the court held that plaintiff's right to rescind for nonperformance was not affected by the fact that, for a certain period, he treated the contract as in force and accepted payments thereunder. "Such indulgence may have operated to deprive him of the right to rescind for any delay occurring theretofore, but, for the reasons heretofore stated [promises of imminent performance], it could not affect his right to rely on a subsequent breach." 171 Cal. at page 524, 153 P. at page 956. Defendant complains that "the demands of Mr. Lincoln were [not] any different or stronger than those made before as against those made after entering into modification." As long as these demands were sufficient to apprise the defendant that performance was expected of him (the court impliedly so found) defendant was not privileged to disregard them.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

155 Cal.App.2d 259

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Illie STONE and Brewington C. Thomas,
Defendants and Appellants.

Cr. 5852.

District Court of Appeal, Second District,
Division 3, California.

Nov. 15, 1957.

Defendants were convicted under first information charging conspiracy to commit theft, burglary, and theft of personalty of value not in excess of \$200, and under second information charging that defendants drove automobile on highway while they were addicted to the use of narcotic drugs and that they drove the automobile on a highway while they were under the influence of narcotics. The Superior Court of Ventura County, William A. Reppy, J., entered judgments of conviction, and an order denying defendants' motion for new trial, and an order consolidating the informations for trial, and defendants appealed from those judgments and orders. The District Court of Appeal, Parker Wood, J., held that informations were properly consolidated for trial where use by defendants of automobile was of substantial importance in commission of the crimes charged in the first information.

Judgments and order denying motion for new trial affirmed, and purported appeal from order consolidating informations dismissed.

1. Criminal Law ⇨741(1), 742(1)

Credibility of witnesses and weight to be accorded to their testimony are matters for determination by jury in criminal prosecution.

2. Burglary ⇨2

Burglary is committed if a person enters a store with intent to commit theft therein. West's Ann.Pen.Code, § 459.

318 P.2d—2½

3. Burglary ⇨41(1)

Evidence sustained burglary convictions of defendants, who allegedly executed short-change tricks in stores and service station. West's Ann.Pen.Code, § 459.

4. Conspiracy ⇨47

Evidence sustained convictions for conspiring to commit theft by short-change tricks.

5. Larceny ⇨55

Evidence sustained convictions for theft of personalty of value not in excess of \$200 by short-change tricks.

6. Automobiles ⇨355(6)

Evidence sustained convictions for driving an automobile on a highway while defendants were addicted to use of narcotic drugs and for driving an automobile on a highway while they were under influence of narcotic drugs in violation of Vehicle Code. West's Ann.Vehicle Code, § 506 (a).

7. Indictment and Information ⇨130

Penal code permits joinder of different offenses, even though they do not relate to same transaction or event, if there is a common element of substantial importance in their commission. West's Ann.Pen.Code, § 954.

8. Criminal Law ⇨620(2)

Where use by defendants of automobile was of substantial importance in commission of crimes charged in first information charging conspiracy to commit theft by short-change tricks, burglary, and theft of personalty of value not in excess of \$200, first information was properly consolidated for trial with second information charging defendants with driving automobile on highway while they were addicted to use of narcotic drugs and charging them with driving automobile on highway while they were under influence of narcotic drugs. West's Ann.Pen.Code, §§ 459, 954; West's Ann.Vehicle Code, § 506(a).

9. Criminal Law ⇨1170½(5)

Deputy District Attorney was not guilty of prejudicial conduct in using and

referring to partial transcripts of previous testimony of one of the defendants in cross examination of that defendant, though such transcripts had been prepared without notice to defendants, and though no copies had been furnished to defendants.

10. Criminal Law ☞369(2)

In prosecution for driving automobile on highway while defendants were addicted to use of narcotic drugs on August 6, 1956, and for driving on highway while under influence of narcotic drugs on that date, evidence that one of the defendants had pleaded guilty on or about October 26, 1955 of being a narcotic addict was relevant to issue whether he was a narcotic addict on August, 6, 1956, especially in view of that defendant's admissions that during time from 1954 to August 1956 he had used narcotics frequently while not in jail. West's Ann.Vehicle Code, § 506(a).

11. Criminal Law ☞706

In prosecution for driving automobile on highway while defendants were addicted to use of narcotic drugs on August 6, 1956, and for driving on highway while under influence of narcotic drugs on that date, wherein one of the defendants testified that he had not used narcotics since 1953, Deputy District Attorney was not guilty of misconduct in presenting on rebuttal testimony of police officer that such defendant had told officer on February 21, 1955 that such defendant had a "fix" on that date, that officer was present when photograph had been taken of such defendant's arm on that date, and that officer had seen some needle marks, some of which appeared to be fresh, on such defendant's arm on that date, though such defendant had testified that he did not recall photograph or making such statement to officer. West's Ann.Pen.Code, §§ 459, 954; West's Ann.Vehicle Code, § 506(a).

12. Criminal Law ☞1023(3)

Order consolidating informations for trial was not an order made after judgment

and was not appealable. West's Ann. Pen.Code, § 1237.

Glen C. Garman, Ventura, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Roy A. Gustafson, District Attorney of Ventura County, and Elwood R. Walls, Deputy Dist. Atty., Ventura, for the People.

PARKER WOOD, Justice.

By information No. 2664 defendants Stone and Thomas were charged in Count I with conspiring to commit theft; in Counts II and III with burglary; and in Count IV with theft of personal property of a value not in excess of \$200. It was also alleged therein that Stone had been convicted of burglary; and that Thomas had been convicted of violating section 2593(a), Title 26, of the United States Code, a felony (failing to pay a tax on marihuana).

By information No. 2676, as amended, the defendants were charged in two counts with violating section 506(a) of the Vehicle Code. In Count I they were charged with driving an automobile upon a highway while they were addicted to the use of narcotic drugs. In Count II they were charged with driving an automobile upon a highway while they were under the influence of narcotic drugs. It was also alleged in said information No. 2676 that the offenses charged in the two counts therein and the offenses charged in all the counts in information No. 2664 were connected in their commission. It was also alleged in the second information (2676) that each defendant had been previously convicted of a felony (the same felonies as alleged in the first information).

Defendants admitted the allegations as to prior convictions.

Over the objection of defendants, the two informations were consolidated for trial. In a jury trial the defendants were convicted on all counts. They appeal from the judgments, the order denying their

motion for a new trial, and the order consolidating the informations for trial.

Appellants contend that the evidence does not support the verdicts; the court erred in consolidating the causes for trial; and the deputy district attorney was guilty of misconduct.

On August 5, 1956, about 3 p. m., the defendant Thomas registered at the Ventura Hotel in Ventura for himself, the defendant Stone, and a woman. The registration as written by him was "Mr. and Mrs. Illie Stone and Joe Brown."

On August 6, 1956, about 1:30 a. m., Officer Gibson observed an automobile, without lights, which was being driven on a street in Ventura. He stopped the automobile. Stone was the driver, and Thomas and a woman were also in the automobile. The officer testified that Stone and Thomas appeared to be intoxicated; their speech was slow, but there was no odor of alcohol. He did not arrest them. Thomas was the owner of the automobile, which was a 1941 Chevrolet.

About 4:15 p. m. on August 6, the defendants took their baggage from the hotel. Thereafter they went, in the Chevrolet, to Oxnard and drove around in that city.

Between 7:30 and 7:45 p. m. on August 6, the defendants went into the La Victoria Market in Oxnard. At that time a girl, 17 years of age, was at the cash register, and her uncle, who was the manager of the store, was also in the store. The defendants looked around in the store about three minutes, and then Thomas called the manager to the back of the store and asked him for sardines in oil. When the manager showed him the sardines Thomas said that he wanted sardines in tomatoes. After the conversation about the sardines had continued about one or two minutes, Thomas took the sardines in oil and went to the cash register and paid for the sardines. While Thomas was negotiating for the purchase of the sardines, Stone took a 29-cent loaf of bread to the girl at the cash register and gave her a twenty-dollar bill. The girl gave him \$19.71 in

change. Then Stone asked her to change five "1's" for a five-dollar bill. He gave her the five "1's" and she gave him a five-dollar bill. Then Stone, while holding two five-dollar bills in his hand, asked her to give him a "10" for two "5's." She gave him a "10" but, according to her testimony, he did not give her two "5's." Then Stone asked her to change the "10" and the two "5's" for a twenty-dollar bill. She made the exchange, and then Stone left the store.

The sardines counter was about 25 feet from the cash register. The manager of the store testified that while he and Thomas were talking about the sardines he (manager) noticed that the girl went to the cash register three or four times; he was watching the girl, who was at the cash register, because the persons in the store (defendants) were strangers. After the defendants left the store the girl and the manager checked the cash register and found that the register was \$10 short. The manager telephoned the police.

About 8 p. m. on August 6, the defendants went into the La Barga Market in Oxnard. At that time Lupe Rivera (a 16-year-old boy) and Mrs. Gamboa, who were employees of the store, were in the store. Thomas asked Mrs. Gamboa where the sardines were. She went with him and showed him where they were. He asked for sardines in tomato sauce. She replied that she did not have that kind. He asked for sardines in mustard. She said that she did not have that kind but did have sardines in oil. He said that he did not know whether he should take that kind. He kept talking about how he hated to shop for groceries for his wife. Mrs. Gamboa noticed that Lupe, who was at the cash register counter, was busy and that a man was there. Mrs. Gamboa left Thomas and proceeded toward the counter. As she approached the counter the man, whom she identified as Stone, left the store. While Thomas was negotiating for the purchase of sardines, Stone took a can of pork and beans, went to the cash register counter, and handed Lupe a ten-

dollar bill. Lupe gave him change, which was 79 cents, four "1's" and a "5." Then Stone asked him if he needed any change for other customers. He said, "Yes." At that time Stone had nine "1's" and a "5." Lupe told Stone to put the "5" away and give him a "1" so that would make \$10 even. Stone gave him ten "1's," and Lupe gave Stone a "10." Then Stone asked Lupe for "the other" ten-dollar bill. Lupe said that he had just given it to him (Stone). Stone asked for the bill "about twice," but when Mrs. Gamboa approached the counter Stone said that Lupe was right and that he (Stone) would not try to cheat him. Then Stone left the store. Thomas also left the store.

About 8:25 p. m. on August 6, the defendant Thomas drove his Chevrolet automobile into a gasoline station in Port Hueneme. Stone was also in the automobile. Thomas got out of the automobile and told Mr. Miller, the station attendant, that he wanted 80 cents worth of gasoline. The attendant put that amount of gasoline in the automobile. Stone asked the attendant about deer hunting and how much the license would cost. Thomas gave the attendant a five-dollar bill and then went with the attendant to the register. The attendant gave Thomas change which was four nickels and four one-dollar bills. Then Thomas said, "you might need that to make change with." Thereupon Thomas handed four "1's" to the attendant and said, "just give me a '5' for those and you will have them to make change." The attendant handed a five-dollar bill to him. Then Thomas, who had that "5" and another "1," said "Well, you might need to make change for a '10' so just take this '6' and '4' and give me a '10' and then you will have change to make for a '10'." The attendant gave him a "10" for the "5" and the "1," but Thomas did not give him the other \$4.00. Thomas entered the automobile and drove away. After the defendants had gone, the attendant "figured it out" on paper, found that he had lost \$5.00, and then he telephoned the police.

Officer Hall, a detective, received a radio call about 7:50 p. m. on August 6, and as a result of that call he went to the La Victoria Market, arriving there about 7:55 p. m. He took a brief report from the manager. After staying there about three or four minutes he began a search of the immediate area in an attempt to locate the men. He drove around the block and went to the La Barga Market. He arrived at that market about 10 minutes after he arrived at the La Victoria Market.

About 9 p. m. on August 6, Officer Valentine observed the Chevrolet automobile in Oxnard and at that time the automobile was being driven by Stone. The officer stopped the automobile and arrested the defendants. He arrested them as a result of a radio broadcast. The officer testified that Stone talked very slowly and seemed to be in a daze, and that his eyes were glassy and dilated.

Officer Hall testified that he had a conversation with Stone about 9:10 p. m. at the police station; Stone appeared to be in a stupor but there was no odor of alcohol; Stone's eyes were pinpointed and glassy. The officer testified further that in the course of his work as an officer he had studied the methods used by narcotic addicts and he had seen hundreds of persons who were under the influence of narcotics; he saw puncture marks on Stone's arms, and many of the marks appeared to be old but two or three of them appeared to be fairly fresh; Stone appeared to be under the influence of narcotics.

Mr. Belanger, a medical laboratory technician, testified that in the course of his work he had seen many persons who were under the influence of narcotics; he examined Stone about 10:40 p. m. on August 6; the pupils of Stone's eyes were pinpointed and he seemed to have a dazed or relaxed manner; on Stone's arms there were numerous scars and marks which, in the opinion of the witness, were made by hypodermic needles; two or three of

the marks were not more than 24 or 48 hours old; most of the marks were dark and were over a vein area; the vein area for two or three inches was a scar; such a scar, which is referred to as a "snake," is formed after a long period of time by repeated injections; in the opinion of the witness, Stone was under the influence of a narcotic drug.

Mr. Belanger testified that he examined Thomas about 11:45 p. m. on August 6; the pupils of Thomas' eyes were pinpointed and showed no reaction to light; he was dazed and "over-relaxed"; the witness did not detect an odor of alcohol on Thomas; there were numerous scars and some fresh marks on Thomas' arms; most of the marks were dark and were over a vein area; it would take many repeated injections over a period of more than a year to form such scars; he (witness) analyzed a specimen of Thomas' urine and found that it contained a large amount of morphine derivative; in the opinion of the witness, Thomas was under the influence of a narcotic drug.

Officer White testified that on August 6, about 9:40 p. m., he asked Thomas if he had "taken more money than had belonged to him from Mr. Miller, the gas attendant"; Thomas said that he did not want to put it (statement) on tape because if he did put it on tape he would go back to jail; Thomas also said that he had pulled "this trick," which he had pulled that night, five or six times during the time he had been up from Los Angeles; the officer asked Thomas if he did not figure that he owed the man some money; Thomas said that he did not want it (statement) on tape, but he would rather give the money back than to have any trouble.

Officer Hall also testified that he saw Stone on August 7, about noon; at that time Stone appeared to be sick; he had his hands on his "stomach" as if he had cramps; he was perspiring, yawning continuously, and his nose was running; in the opinion of the officer, Stone was in a condition known as the "withdrawals," which is a condition wherein a person is

"coming off of the fix of narcotics and needs more" narcotics; Stone said that he was sick and needed "a fix" and that he had a spoon of heroin at a hotel in Ventura; Stone also said that if the officer would let him get a fix from that heroin he would be willing to be arrested and "go" on a possession of narcotics charge rather than on burglary charges.

Officer White also testified that when he saw Thomas on August 7, about 11 a. m., Thomas appeared to be chilled, he had cramps, was vomiting, perspiring, and yawning; his nose was running; in the opinion of the witness, Thomas was in a narcotic withdrawal.

A physician, who was qualified to give an opinion relative to the effects of narcotics upon the human body, testified in response to proper hypothetical questions that in his opinion the persons referred to in the questions were, on August 7, 1956, addicted to the use of a narcotic drug.

Defendant Thomas testified that on August 6, about 8 p. m., he and Stone were in Thomas' 1941 Chevrolet automobile and were driving around in Oxnard; he and Stone went into the La Barga Market and Thomas asked a lady employee for sardines in tomato juice; the lady said that the store did not have that kind but did have sardines in oil; Thomas said that he did not want sardines in oil; then Thomas and Stone left the store and went into the La Victoria Market, and Stone asked a man employee for sardines in tomato juice; the man said that the store did not have that kind; Thomas picked up a can of sardines in oil, went to the cash register, and paid for the sardines; at that time Stone had left the store; when Thomas last saw Stone in the store, Stone was carrying a loaf of bread toward the counter (register); after leaving that store they went into a gasoline station in Port Hueneme, and Thomas, who was driving the automobile at that time, asked for 80 cents worth of gasoline; the man (attendant) put the gasoline in the auto-

mobile, and Thomas gave him a five-dollar bill; the man gave Thomas \$4.20 change; then Thomas asked the man to take "this 5" and a "1" and four "1's" and then to give Thomas a ten-dollar bill; the man did that; after leaving the station they stopped and changed drivers, and Stone was driving at the time the officer stopped them and made the arrest.

Thomas also testified that he had used narcotics, and the last time he had used them was about July 20, 1956; he had not taken any narcotic within a week prior to August 6, 1956; he was convicted in Texas of a felony; the felony was the failure to pay a federal tax (apparently a tax on 118 pounds of marihuana). On cross-examination he testified that he was last employed in 1955; the total time he had used narcotics was about fifteen months, but that was not the preceding fifteen months; he first used heroin in 1952, and he used it once or twice a week for six months; after that six months he was in jail for fourteen months; he started using narcotics again in September, 1954, and he used them two or three times a week until November, 1954; in that month he pleaded guilty to a charge of being a narcotic addict, and thereafter he was in jail; he started using narcotics again in May, 1955, and used them about ten days; thereafter he was in jail; he started using narcotics again in July, 1955, and used them until October, 1955; in that month he pleaded guilty to a charge of being a narcotic addict, and thereafter he was in jail until July, 1956; he started using narcotics again about the middle of July, 1956, and stopped using them about July 20, 1956; he has known Stone about nine years.

Defendant Stone testified that on August 6 he and Thomas went into La Barga Market; that was the first market they entered that evening; Thomas went to the canned goods department; Stone got a can of pork and beans, went to the counter and gave the "young fellow," who was the cashier, a five-dollar bill; the cashier gave Stone the change; then Stone asked

the cashier if he wanted the "change back"; Stone gave the cashier five "1's" for a "5"; Stone asked him if he wanted a "5" and five "1's" for a "10"; the cashier seemed to get confused, and Stone said "I am sorry you got mixed up"; then Stone left the store; Thomas did not have anything when he left that store; then Stone and Thomas went into the La Victoria Market; Stone got a loaf of bread, went to the cash counter, and gave the lady a twenty-dollar bill, and she gave him the change; then he said he had a bunch of "1's" and that he did not want to take the change from her; he asked if she needed the change; he gave her a "5" and five "1's" and she gave him a "10"; he gave her two "10's" for a "20," and he left the store; then Stone and Thomas went to Port Hueneme and stopped in a service station; Thomas got out of the car and bought some gas; Stone stayed in the car and talked to the attendant about deer hunting; thereafter when they were driving into Oxnard, they were arrested; at the police station Officer Hall asked him about using narcotics, and he replied that he had used narcotics "a long time back"; the officer asked about the marks on his (Stone's) arms, and Stone replied that they came from a skin rash; he (Stone) had withdrawals in 1950 but has not had any withdrawals since that time.

[1-6] The argument of appellants, regarding the alleged insufficiency of the evidence, is to the effect that the girl, who was cashier at the La Victoria Market, was confused regarding the exchange of money, and there were inherent improbabilities in her testimony; that no crime was committed at the La Barga Market—it was not claimed that any money was wrongfully taken at that place, but the only incident there was that some discussion was had regarding change, and when the misunderstanding was called to Stone's attention he apologized and left the store; that the attendant at the gasoline station, who admitted that he was confused, did not know that he had lost \$5.00

but he concluded that he lost that amount; that there were inconsistencies in the testimony of Officer Hall; the hypothetical questions, which were asked the physician, were based upon facts not in evidence; the opinions of the medical laboratory technician were based upon a cursory examination of defendants and were speculative. That argument relates to the credibility of the witnesses and the weight to be accorded to their testimony. Such matters were for the determination of the jury. Even though no money was taken wrongfully at the La Barga Market, there was a question of fact for the jury as to whether the defendants entered that store with intent to commit theft therein. Burglary is committed if a person enters a store with the intent to commit theft therein. Pen.Code, § 459. In determining the question of intent with reference to entering the La Barga Market, the similarity of the methods used by defendants in the two stores was of significance. Thomas engaged the adult person in each store in conversation about purchasing a kind of sardines which was not available, while Stone was engaging the cashier in each store, who was a minor, in complicated change transactions in paying for a low priced article. Stone, after paying for a can of beans by presenting a five-dollar bill and receiving change therefor, indicated he was solicitous regarding the boy's supply of change for other customers, and thereupon he initiated the further exchange of bills. The similarity of the transactions and the further evidence that Stone asked twice for "the other ten," when the "ten" had already been given to him, and the further evidence that Thomas had purchased sardines before they entered the La Barga Market, indicate an intent to commit theft in the La Barga Market. As to the other crimes alleged, it is not necessary to discuss the evidence which is stated above in some detail. The argument of appellants, with reference to insufficiency of the evidence, pertains to questions of fact. The evidence was sufficient to support the verdicts.

[7] Appellants contend further that the court erred in consolidating the two informations for trial. As above stated, it was alleged in the second information that the offenses charged in the two informations were connected in their commission. Appellants argue that the offenses charged in the informations were not connected in their commission, that there was no common element of substantial importance in their commission, and that reference in the consolidated trial to narcotics was prejudicial to the defendants on the charges of conspiracy, burglary, and theft. Section 954 of the Penal Code provides, in part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. * * *" In *People v. Scott*, 24 Cal.2d 774, at pages 778 and 779, 151 P.2d 517, at page 519, it was said: "As it now reads the statute [section 954] permits the joinder of different offenses, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission, for the joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant." In the present case a common element of substantial importance in the commission of the crimes charged in both informations was the use of the automobile. Of course, the use of the automobile was essential in the commission of the crimes charged in the second information, namely: that defendants drove an automobile while they were under the influence of narcotics and while they were addicted to the use of narcotics. The use of the automobile was of substantial importance in the commission of the crimes charged in the first information, namely: conspiracy to commit theft; burglary; and theft. The overt act alleged, with reference to the conspiracy, was that defendants went

to the La Victoria Market in Oxnard. The evidence with respect to the conspiracy included evidence as follows: the defendants, who had been friends about nine years, were guests at the hotel in Ventura; on August 6, about 1:30 a.m., they were in Thomas' automobile in Ventura and they were stopped and questioned by a police officer; on August 6 they went from Ventura to Oxnard and Port Hueneme in the automobile, and they returned to Oxnard in the automobile; on that automobile trip they went to the La Victoria Market and the La Barga Market in Oxnard where the burglaries, involving similar methods and "shortchange tricks," were committed, and they went to the service station in Port Hueneme where the theft, involving a "shortchange trick," was committed; the burglaries and the theft, at those different places and cities, were committed within a period of approximately an hour; during that trip each defendant drove the automobile part of the time; defendants were in the automobile when they were arrested in Oxnard which was about 30 minutes after they left the service station in Port Hueneme. The automobile was a principal factor in the transaction whereby theft was committed at the service station. Defendants went into the station in the automobile, ordered a small amount of gasoline for it, and then Stone, who remained in the automobile, carried on a conversation with the intended victim (attendant) about deer hunting, while Thomas performed the shortchange trick. When defendants left the station, Thomas (the short man) was driving but thereafter defendants changed drivers, and Stone (the tall man) was driving when an officer stopped the automobile (about 30 minutes later) and arrested the defendants. Material evidence on behalf of the prosecution, with respect to the charges in both informations would include the circumstances prevailing at the time of and soon after the arrest, such as the appearance, statements, conduct, and location of the defendants. Such circumstances, under any of the

charges, would include the evidence that defendants were in the automobile, they seemed dazed, the pupils of their eyes were pinpointed, they had fresh marks on their arms, Stone's eyes were glassy and his speech was very slow. It thus appears that the use of the automobile was a common element of substantial importance in the commission of the crimes charged in both informations, and that if the informations had not been joined for trial there would have been repetition of much of the evidence.

The People assert that a further common element of substantial importance in the commission of the crimes charged in both informations is that the defendants allegedly were narcotic addicts. Of course, addiction to the use of narcotics was a principal element in the crimes charged in the second information, namely, driving an automobile while addicted to and under the influence of narcotics. The People argue, with respect to the charges in the first information (conspiracy to commit theft; burglary; and theft), that proof of addiction to the use of narcotics, with the resultant craving for them, might establish a motive on the part of defendants to commit the crimes, that is, a motive to obtain money for the purchase of narcotics. In view of the above conclusion relative to the use of the automobile, it is not necessary to decide this question regarding motive.

[8] The court did not err in consolidating the two informations for trial.

[9] Appellants contend further that the deputy district attorney was guilty of prejudicial misconduct for the reasons (1) that during his cross-examination of Thomas he referred to and used partial transcripts of Thomas' previous testimony, and (2) that such transcripts were prepared without notice to defendants and copies were not furnished to them, and they did not have an opportunity to determine whether the transcripts were correct. They argue that the purpose and effect of such use of the partial transcripts was to create an

impression that the deputy's questions were based upon a transcript of Thomas' previous testimony and that Thomas was not telling the truth. When counsel for defendants noticed that the deputy was referring to a transcript he (counsel for defendants) asked if the deputy was referring to a daily transcript of the proceedings. The deputy replied that he had asked the reporter to type up "Thomas' examination." Counsel for defendants said that he would object to the use of the daily transcript unless defendants were furnished a copy. The deputy replied that neither the People nor the defendants had asked for a daily transcript and he knew of no law that required him to get the consent of counsel for defendants before he asked the reporter to type a portion of what had been said. The objection was overruled. This contention is not sustainable.

[10] Appellants contend further that the deputy district attorney was guilty of prejudicial misconduct in that he asked Thomas if he had been convicted of being a narcotic addict in 1954. Prior to asking that question, Thomas had testified that he was not a narcotic addict in 1954. Counsel for defendants objected to the question, and the objection was sustained and the jury was instructed to disregard it. Thereafter the deputy district attorney asked Thomas whether or not on November 19, 1954, he admitted by way of pleading guilty that he was a narcotic addict. Defendants' objection to the question was overruled. Thomas replied in the affirmative. The deputy asked Thomas if he was a narcotic addict on October 26, 1955. Thomas said he was not. Then the deputy asked him if he admitted on or about October 26, 1955, by pleading guilty that he was an addict. Defendants' objection to the question was overruled. Thomas replied that he entered a plea of guilty but he did not admit the use of narcotics. Appellants argue to the effect that their prior bad acts were not relevant to their guilt or innocence of the present charges, and that since prior mis-

demeanor convictions may not be referred to for impeachment purposes, the deputy district attorney must have asked the questions for the purpose of prejudicing the jury. The prior admissions of Thomas were relevant to the present issue whether Thomas was a narcotic addict when he was driving the automobile, especially in view of Thomas' other admissions, to the effect, that during the intervening time from 1954 to August, 1956, he used narcotics frequently when (during said period of time) he was not in jail. The deputy district attorney was not guilty of misconduct in asking those questions.

[11] Appellants also contend that the deputy district attorney was guilty of misconduct in presenting certain testimony on rebuttal. Stone had testified on direct examination that he had not used narcotics since 1953. He had testified on cross-examination that he did not recall telling an officer on February 21, 1955, that he had a fix of heroin at 11 o'clock on that date; he did not recall that a photograph of his arm was taken on that date; he did not have any fresh needle marks on his arm on that date. As a witness on rebuttal, the prosecution called Officer Robinson who testified that Stone told him on February 21, 1955, that he had a fix at 11 a.m. on that date; that he (officer) was present when a photograph of Stone's arm was taken on February 21, 1955; that on said date he saw some needle marks on Stone's arm, which marks appeared to be fresh. The fact that Stone had said that he did not recall making the statement to the officer, and that he did not recall a photograph, did not preclude the prosecution from presenting the testimony of the officer. See *Ehat v. Scheidt*, 17 Cal.App. 430, 436, 120 P. 49. The officer's testimony tended to rebut Stone's testimony that he had not used narcotics since 1953. This contention is not sustainable.

[12] The order consolidating the informations for trial is not appealable. Pen. Code, § 1237. That order is not an order made after judgment.

The purported appeal from the order consolidating the informations for trial is dismissed. The judgments and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



155 Cal.App.2d 288

SUBSEQUENT INJURIES FUND OF CALIFORNIA, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, James W. Clubb, Pacific States Corporation, and Industrial Indemnity Company, Respondents.

No. 17632.

District Court of Appeal, First District,
Division 1, California.

Nov. 18, 1957.

Hearing Denied Jan. 15, 1958.

Workmen's compensation proceeding under claim for benefits under Subsequent Injuries Fund for compensation in respect to pre-existing eye condition which limited employee's vision. From award of Industrial Accident Commission, Fund petitioned for review. The District Court of Appeal, Fred B. Wood, J., held that facts did not present exception to general rule of statute barring proceedings against state for payments from Subsequent Injuries Fund more than five years from date of injury.

Award annulled.

1. Workmen's Compensation ⇐1295

An employer by voluntarily furnishing medical treatment or making compensation payments should not be allowed by rendering such service, to lull employee into a false sense of security and thus there is good reason for tolling running of time against claim for compensation during the

time such payments are made. West's Ann.Labor Code, §§ 4600-4605, 4650-4663, 4750-4755, 5405, and subd. (b), 5410.

2. Workmen's Compensation ⇐1295

Where there are two employers, a general and special employer, furnishing of medical service or making of disability payments by one of them will toll statute of limitations against other, under appropriate circumstances. West's Ann.Labor Code, §§ 4600-4605, 4650-4663, 4750-4755, 5405, and subd. (b), 5410.

3. Workmen's Compensation ⇐1292

In application by employee for benefits under Subsequent Injuries Fund for compensation in respect to pre-existing eye condition which limited his vision, brought almost six years after injury, facts showing that payments were stopped by insurer four months after injury, did not present exception to general rule that proceedings against state for payments from Subsequent Injuries Fund must be instituted within five years from date of injury. West's Ann.Labor Code, § 5410.

Edmund G. Brown, Atty. Gen., Gerald F. Carreras and Albert W. Harris, Jr., Deputy Attys. Gen., for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondent, Industrial Accident Comm.

Charles P. Scully, Lowell A. Airola, Victor Van Bourg, San Francisco, for respondent, James W. Clubb.

FRED B. WOOD, Justice.

On July 27, 1949, the employee was injured by exposure to parathion, a poison used in crop spraying. It was not until June 28, 1955, that he applied to join the State as a defendant, claiming benefits under the Subsequent Injuries Fund for compensation in respect to a preexisting eye condition which limited his vision.

The commission found a permanent disability of 69% due to the spray poisoning (for which the employee had been compensated) and that this disability when added

to the preexisting eye disability resulted in a combined permanent disability of 79%. Accordingly, the commission made an award against the state in the sum of \$1,200 (less \$600 payable to the employee's attorneys) and a life pension of \$8.77 a week, beginning May 2, 1956. Upon reconsideration the commission rendered a decision substantially the same in all respects material to the present inquiry.

The sole question is whether or not the statute of limitations had run against this claim.

Section 5410 of the Labor Code has been held applicable. *Subsequent Injuries Fund v. Industrial Acc. Comm.*, 39 Cal.2d 83, 89-92, 244 P.2d 889; *Sutton v. Industrial Acc. Comm.*, 46 Cal.2d 791, 794, 298 P.2d 857; *Subsequent Injuries Fund v. Industrial Acc. Comm.*, 151 Cal.App.2d 606, 312 P.2d 78. Section 5410 imposes a five-year limitation, from the date of injury, for an employee to institute proceedings "upon the ground that the original injury has caused new and further disability." This statute, having been invoked by the State, would seem to operate as a complete bar to the employee's application for benefits payable out of the Subsequent Injuries Fund. In support of its decision the commission invokes subdivision (b) of section 5405 of the Labor Code which allows the commencement of proceedings within one year from "the expiration of any period covered by payment under Article 3 of Chapter 2 of Part 2 of this division" for the "collection of the benefits provided by Articles 2 or 3, or both, of Chapter 2 of Part 2 of this division." A lump sum payment which the employer's carrier made in June, 1955, would, the commission says, cover all of the permanent disability payments, attributable to the spray injury, up to a point of time less than one year prior to the filing of the employee's claim against the State. That lump sum payment was result of a compromise and settlement between the employee and the insurance carrier. There well might be a question whether it was a "payment" that "covered" any particular "period" of time within the meaning of

those terms as used in section 5405, subdivision (b), a question we need not decide.

Articles 2 and 3, mentioned in section 5405, relate respectively to medical and hospital treatment the employer must furnish (§§ 4600-4605) and disability payments he must make (§§ 4650-4663). They do not literally embrace the payments which by article 5 (§§ 4750-4755), later added to the same chapter, the State undertakes to make when an industrial injury results in permanent disability exceeding 70% and is due in part to a "previous disability or impairment" (§ 4750). See the discussion of a similar though not precisely identical problem in *State of California v. Industrial Acc. Comm.*, 151 Cal.App.2d 147, 311 P.2d 42.

[1,2] This is not a mere matter of words of cross-reference. There is good reason for tolling the running of time against a claim for compensation from an employer for medical treatment or for disability payments during the time, if any, that the employer voluntarily furnishes such treatments or makes such payments. He should not be suffered, by rendering such service, to lull the employee into a false sense of security and then, more than a year from the injury, invoke the statute. Such an injustice section 5405 effectively prevents. See *Bulger v. Industrial Acc. Comm.*, 218 Cal. 716, 24 P.2d 796; *James L. McLaughlin Co. v. Industrial Acc. Comm.*, 86 Cal.App. 406, 408, 260 P. 829. This reasoning applies also when the real employer conceals the facts concerning the terms of employment and in procuring another person to furnish the service or make the payments leads the employee to believe that his injuries will be taken care of by the party or parties legally liable. *Pacific Emp. Ins. Co. v. Industrial Acc. Comm.*, 66 Cal.App.2d 376, 380-382, 152 P.2d 501. Similarly, when there are two employers, a general and a special employer, the furnishing of medical service or the making of disability payments by one of them will toll the statute against the other, under appropriate circumstances. *State Comp. Ins. Fund v. Industrial Acc. Comm.*,

26 Cal.2d 278, 158 P.2d 195; State Comp. Ins. Fund v. Industrial Acc. Comm., 73 Cal. App.2d 248, 166 P.2d 310.

[3] This reasoning does not apply to the circumstances of the instant case. No one lulled the employee into a false sense of security for any appreciable period of time. In his application, filed November 21, 1949, he joined the employer and the latter's insurance company,¹ alleging as the "reason for filing this claim" the fact that on "November 17, 1949, the insurance company advised applicant, they were not furnishing any further medical, or paying any more compensation" and that "applicant is still unable to do any work." At that time less than four months of the five-year statute of limitations had run. At the very most, the paying of compensation or the furnishing of medical treatment for such a period would toll the running of the statute for not more than four months, too short a period to bridge the nearly six-year gap between the date of injury and the date of joinder of the State for the purposes of drawing upon the Subsequent Injuries Fund. It was not until April 28, 1955, that the parties executed the compromise and release, which the referee on June 7, recommended for approval and the commission approved on June 10, 1955. The five-year statute (§ 5410) even if tolled for nearly four months from and after the date of the injury, had already run. It would be stretching the spirit and the letter of the text of section 5405 beyond all reason were we to undertake to make it apply thus retroactively. Moreover, it is quite doubtful if there is such a relation between the State and the employer or his carrier as would make it reasonable to infer from the provisions of section 5405 a legislative intent to toll the statute as against the State if predicated merely upon the furnishing of medical benefits or the payment of compensation by the employer or

his insurance carrier. We are leaving undecided the question whether the references to "Article 2" and to "Article 3" (which appear in § 5405) include a reference to article 5 and the Subsequent Injuries Fund.

It happens, too, that on the very day that he applied for adjustment of his claim in respect to the spray poisoning the employee filed a separate application against the employer and its carrier in respect to the prior injury, the eye injury. As the reason for the latter, he said, in the application, that he "thought it advisable to present this matter for hearing at same time, for possible adjustment." Quite likely at that very moment, certainly during the hearings which ensued and long before the expiration of the five-year period, the employee must have become aware of facts which put him upon notice that he might have a claim against the Subsequent Injuries Fund. During all of that period the State had no knowledge and no information concerning the possibility of any such claim. Under these circumstances it would seem highly inequitable to stretch the statutes, as the respondent commission would have us stretch them, to toll the running of the statute against this claim.

The employee makes a somewhat different approach to the problem than does the commission. He argues, in effect, that section 5410 does not apply because in this case his claim against the State was not filed until after the lapse of five years. That, we think, is an obvious non sequitur. He then argues that sections 5803 and 5804 of the Labor Code are inapplicable because, as against the State, he is not requesting that a prior award be altered. That is correct. Incidentally, no party to this proceeding claims that either of those sections applies. Finally, he says that "since neither Section 5410 nor Sections 5803 and 5804 are applicable here, the only applicable provision is Section 5405, which provides

1. When he did that, § 5404 blocked the running of the statute of limitations "as to all further claims by such party [the employee] against the defendants therein named [the employer and its insur-

ance carrier] for compensation arising from that injury, and the right to present such further claims is governed by Sections 5803 to 5805, inclusive."

that if a claim is filed within one year from the time of the last payment of benefits, then the claim is a timely one." That is essentially the same position which the respondent commission takes, one which we have found untenable.

We conclude that the facts of this case do not present an exception to the general rule that section 5410 applies and that proceedings against the State for payments from the Subsequent Injuries Fund must be instituted within five years from the date of injury.

The award is annulled.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.



155 Cal.App.2d 483

Pam Aloha DAMPIER, Plaintiff and Respondent,

v.

Frank Marlon DAMPIER, Defendant and Appellant.

Civ. 22588.

**District Court of Appeal, Second District,
Division 2, California.**

Nov. 25, 1957.

Proceeding on wife's motion for issuance of an execution based upon order in prior divorce proceeding requiring husband to make payments on note executed by husband and wife to bank until indebtedness to bank was completely liquidated. The Superior Court of Los Angeles County, Edward R. Brand, J., rendered order directing issuance of writ of execution, and husband appealed. The District Court of Appeal, Fox, Acting P. J., held that in view of fact that amount due when judgment was rendered did not appear in judgment, and wife thereafter entered into stipulated judgment with bank, it was improper to issue writ of execution based on judgment.

Reversed.

1. Divorce ⇐263

Where interlocutory divorce decree ordered husband to make payments on note, which husband and wife had executed to bank, wife was "party in whose favor judgment was given" within statute providing that party in whose favor judgment is given may have writ or order issued for execution of judgment. West's Ann.Code Civ. Proc. § 681.

See publication Words and Phrases, for other judicial constructions and definitions of "Party in Whose Favor Judgment Was Given".

2. Divorce ⇐263

Where husband and wife executed note to bank for amount of \$740.70 and in subsequent interlocutory divorce decree husband was ordered to make monthly payments on note until indebtedness to bank was completely liquidated, but amount due when judgment was rendered could not be determined from judgment, and wife thereafter entered into stipulated judgment with bank for \$513.66, it was improper to issue writ of execution based upon original order. West's Ann.Code Civ.Proc. § 681.

3. Divorce ⇐263

Where interlocutory divorce decree ordered husband to make monthly payments on note executed by husband and wife to bank until indebtedness to bank was completely liquidated but amount due when judgment was rendered did not appear in note, and wife thereafter entered into stipulated judgment with bank, if wife desired to proceed further by way of execution it would be necessary first for her to secure modification of original judgment showing amount thereof in her favor. West's Ann. Code Civ.Proc. § 681.

Marvin Licker, Los Angeles, for appellant.

Iverson & Hogoboom, Los Angeles, and Robert E. Mitchell, for respondent.

FOX, Acting Presiding Justice.

Defendant appeals from an order directing the issuance of a writ of execution.

Plaintiff secured an interlocutory decree of divorce which provided: "The defendant is ordered to make the monthly payments on the note at the Security-First National Bank, 14th and Wilshire Branch, Santa Monica, California, amounting to Fifty Dollars (\$50.00) per month, and to pay the same until the indebtedness to said bank is completely liquidated."

In due course a final judgment was entered from which no appeal was taken.

Plaintiff made a motion for issuance of an execution based upon the above order. She supported her motion by her own affidavit and that of B. B. Bashore, an employee of the Security-First National Bank. Defendant filed an affidavit in which he stated, *inter alia*, that he was not indebted to plaintiff. The affidavits on behalf of plaintiff disclosed that while plaintiff and defendant were living together as husband and wife they executed a promissory note to the bank for \$740.70 covering a loan of money to them; that the note was secured by certain chattel mortgages; that after plaintiff secured the interlocutory decree, she alone executed a renewal note for the balance remaining unpaid in consideration of an extension of time, with the same chattel mortgage security; that thereafter the bank sold the property covered by two of the chattel mortgages, applied the net amount realized therefrom on the indebtedness, and determined that the security represented by the third chattel mortgage was valueless; that after such credits plaintiff entered into a stipulated judgment with the bank for \$513.66 and agreed to make monthly payments thereon until fully paid; and that plaintiff had never received any payment from defendant on account of the provision quoted above from the interlocutory decree. Execution was ordered issued "in the sum of \$515.66."

[1] Section 681, Code of Civil Procedure, provides that "The party in whose favor judgment is given may * * * have a writ or order issued for the execution or enforcement of the judgment." Relying on this statute defendant contends that

the writ was improperly issued on the theory that the judgment is not in plaintiff's favor. In making this contention defendant overlooks the obvious fact that the only judgment rendered in this case was in favor of plaintiff—not in favor of anyone else. The provision in the judgment directing defendant to make the payments on the note to the bank was for plaintiff's benefit because she was obligated to pay such indebtedness. It may therefore properly be said that the judgment was in her favor.

But "[b]efore execution can issue, the judgment must be for money, and the amount due and the identity of the persons to whom payable must be fixed with exactness." *L. A. Local, etc., Bd. v. Stan's Drive-Ins, Inc.*, 136 Cal.App.2d 95, 97-98, 288 P.2d 291, 293. To the same effect see *Bank of America v. Standard Oil Co.*, 10 Cal.2d 90, 93-94, 73 P.2d 903; *McKay v. Coca-Cola Bottling Co.*, 110 Cal.App.2d 672, 677, 243 P.2d 35, and *Feldmeier v. Superior Court*, 12 Cal.2d 302, 307, 83 P.2d 929, 119 A.L.R. 927.

[2] The judgment here does not order payment to plaintiff and the amount required to be paid cannot be ascertained therefrom. Plainly, the judgment referred to an existing obligation in favor of the bank. The affidavits disclose that the original note was a joint obligation of the parties for \$740.70 and was secured by chattel mortgages on two automobiles and on their furniture. It does not appear what amount was due when the judgment was rendered. The chattel mortgages on the automobiles were foreclosed and the net proceeds therefrom in the amount of \$110 were applied on the loan. The chattel mortgage on the furniture was not foreclosed because the security was considered valueless. Thereafter plaintiff entered into a stipulated judgment with the bank for \$513.66, payable in monthly installments; the execution was for this amount plus \$2. This is not the note defendant was ordered to pay. And it cannot be determined from the judgment the amount he is called upon to pay. It was therefore improper to issue

the writ of execution. *McKay v. Coca-Cola Bottling Co.*, supra; *Bank of America v. Standard Oil Co.*, supra.

[3] If plaintiff desires to proceed further in this matter by way of execution it will be necessary first for her to secure a modification of the judgment showing the amount thereof in her favor. See *Feldmeier v. Superior Court*, supra.

The order is reversed.

ASHBURN, J., and RICHARDS, J. pro tem., concur.



155 Cal.App.2d 415

John F. O'LAUGHLIN, Petitioner,
v.

The SUPERIOR COURT of the State of California, In and For the COUNTY OF SAN DIEGO and John A. Hewicker, Judge of the Superior Court, Respondents.

Civ. 5816.

District Court of Appeal, Fourth District,
California.

Nov. 21, 1957.

Rehearing Denied Dec. 11, 1957.

Hearing Denied Jan. 15, 1958.

Certiorari proceeding to review an order of the Superior Court of San Diego County, John A. Hewicker, J., adjudging petitioner guilty of contempt of court and imposing sentence. The District Court of Appeal, Mussell, J., held that facts stated in order as to improper cross-examination of a witness for prosecution in a criminal case were insufficient to support adjudication of contempt.

Order annulled.

1. Contempt ⚡60(3)

Contempt of court is a specific criminal offense, a mere preponderance of evidence is insufficient to support finding of contempt and defendant cannot be compelled to be sworn as a witness.

2. Contempt ⚡66(7)

In reviewing contempt proceedings, the charge, evidence, findings and judgment must be strictly construed in favor of defendant, and no intendments or presumptions can be indulged in aid of their sufficiency.

3. Contempt ⚡10

Attorney may not be punished for contempt of court because he is honestly mistaken in his interpretation of the law, where he presents his mistaken views to court in a proper and respectful manner.

4. Contempt ⚡63(4)

Order adjudging contempt committed in presence of court must recite facts which actually constitute contempt.

5. Contempt ⚡63(4)

Facts stated in order as to improper cross-examination of witness for prosecution, calling for his opinion as to truthfulness of testimony of another prosecution witness, were insufficient to support contempt adjudication, where order contained no findings of facts sufficient to show that objectionable question was asked with intent to mislead and prejudice jury against prosecution and no attempt to pursue inquiry further was made after objection had been sustained.

6. Criminal Law ⚡706

Asking witness for prosecution on cross-examination in prosecution for kidnapping and other offenses whether testimony of his wife, alleged victim of offenses, was not a carbon copy of specified murder, for which witness admittedly had previously been convicted, was objectionable as calling for opinion of witness as to truthfulness of wife's testimony.

7. Contempt ⚡63(4)

Adjudication that defense attorney was guilty of contempt could not be sustained on ground that manner in which he conducted trial was subject to criticism, where order of contempt stated no facts sufficient to support such charge.

8. Contempt ⚡63(4)

Conclusions of trial court cannot cure the failure to recite in detail in order of

contempt sufficient facts to constitute contempt of court.

Barton C. Sheela, Jr., San Diego, for petitioner.

James Don Keller, Dist. Atty., and Claude Brown, Deputy Dist. Atty., San Diego, for respondents.

MUSSELL, Justice.

In this proceeding in certiorari, petitioner, an attorney, seeks to annul an order of the Superior Court of San Diego County adjudging him in contempt of court, ordering that he pay a fine and that he be imprisoned for a period of three days, two of which were suspended.

The alleged contempt occurred on January 8, 1957, before the court and in the presence of the jury in the trial of an action entitled "The People of the State of California, Plaintiff, vs. Lucille M. Whisenand and Beatrice Victoria Winn, Defendants" and during the cross-examination of George D. Latham, who was a witness for the prosecution. This witness had admitted that he had been previously convicted of the crime of Murder in the state of North Dakota. The defendants, Whisenand and Winn, were being tried on charges of kidnapping, attempt to commit murder, robbery, burglary, and conspiracy to commit the crime of kidnapping. The testimony of Mrs. Ruth Latham, wife of George D. Latham, was to the effect that she had been abducted from her home in San Diego, carried about San Diego in a panel delivery truck, concealed for a time at the home of Mrs. Winn, then transported in the trunk of an automobile to a point in Imperial county, where she was stripped of all her clothing and buried alive under rocks by the defendants; that she freed herself from the bonds on her wrists and feet, pushed the rocks aside, and walked to the highway, where she was discovered by a passing motorist.

The order adjudging petitioner guilty of contempt is, in part, as follows:

"Upon his further cross-examination on the above date (January 8, 1957) the witness (George D. Latham) was asked by John F. O'Laughlin, an attorney for Lucille M. Whisenand, the following question: 'Well, Sir, isn't the story of your wife, the story that your wife related here, about being placed in the ditch and about walking to her rescue and telling who had harmed her, isn't that a carbon copy of the North Dakota murder?'

"By Mr. Low (Deputy District Attorney): 'Just a minute. Objected to as immaterial and highly improper. Counsel knows it.'

"The Court: 'Sustain the objection.'

"Mr. O'Laughlin: 'Maybe Mr. Latham knows better, too.'

"Whereupon a demand for an offer of proof was made by Mr. Low, and out of hearing of the jury the following offer of proof was made:

"Mr. O'Laughlin: 'Your Honor, I have a newspaper article that was written back in North Dakota and it says this:

"'Kidnap trial witness tells of North Dakota murder conviction 36 years ago.

"'It says, "Old newspaper files report Latham was convicted at New Rockford as an accomplice in the fatal shooting of Angelo Meggo, described as an Italian farm laborer. The old newspapers quote J. A. Manley, then State's Attorney of Eddy County, to the effect that Latham and Henry Epstein, alias Henry Jackson, made a statement concerning the shooting of Meggo in a robbery aboard a freight train that was traveling across Eddy County. Meggo, shot twice in the abdomen, and thrown from the train southeast of New Rockford, dragged himself to a store in the village of Dundas. He died shortly afterward. Authorities said in his statement Latham told them Epstein did the shooting but that he admitted he was pres-

ent. Epstein received a fifteen-year sentence to the penitentiary.””

The reporter's transcript, however, shows that after the foregoing question was asked and the objection thereto sustained, Mr. Low, counsel for the People, said "If the court please, we would like to ask counsel to approach the bench and make an offer of proof on that. There is no basis for it." All counsel then approached the bench and out of the presence of the jury, petitioner said, "O.K. What do you want to know?", and the court replied, "Make your offer of proof." Following this order of the court, petitioner quoted from a newspaper article as set forth in the quoted portion of the contempt order. Following these proceedings, Mr. Low stated that he would appreciate some sort of statement by the court to the jury, and the judge replied, "I am going to", after which, in the presence of the jury, he made the following comments:

"The Court: Mr. O'Laughlin, you asked Mr. Latham about the similarity between the incident in North Dakota and here. You have an article from which you read. That incident has absolutely no similarity of any kind or character with the present offense. You knew it at the time you asked the question and you only asked the question for the purpose of leaving a bad inference. At this time I charge you with misconduct. I don't want it to happen again, Mr. O'Laughlin. If it does, I am going to do something to you.

"Mr. O'Laughlin: Your Honor, I showed my good faith on it.

"The Court: There was no good faith shown whatsoever. You have the article there and it has absolutely no resemblance to this incident at all and you knew it, and the next time, Mr. O'Laughlin, a thing like that happens, I am going to put you out that left door over there. (Door leading to jail.) That is what is going to happen to you. Proceed. Proceed."

A recess was then ordered, after which, in chambers, the court informed the petitioner, inter alia, that the question asked by petitioner was unethical and uncalled for and that if it were not for the fact that petitioner had not been out in practice for a very long time he would cite him for contempt at that time, but that he was going to continue the matter until the conclusion of the trial and that at that time, if he had not changed his mind, he was going to cite petitioner for contempt. Following further remarks by the court and counsel, the court stated that if he held petitioner in contempt of court, he did not know what he was going to do and that "If I do, maybe I better make the sentence such that he will be forced to take out a writ of certiorari and go see whether I am justified." The trial was then resumed and examination of the witness, Latham, was concluded without further reference to questions asked by the petitioner.

On January 18, 1957, proceedings were had in which the court related the circumstances surrounding the asking of the question of the witness, Latham, by petitioner and stated to petitioner, among other things, that he thought he was in contempt of court; that he could have found petitioner in contempt of court at the time (January 8, 1957) and sentenced him but that he wanted petitioner to have a right to be heard. The court then stated he would furnish petitioner with a transcript of the proceedings and his remarks so that petitioner would be fully apprised of the charge made against him and that petitioner could appear in person or by counsel and answer it. After further remarks by the court and counsel, the matter was continued from time to time until June 13, 1957, when the court found that petitioner had asked the question of the witness, George D. Latham, without any basis in fact, and was not acting in good faith; that the question was asked with intent to mislead the jury, to prejudice the jury against the case of the People; that the question was improper and was asked with the intent to thwart and obstruct justice

and that the two crimes bore no similarity. The court then found petitioner guilty of contempt and imposed a sentence of fine and imprisonment.

[1-3] The question of whether the order herein adjudging petitioner in contempt should be annulled must be determined in the light of certain well established rules governing contempt of court. In *Bennett v. Superior Court*, 73 Cal.App.2d 203, 210-211, 166 P.2d 318, it was held that contempt of court is a specific criminal offense; that the proceeding is of such a distinctly criminal nature that a mere preponderance of the evidence is insufficient; that the defendant cannot be compelled to be sworn as a witness; that in reviewing the proceedings, the charge, the evidence, the findings and judgment are all to be strictly construed in favor of the accused, and no intendments or presumptions can be indulged in aid of their sufficiency. And on page 218 of 73 Cal.App.2d, on page 326 of 166 P.2d the court said:

"We know of no rule of law permitting a court to punish an attorney because he is honestly mistaken in his interpretation of the law when he presents his mistaken views to the court in a proper and respectful manner. As is said in *Ex parte Lake*, supra [65 Cal.App. 420, 224 P. 130]: 'It never has been held that in the trial of an issuable fact an attorney is guilty of contempt in merely offering insufficient, or even incompetent, evidence in an effort to prove that fact.'"

[4] In *Wilde v. Superior Court*, 53 Cal. App.2d 168, 177-178, 127 P.2d 560, 565, it was held:

"In cases of contempt committed in the presence of the court, the order adjudging the contempt must also recite facts which actually constitute contempt. It is also true that as the proceedings are of a criminal nature no presumptions may be indulged in favor of the judgment. These rules were clearly stated in *In re Lake*, supra [65 Cal.App. 420, 224 P. 126], as follows:

"The reason for this rule is clearly stated in the *Hotaling* case, from which we quote ([*Hotaling v. Superior Court*] [191 Cal. 501], 217 P. 74, 29 A.L.R. 127): "Contempt of court is a specific criminal offense. [Citing cases.] A contempt proceeding is not a civil action, either at law or in equity (herein disagreeing with *Ex parte Selowsky* [189 Cal. 331], 208 P. 99, 100) * * *, but is a separate proceeding of a criminal nature and summary character [Citations.] in which the court exercises but a limited jurisdiction. * * * The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient.'"

In *Gallagher v. Municipal Court*, 31 Cal. 2d 784, 795-796, 192 P.2d 905, 912, it is said that:

"In a summary contempt proceeding the judge who metes out the punishment is usually the injured party and the prosecutor as well. Since such a situation invites caprice, appellate courts almost without exception require that the order adjudging a person in direct contempt of court recite in detail the facts constituting the alleged transgression rather than the bare conclusions of the trial judge. * * *

"An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case. * * * The public interest in an independent bar would be subverted if judges were allowed to punish attorneys summarily for contempt on purely subjective reactions to their conduct or statements."

In *Platnauer v. Superior Court*, 32 Cal. App. 463, 474-475, 163 P. 237, 242, quoted by the court in the *Gallagher* case, supra, it was held:

"A lawyer, when engaged in the trial of a case, is not only vested with the right, but, under his oath as such officer of the court, is charged with the duty of safeguarding the interests of his client in the trial of an issue involv-

ing such interests. For this purpose, in a trial, it is his sworn duty, when, the cause requires it, to offer testimony in behalf of his client or in support of his case in accordance with his theory of the case, to object to testimony offered by his adversary, to interrogate witnesses, and to present and argue to the court his objections or points touching the legal propriety or impropriety of the testimony or of particular questions propounded to the witnesses. If, in discharging this duty, he happens to be persistent or vehement or both, in the presentation of his points, he is still, nevertheless, within his legitimate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety. As well may be expected in forensic polemics, he cannot always be right, and may wholly be wrong in his position upon the legal question under argument and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But, whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it."

In *Chula v. Superior Court*, 109 Cal.App. 2d 24, 39-40, 240 P.2d 398, 408, this court held:

"An attorney has the duty to protect the interests of his client. He has a right to propound a legitimate argument and to protest an erroneous ruling, and there is no rule permitting a court to punish an attorney because he is honestly mistaken in his interpretation of the law when he presents his mistaken views to the court in a proper and respectful manner.

"In *Gallagher v. Municipal Court*, 31 Cal.2d 784, 192 P.2d 905, the court cited with approval *Platnauer v. Superior Court*, *supra*, and stated, 31 Cal. 2d at page 788, 192 P.2d at page 908:

'But certainly a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, provided of course, that he does not resort to deceit or to wilful obstruction of the orderly processes.'

[5,6] An examination of the order of contempt herein, considered in the light of the foregoing authorities, impels us to conclude that the order must be annulled. It is apparent from the contempt order that it is based on the finding that the question asked George Latham by petitioner constituted contempt of court. The question "Well, Sir, isn't the story of your wife, the story that your wife related here, about being placed in the ditch and about walking to her rescue and telling who had harmed her, isn't that a carbon copy of the North Dakota murder?", apparently called for the opinion of the witness, Latham, as to the truthfulness of his wife's testimony and was clearly objectionable. However, an objection thereto was sustained by the court and there was no attempt on the part of the petitioner to pursue the inquiry further after the objection was sustained. The record shows that petitioner was then requested by counsel for the People (out of the presence of the jury) to make an offer of proof and after having been ordered by the court so to do, petitioner quoted from a newspaper article. However, no offer of proof was made before the jury and when the trial resumed, the court stated to the jury that petitioner had read from a newspaper article and made the remarks above quoted. These remarks indicated that the court then considered the matter terminated for he did not then find the petitioner guilty of contempt or state that he would do so and the record shows that petitioner was not found guilty of contempt until June 13, 1957, several months thereafter.

[7,8] While in the contempt order the court found that the question was asked with intent to mislead and prejudice the jury against the case of the People, there

are no findings of fact stated in the order sufficient to show that the question was asked with the intent stated by the court. The record also shows that the court criticized the petitioner for the manner in which he conducted the trial and that the court was influenced thereby to find him guilty of contempt therefor. However, the order adjudging petitioner guilty of contempt must recite facts which actually constituted contempt (*Wilde v. Superior Court*, supra), and we are not here concerned with matters which do not appear therein. There are no presumptions in favor of the order and the conclusions of the trial court cannot cure the failure to recite in detail sufficient facts in the order to constitute contempt of court. We conclude that, under the circumstances shown by the record and the rules announced in the decisions cited herein, the contempt order must be set aside.

The order adjudging petitioner guilty of contempt of court and imposing sentence is annulled.

BARNARD, P. J., and GRIFFIN, J., concur.



155 Cal.App.2d 379

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Jack MAST, Defendant and Appellant.
Cr. 3379.

District Court of Appeal, First District,
Division 2, California.

Nov. 21, 1957.

Rehearing Denied Dec. 20, 1957.

Hearing Denied Jan. 15, 1958.

Defendant was convicted of bookmaking. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., rendered judgment, and defendant appealed. The District Court of Appeal, Kauf-

man, P. J., held that where arresting officer testified as to transaction in which informer took active part, defendant had right to ascertain identity of and examine informer, whose participation in transaction and information caused defendant's arrest and conviction, and denial of such right was prejudicial.

Reversed.

1. Witnesses — 216

In prosecution for bookmaking, wherein officer testified as to transaction in which informer took active part, defendant had right to ascertain identity of and examine informer, whose participation in transaction and information caused defendant's arrest and conviction, and denial of such right was prejudicial. West's Ann.Pen.Code, § 337a and subs. 2, 4, 6; § 995.

2. Criminal Law — 1144(13)

Where defendant was deprived of opportunity of producing evidence which might have resulted in exoneration, reviewing court could not assume that because prosecution evidence might seem strong that undisclosed evidence might not prove sufficient to overcome it in minds of jurors.

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

The appellant, Jack Mast, and one Morris Cooper were charged jointly in an indictment on three counts of bookmaking in violation of subdivisions two, four and six of Penal Code, section 337a, and one count of conspiracy to violate Penal Code, section 337a. Appellant's oral motion to dismiss the indictment pursuant to Penal Code, section 995, was denied. The appellant pleaded not guilty to all counts charged. Appellant waived a jury and was found guilty as charged on each of the four counts

and was sentenced to imprisonment in the County Jail for one year, the sentences to run concurrently. This appeal is taken from the judgment and the order denying the motion for a new trial.

Appellant and Morris Cooper were co-owners of a cigar store at 2260 Chestnut Street, San Francisco. William Koenig, a member of the Gambling Detail of the San Francisco Police Department knew that both appellant and Cooper had been arrested previously for bookmaking. Sergeant Mullan testified that appellant had been arrested in 1952 for bookmaking on the Chestnut Street premises. The Captain of the Northern District in which appellant's place of business is located had received anonymous letters and telephone calls wondering why the police allowed bookmaking to be carried on at appellant's store. As a result, on 25 different occasions between February and July, 1956, various police officers conducted an intermittent surveillance of appellant's store through the window of Foster's Cafeteria across the street. On numerous occasions, these officers saw customers reach for their wallets and extend what appeared to be money to the appellant and receive no merchandise in return. Almost always after one of these transactions, the appellant and Cooper would leave the store and make a telephone call at a nearby bar. On several occasions, one just four days before the arrest, the police used a confidential informer whom they observed handing money to the appellant and who then told them that he had orally placed bets with the appellant and that he thought the records were kept on the adding machine. Neither the officers nor the informer ever saw the appellant making any notes or memorandums. Appellant's counsel was not permitted to ask questions to establish the reliability or identity of the informer at the trial.

On July 14, 1956, at a little after 1 p.m., the informer entered appellant's store wearing a concealed radio transmitter which broadcast to a patrol car a block away. Sergeant Mullan in the patrol car listened to a male voice speak to a person named

"Jack" and heard a conversation involving the name of a horse and \$2 to win. Sergeant Mullan took no notes of the conversation and did not recognize the voice of the informer or that of the person who replied. A baseball game was being televised at this time and there were several people in appellant's store. About five minutes after the above conversation, the appellant left his store and entered the Spar Tavern across the street where he was arrested in the phone booth by Sergeant Mullan. A search of the appellant's person revealed a slip of adding machine paper with the following numbers, 264, 354, 880, and eighteen dimes. The police officers then searched the appellant's store and seized pads and slips of paper, a Daily Bulletin Sports Review for July 14, a racing form and an adding machine. It is conceded that both the arrest of the appellant and the search of his store were made without a warrant.

In the opinion of the prosecution's expert witness, the slip of paper found on the appellant was a record of bets as the numbers on the slip correlated with figures appearing in the Daily Bulletin for July 14, 1956. The expert also testified that the various slips of paper taken from the rear of appellant's store were records of bets in a manner used by bookmakers in San Francisco as well as the "owe sheet" found in the cash register. When the officer showed appellant the "owe sheet" and asked him what it represented, appellant replied that it represented sums of money owed to "us" and that someone had left the Daily Bulletin and racing form at the store.

[1] The determinative issue on appeal is that appellant was denied the right to ascertain the identity of and examine the informer whose participation and information caused his arrest and conviction. It is unnecessary to discuss the appellant's other contentions on appeal, as we think the appellant here was entitled to ascertain the identity of the informer. The record discloses that a stipulation was entered into by and between the people and the defend-

ant agreeing that all of the evidence that was taken on the voir dire could be considered as being submitted on the trial subject to all of the defendant's objections. On the record, therefore, defendant was refused the identity of the informer both on voir dire and at the time of the trial.

[2] We need quote only from this court's recent opinion in *People v. Castiel*, 153 Cal.App.2d 653, at page 658, 315 P.2d 79, at page 82: "The Roviario case [*Roviario v. U. S.*], supra, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, and the *Lawrence* case, supra, 149 Cal.App.2d 435, 308 P.2d 821 (decided by this court without benefit of the reasoning in, or knowledge of, the *Roviario* decision, since the *Roviario* opinion was filed in Washington on the day before the filing of the *Lawrence* opinion here) both dealt with the precise question here involved, the right of the defendant to have the identity of the participant-informer disclosed on cross-examination of the officer-witness who testified about the transaction in which the informer took an active part. In both it was concluded that in such circumstances the government's privilege must yield to the defendant's right to be informed of the identity of the informer-participant. * * * No one knows what the undisclosed informer, if produced, might testify. He might contradict or persuasively explain away the prosecution's evidence. It is the deprival of the defendants of the opportunity of producing evidence which *might* result in their exoneration which constitutes the error in this case, and we cannot assume because the prosecution evidence may seem strong that the undisclosed evidence might not prove sufficient to overcome it in the minds of the jurors. To do so is to reason that in no case can a defendant suffer prejudice from the suppression of evidence which may be favorable to him if the prosecution has produced what seems to be a strong eyewitness case of the defendant's guilt," and *People v. Lawrence*, 149 Cal.App.2d 435, 308 P.2d 821, also decided by this court.

It is our view that the error in refusing appellant the right to ascertain the identity of the informer was prejudicial.

Judgment reversed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; SPENCE, J., dissenting.



**Bertille B. SMITH, Administratrix with-
will-annexed of the Estate of Vincent
Richard Smith, sometimes known as V.
R. Smith, V. R. "Dick" Smith, and Dick
Smith, deceased, Plaintiff and Respond-
ent,**

v.

**Frank BULL, Mel Roach, Doe I to Doe XV,
Inclusive, Defendants.***

Frank Bull, Appellant.

Civ. 22360.

**District Court of Appeal, Second District,
Division 1, California.**

Nov. 22, 1957.

Rehearing Denied Dec. 19, 1957.

Hearing Granted Jan. 15, 1958.

Action by administratrix of deceased partner against surviving partner for an accounting. From a judgment of the Superior Court, Los Angeles County, Vernon M. Hunt, J., allowing administratrix a sum for conversion and appropriation of partnership good will, the defendant appealed. The District Court of Appeal, White, P. J., held that where plaintiff's husband and defendant, who formed advertising agency partnership, divided personal property by agreement and plaintiff's husband remained in possession of partnership premises, and old address and telephone number, and both partners after dissolution conducted businesses in same general district but under different names, and defendant did not in any way hold himself out as successor to partnership, business of which consisted of accounts brought in by partners or an ac-

* Opinion vacated 325 P.2d 463.

count executive through his personal contacts or friendships, partnership had no good will which could have been sold or which was converted to defendant's own use.

Judgment affirmed as modified.

1. Good Will ⇐

The "good will" of a business is not limited to the expectation of continued patronage of the general public, but includes expectation of continued patronage of its former and present customers. West's Ann. Bus. & Prof. Code, §§ 14100, 14102.

2. Partnership ⇐310

Where plaintiff's husband and defendant, who formed advertising agency partnership, divided personal property by agreement and plaintiff's husband remained in possession of partnership premises, and old address and telephone number, and both partners after dissolution conducted businesses in same general district but under different names, and defendant did not in any way hold himself out as successor to partnership, business of which consisted of accounts brought in by partners or an account executive through his personal contacts or friendships, partnership had no good will which could have been sold or which was converted to defendant's own use.

A. G. Ritter, H. E. Lindersmith, Los Angeles, for appellant.

Darling, Shattuck & Edmonds, by Thomas F. Call, Los Angeles, for respondents.

WHITE, Presiding Justice.

Defendant Frank Bull appeals from the judgment in an action for an accounting, brought by the administratrix with the will annexed of his deceased former partner, V. R. Smith, hereinafter referred to as "Smith". Respondent is also Smith's widow and sole distributee.

Appellant and Smith, by oral agreement, on September 1, 1949, entered into a part-

nership for the purpose of doing business as an advertising agency under the firm name and style of Smith & Bull. Each partner owned a 50% interest, and each had the right to terminate the partnership at any time.

The court found that the partnership continued up to February 27, 1953; and that on that day it was dissolved by mutual consent; that "in February, 1953", appellant "converted and appropriated for himself alone, and for his sole benefit and profit the copartnership business, good will, the customers and all the company employees with one exception. At the time of said conversion and appropriation the partnership had a goodwill of \$57,391.66". The court further found that appellant had accounted to Smith before his death, on June 6, 1953, "for all of the personal and real property and a portion of the accounts receivable and money on deposit", but that he had never accounted for the remaining accounts receivable, the balance of money on deposit in the partnership bank account "nor for any of the goodwill of the partnership". Respondent's interest in the money still on deposit in the name of Smith & Bull was found to be \$2,057.89; her interest in the paper stock inventory \$1,012.95; her interest in the collections on accounts receivable \$14.18; pursuant to stipulation, judgment was given for those amounts; and, from the record and briefs it appears that those items were offered before the action was begun and paid before this appeal was taken.

From said findings it was concluded that plaintiff is entitled to recover, in addition to those items said to have been paid, one-half of certain accounts receivable when and if collected, and \$28,695.82, with interest from date of entry of final judgment herein, which sum "represents one-half the value of the good will of the copartnership of Smith & Bull when converted and appropriated by" appellant. Judgment was given accordingly.

Only one item of the judgment—\$28,695.83 for one-half of the value of the good will

of the partnership "when converted and appropriated"—is claimed to be erroneous.

The following grounds for reversal are urged: (1) that as a matter of law no partnership good will existed; (2) that there is no evidence to support a finding that partnership good will existed; (3) that the partnership good will had no value; (4), that the value of the partnership good will found by the trial court was erroneous; and (5) that there is no evidence of any conversion by appellant of the good will or anything else belonging to said partnership.

[1] "The 'good will' of a business is the expectation of continued public patronage". Bus. & Prof.Code, 14100. It is property and may be transferred. Bus. & Prof.Code, 14102. It is not limited to the expectation of continued patronage of the general public, but includes the expectation of continued patronage of its former and present customers. *Bergum v. Weber*, 136 Cal.App. 2d 389, 392, 288 P.2d 623; *Handyspot Co. of Northern California v. Buegeleisen*, 128 Cal.App.2d 191, 195, 274 P.2d 938.

Respondent, in her brief, relies upon the decision in *Mackay v. Clark Rig Building Co.*, 5 Cal.App.2d 44, 60, 42 P.2d 341, 348, wherein the statements are made that "The question of whether the business possessed a good will is a *question of fact* to be determined upon the trial of the action" and that "it may not be declared that good will cannot as a *matter of law* attach to the business of building oil derricks * * *". (Emphasis added.)

Appellant in the instant action relies upon the case of *Little v. Caldwell*, 101 Cal. 553, wherein at page 560, 36 P. 107, at page 109, after stating that in both commercial and personal service partnerships the surviving partner must complete all executory contracts of the firm, it is said that in the personal service or professional partnership the survivor "is not required to make an allowance in the settlement of the partnership accounts for what may be termed the good will of the partnership, or for the profits of such future business as may have been

given to him by former clients of the firm * * *".

In both the *Mackay* and *Little* cases, supra, demurrers to complaints for accounting were sustained, and judgments rendered for defendants (the surviving partners) were reversed on appeal. In both, the partnership had been dissolved by the death of a partner; and in both the surviving partner completed performance of existing contracts for services to be rendered,—in the *Mackay* case the building of oil derricks, and in the *Little* case the rendering of services as attorneys under a contingent fee contract. In the *Little* case, it was held that the original contract was for the services of both partners and upon *Little's* death the clients could elect to consider the employment terminated. But, since the client was willing to intrust the survivor with the further management of the litigation, the survivor was bound to complete the unfinished contract for the benefit of the partnership.

The facts in the instant action differ materially from those considered in *Mackay v. Clark Rig Building Co.*, supra, and *Little v. Caldwell*, supra, in that the instant action does not involve contracts or "unfinished business" which one partner was obligated to perform after dissolution because of the death of the other partner.

Likewise, other cases cited by the parties on the instant appeal are not controlling because of their differing facts.

In *Driskill v. Thompson*, 141 Cal.App.2d 479, 296 P.2d 834, 838, one partner, who before dissolution procured for himself alone a lease of the partnership premises, ousted his partners and carried on alone the partnership dance hall business in the leased premises, was required to pay the former partners for their share of the "business, together with its good will".

In *Miller v. Hall*, 65 Cal.App.2d 200, 150 P.2d 287, 288, *Miller* retired from a brokerage partnership because of a paralytic stroke. *Hall* circularized the partnership's customers, referred to an old communication from the partnership and said "our prin-

principles and policies haven't changed a bit". He was required to pay Miller for his portion of the good will. There the appellate court stated that the use of the same address, the organization, and the files was a partnership asset and said: "we are unable to hold, as a matter of law, that Hall was under no duty to account to Miller for the value of this good will".

In *Ruppe v. Utter*, 76 Cal.App. 19, 243 P. 715, the defendant partner, after refusing to buy or sell pursuant to the partnership agreement, continued in possession of the leased premises, the furniture and equipment, etc. and operated the partnership mortuary business for his sole benefit. It was there held that the lease, the permit to do business, the good will and the profits of the continued business should be accounted for even though plaintiff (the withdrawing partner) had formed other connections and solicited similar business.

[2] In the instant action, the partners had divided by agreement the personal property, and Smith, not the appellant, had remained in possession of the partnership premises, the old address and telephone number. Both partners after dissolution conducted businesses in the same general district under the names of "Smith & Ganz" and "Frank Bull & Co.", respectively. Appellant did not in any way hold himself out as the successor to the partnership.

More helpful in the instant action is the decision in *Heywood v. Sooy*, 45 Cal.App. 2d 423, 114 P.2d 361, where, as here, the partnership was dissolved and the partnership assets were divided by mutual consent. Mr. Justice Spence, speaking for the court, quotes with approval from *Little v. Caldwell*, supra, and at page 426 of 45 Cal. App.2d, at page 363 of 114 P.2d, says: "It will be noted that the cited case refers to the 'contract [of employment]' and states that such contract is to be viewed by a court of equity as an asset of the partnership. *It will be further noted that the cited case repudiates the notion that a partner is accountable after dissolution for any allowance for what may be termed the 'good*

will' of the partnership which may result in contracts of employment after dissolution. While the cited case did not involve the precise points presented here, we believe that it indicates the line of demarcation between 'unfinished business', being business covered by contracts of employment at the time of dissolution, and other matters, not covered by contracts of employment, but which thereafter become the subjects of contracts of employment through the good will previously existing between the partnership and the clients. As to the 'unfinished business', a duty to perform services rests on the partnership at the time of dissolution and continues thereafter to rest on the partners or the surviving partner. As to the other matters, no duty to perform services rests on the partnership at the time of dissolution and no duty continues thereafter to rest on the partners or surviving partner. And where no duty to perform the services rests on the partnership at the time of dissolution, such services as may thereafter be performed by either of the former partners under contracts of employment subsequently made with former clients cannot be considered 'unfinished business' of the partnership at the time of the dissolution." (Emphasis added.) Judgment for a portion of the fees collected by Sooy for services in litigation begun by old clients of the partnership after its dissolution was reversed with directions that findings and conclusions be reframed and judgment entered for defendant. Petitions for rehearing by the District Court of Appeal and hearing by the Supreme Court were denied, and we have found no modification of the decision.

Under the facts of the instant action, we are persuaded that as a matter of law the partnership of Smith & Bull in February 1953 had no good will which could have been sold or which was converted to his own use by appellant.

Smith and Bull had individually engaged in various phases of the advertising agency business for many years, they had been partners before, and each had been a member of other firms prior to 1949 when Smith

& Bull was formed by them. Each had some accounts at the beginning of the partnership. The accounts which "just came in" were negligible. The large accounts were brought in by a partner or an account executive through his personal contacts or friendships. The largest account serviced by the partnership was Seaboard Finance Company. Over half of the partnership's gross billing was to Seaboard. The Seaboard account had been secured and serviced by the joint efforts of the partners and their employee who was the account executive assigned to that work. Early in December 1952, Seaboard had advised Smith and Bull and their account executive that they were dissatisfied with the service and were considering taking their account elsewhere on March 1st. February 5, 1953, Bull wrote Smith that he wished to withdraw from the partnership, and could not go along with Smith's proposal that their partnership be merged with several other agencies into a corporation. A few days later at a meeting of Smith, Bull and several of their employees, it was agreed that the partnership would be dissolved, that Bull would remove his business from the partnership premises, that Smith should have first opportunity to solicit the Seaboard business and if he were unsuccessful Bull would try to get it. In evidence is a letter from Seaboard dated January 15th telling of its dissatisfaction, and a letter dated February 26th advising that its account is being taken elsewhere on March 1st.

The evidence is that Smith, soon after the oral agreement to dissolve the partnership, arranged an appointment with an officer of Seaboard concerning its future business; that he failed to keep the appointment; that later Bull solicited the business for himself; and that it was given to him on March 1st. Some of the evidence above summarized was hearsay, but it was admitted without objection, and it was not contradicted.

Under these facts, and without any proof of any illegal or unfair act on the part of Bull, as a matter of law he cannot be held

responsible to Smith for any good will of the former partnership.

As said in *Pollock v. Ralston*, 5 Wash.2d 36, 104 Pa.2d 934, 938,

"We are of the opinion that, under the facts of this case, there was no good will of any value which could be or was appropriated * * * The partnership here involved was a mere agency partnership, holding agency contracts, terminable at will, which contracts were secured and held purely because of the skill and experience of these parties. * * * The partnership was dissolved, and the partnership name * * * expired upon the dissolution and was not thereafter used. * * *. The business of the partnership was not continued. * * *

"A partner cannot be charged with appropriating the good will after dissolution because he individually solicited the business of the firm's patrons without using the firm name, or because after dissolution he continued to use his own name in similar business, even though his own name had been the firm name, there being no attempt to deceive people into believing that they were dealing with the old firm' * * "

In the instant action, as in the last cited case, the partnership "partook more of the nature of a professional than a trading or commercial partnership", and under the established facts there was no good will after the dissolution of the partnership. Nor do the facts of the instant action permit the conclusion that appellant "converted and appropriated the partnership good will" before the dissolution took place.

The only evidence in the record as to the existence and value of the partnership good will is the testimony of Hugh V. Hunter, a certified public accountant, that he believed "the same general formula" would "apply to all personal service agencies in the evaluation of good will"; "at least there is good will attached to personal service organizations"; that he had, at the request of respondent's counsel, done some research

on the question of evaluation of good will; that, from Smith & Bull's gross billing, net profit and cost of advertising and entertainment for the years 1949 to 1952, his opinion is "there is definitely some good will to such an organization"; that from those figures he had used five methods of evaluating such good will, and the average of the five results was \$57,391.66, which in his opinion is the value of the good will of Smith & Bull "when the partnership was still alive, as of February 28th"; that he estimated the value "without any reference at all to why or what caused the income to be created"; and on cross-examination that "when the partners have discontinued the business * * * completely quit * * * and neither one of them did any more * * * under the name of the business, or following out the investment * * * the old organization obviously, as an empty shell, would have no good will."

We find nothing in the agreement dated May 5, 1953, prepared by Attorney Shattuck and signed by Smith and Bull, that "Nothing in this agreement is intended to be construed as in any way affecting the rights of either party against the other connected with or arising out of the partnership of Smith & Bull. The entire purpose of this agreement being merely to divide as hereinabove set forth between Smith and Bull certain of the assets of Smith & Bull and to arrange for the payment of the listed obligations of Smith & Bull as hereinbefore set forth. Each of the parties hereto expressly reserves any and all rights he may have as a partner or former partner of Smith & Bull, and this agreement is in no way intended as an agreement winding up or dissolving Smith & Bull, a partnership, nor to release either party from any obligation to the other party", that supports a finding that partnership good will existed or was converted or appropriated. Nor is such support to be found in Attorney Shattuck's testimony that said agreement was one "retaining the right to continue to assert our right to good will and to damages for taking the business".

It is ordered that the findings of fact and conclusions of law be reframed in accordance with the views herein expressed; that the judgment be amended by striking therefrom the following:

"3. That plaintiff shall recover from defendant Frank Bull the sum of twenty-eight thousand six hundred ninety-five and 83/100 dollars (\$28,695.83), with interest thereon from the date of entry of this final judgment, until paid, at the rate of seven per cent (7%) per annum."

As so modified the judgment is affirmed. The parties will bear their respective costs on appeal.

FOURT, J., and DRAPEAU, J. pro tem., concur.



155 Cal.App.2d 255

Lorelle K. BURMAN, Plaintiff and Appellant,

v.

Edward Kelth BURMAN, Defendant and Respondent.

Civ. 22529.

District Court of Appeal, Second District,
Division 2, California.

Nov. 15, 1957.

Divorce proceeding. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered order awarding wife pendente lite \$150 a month alimony, \$150 a month child support, \$1,000 attorney's fees and \$250 court costs, and wife appealed. The District Court of Appeal, Richards, J. pro tem., held that where wife listed her necessary expenses for herself and minor child as \$838 a month and husband's total monthly expenses were \$765, whereas in year prior to filing of divorce complaint

his total withdrawals from family partnership, averaged \$670 a month, there was no abuse of discretion in awards made.

Affirmed.

1. Divorce ☞215, 308

The amount of alimony and child support pendente lite is dependent upon needs of wife and ability of husband to pay, and in determining amount of award there must be taken into consideration the circumstances of parties, their respective incomes and earning abilities and their respective needs.

2. Divorce ☞214(1)

Expenses listed in wife's questionnaire in domestic relations proceeding are merely her estimate of her reasonable monthly needs.

3. Divorce ☞211, 286, 296, 312.6(4)

The trial court has substantial range of discretion in determining amount of support money pendente lite, and finding of court will not be disturbed on appeal unless an abuse of discretion clearly appears.

4. Evidence ☞424

In proceeding to determine amount of support money for wife and child pendente lite, husband's testimony as to oral agreement between himself and other partners limiting each partner to weekly withdrawal of \$100 was admissible although partners' withdrawals allegedly had been fixed by written amendment of partnership agreement, and did not violate parol evidence rule. West's Ann.Code Civ.Proc. § 1856.

5. Evidence ☞424

Parol evidence rule applies only between parties to a contract, and their representatives or successors in interest. West's Ann.Code Civ.Proc. § 1856.

6. Divorce ☞192, 211, 223, 308

Order awarding wife pendente lite \$150 a month alimony, \$150 a month child support, \$1,000 attorney's fees and \$250 court costs to wife, who claimed monthly expenses of \$838 a month, against husband, whose expenses were found to be \$765 a month, whereas in year prior to filing of

divorce complaint his total withdrawals from family partnership averaged \$670 a month, was not an abuse of discretion.

Albert E. Isenberg and Ronald H. Free-
mond, Beverly Hills, for appellant.

Harry A. Kaplan, San Pedro, for re-
spondent.

RICHARDS, Justice pro tem.

Plaintiff-wife appeals from an order awarding her *pendente lite* \$150 a month alimony, \$150 a month child support, \$1,000 attorney's fees and \$250 court costs, and also from the order denying her exceptions to the commissioner's findings upon which the aforesaid order was based.

[1] The appellant's principal contention is that the evidence established her needs and the defendant's ability to pay in excess of \$300 per month for the support of herself and their 13 months old child pending the trial of the action. The general principles which govern the propriety of an award of temporary support in an action for divorce are well-established. The amount of an order of alimony and child support *pendente lite* is dependent upon the needs of the wife and the ability of the husband to pay (*Sweeley v. Sweeley*, 28 Cal.2d 389, 390, 170 P.2d 469; *Arnold v. Arnold*, 215 Cal. 613, 615, 12 P.2d 435) and in determining the amount of an award there must be taken into consideration the circumstances of the parties, their respective incomes and earning abilities and their respective needs. *Sweeley v. Sweeley*, supra; *Falk v. Falk*, 48 Cal.App.2d 780, 788, 120 P.2d 724; *Howton v. Howton*, 51 Cal.App.2d 323, 325, 124 P.2d 837.

[2] Appellant, the minor child and a nurse live in the family home of the parties. She is unemployed and suffers mildly from arthritis. Her affidavit which was filed in support of the issuance of the order to show cause was received in evidence and lists her necessary expenses for herself and the minor child in the total sum of \$838 a month. Included in her list of necessary

expenses is an item of \$75 a month for rent. She testified that this was for payment of taxes on the home but admitted she had paid no taxes and there is no evidence in the record that she will be obliged to pay any taxes on the home pending the trial of the action. Another item listed by appellant is \$268 a month for laundry and help but from the evidence it appears that the cost of a nurse or housekeeper is being paid for by appellant's parents. The other monthly expenses listed in her affidavit were food \$200; clothes \$100; transportation \$60; doctor and dentist \$25; utilities \$60 and incidentals \$50. Aside from her testimony of the monthly amounts given to her by defendant for household expenses before their separation, plaintiff was not able to substantiate any of these items by proof of actual outlays. The transportation item included a weekly drive to Palm Springs; she was unable to state how often she required medical attention and the defendant testified she had not had any medical treatment for her arthritis. We think that it is well understood that the expenses listed in the wife's questionnaire in domestic relations proceedings are merely her estimate of her reasonable monthly needs.

Turning to the husband's ability to pay, it appears that he is a member of a family partnership that operates three department stores and an apartment house and that his share of the partnership profits in 1955 after taxes was approximately \$17,400. However, by agreement, he is permitted to withdraw only \$100 a week from the partnership and any withdrawals in excess thereof require consent of a majority of the partners. In the fiscal year previous to the hearing on the order to show cause, while the parties were living together, the defendant had a total drawing of slightly under \$8,000. Defendant's expenses, living apart from the appellant, were found to be \$340 a month which includes a payment of approximately \$90 a month on the balance due on the home occupied by the appellant. Under the order herein made, defendant is required to pay \$300 a month for the support of plaintiff and the child.

Also under the order he is required to pay \$125 a month on the attorney's fees and court costs of \$1,250. His personal expenses and payments on the home occupied by plaintiff are \$340 a month, making his total monthly expenses \$765 a month whereas in the year prior to the filing of the divorce complaint his total withdrawals from the partnership, expended for family support and for an addition to the house, averaged approximately \$670 a month.

[3] The trial court has a substantial range of discretion in determining the amount of support money *pendente lite* and the finding of the court will not be disturbed on appeal unless an abuse of discretion clearly appears. *Sweeley v. Sweeley*, supra, 28 Cal.2d 389, 393, 170 P.2d 469; *Baldwin v. Baldwin*, 28 Cal.2d 406, 413, 170 P.2d 670; *Newbauer v. Newbauer*, 95 Cal.App.2d 36, 39, 212 P.2d 240. "That the members of this court might have been more liberal is not the test. The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did." *Newbauer v. Newbauer*, supra, 95 Cal.App.2d at page 40, 212 P.2d at page 243; accord: *Frazier v. Frazier*, 115 Cal. App.2d 560, 562, 252 P.2d 698.

[4, 5] Finally, appellant asserts a violation of the parol evidence rule in the admission of respondent's testimony of the oral agreement of the partners limiting each partner to a weekly withdrawal of \$100. The original partnership agreement provided that each partner shall be entitled to a weekly drawing account to be mutually determined from time to time. No useful purpose would be gained by discussing appellant's tenuous argument the the partners' withdrawals were fixed by a subsequent written amendment to the partnership agreement for, in any event, appellant may not successfully urge error in the admission of the extrinsic evidence as it is fundamental that the parol evidence rule applies only between the parties to a contract, and

their representatives, or successors in interest. Code Civ.Proc. § 1856.

[6] We cannot say from the record before us that an abuse of discretion has been shown in the awards here made and we find no reversible error in the other contentions advanced by the appellant.

The orders are affirmed.

FOX, Acting P. J., and ASHBURN, J.,
concur.



155 Cal.App.2d 293

Fredric REID and Harry Carscallan, co-partners, doing business under the firm name and style of Publication Press of Pasadena, Plaintiffs and Respondents,

v.

**The MASS COMPANY, Inc., et al.,
Defendants,**

**The Mass Company, Inc., a corporation, and
Robert J. Snetsinger, Appellants.**

Civ. 22366.

**District Court of Appeal, Second District,
Division 2, California.**

Nov. 18, 1957.

Rehearing Denied Dec. 13, 1957.

Hearing Denied Jan. 15, 1958.

Action against former employees for damages and injunction. From a judgment of the Superior Court, Los Angeles County, Walter R. Evans, J., defendants appealed. The District Court of Appeal, Fox, Acting P. J., held, inter alia, that the evidence warranted finding that defendants engaged in unfair competition, and that injunctive relief and allowance of damages were warranted by the evidence.

Affirmed.

1. Injunction ⚡56

Master and Servant ⚡60

A customer list built up by employer over period of years is the employer's prop-

erty, and its use by a former employee for his own advantage will be enjoined. West's Ann.Labor Code, § 2860.

2. Injunction ⚡56

Equity will intervene to restrain an employee from divulging confidential information gained in course of his employment, or using such information to his employer's prejudice. West's Ann.Labor Code, § 2860.

3. Constitutional Law ⚡88

Every individual possesses a form of property, the right to pursue any calling, business or profession he may choose.

4. Master and Servant ⚡60

A former employee has right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided that such competition is fairly and legally conducted. West's Ann.Labor Code, § 2860.

5. Master and Servant ⚡60

Equity will, to the fullest extent, protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should also be solicitous for the right inherent in all people, not fettered by negative covenants on their part to the contrary, to follow any of the common occupations of life. West's Ann.Labor Code, § 2860.

6. Master and Servant ⚡60

The elements determinative of what constitutes unfair competition by a former employee are: (1) information was confidential and not readily accessible to competitors; (2) former employee solicited customers of his former employer with intent to injure him; (3) former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to trade; (4) business is such that a customer will ordinarily patronize only one concern; (5) established business relation-

ship between customer and former employer would normally continue unless interfered with.

7. Master and Servant ⇐60

Information used by former employees concerning employer's customers was confidential notwithstanding no lists were furnished to salesmen who used obvious methods in choosing prospective customers to subscribe to employer's unique advertising medium, such as telephone directory, newspaper, driving through town and picking the best looking stores, et cetera, where such sources would not disclose the persons who ultimately made up the list of employer's customers and it was the list of persons who did purchase employer's service that constituted confidential information. West's Ann.Labor Code, § 2860.

8. Master and Servant ⇐66

Where employer engaged in business of selling unique advertising medium to certain merchants had expended considerable time, labor and money in building up a list of subscribers who accepted and subscribed to such medium, it was not necessary to show, in action for unfair competition against former employees who established competitive business, that employees actually used such a list if employees carried such a list in mind or memory since such group of merchants would be more likely to purchase such service. West's Ann.Labor Code, § 2860.

9. Master and Servant ⇐60

Former employees could not escape liability for unfair competition with former employer on ground that former employees who were salesmen were in nature of independent contractors who chose their own customers and established business relationship between customer and advertising services sold by former employer thus negating possibility of any confidential information, where it was the identity of customers who had been secured that constituted the confidential information. West's Ann.Labor Code, § 2860.

10. Master and Servant ⇐60

Even if employer's customer list did not in itself constitute such a trade secret as would warrant court's intervention against former employees engaging in unfair competition, the list became a trade secret when there was other confidential information as to customers on the list. West's Ann.Labor Code, § 2860.

11. Master and Servant ⇐60

Where only a few of employees had access to master chart which was kept for purpose of determining approximate expiration date of contracts for sale of advertising medium in a particular area, and former employees who established competitive business used such knowledge to solicit former employer's subscribers even before employer's salesmen could reach them, the list of such subscribers in conjunction with information concerning contract expiration dates was not readily accessible to competitors and constituted confidential information the unauthorized use of which a court of equity would prevent. West's Ann.Labor Code, § 2860.

12. Injunction ⇐128

Master and Servant ⇐66

In action for damage and injunction against former employees engaging in unfair competition with former employer, evidence sustained finding that all of acts and conduct of defendants were motivated from express malice and with express intention of deliberately and maliciously injuring former employer in his business. West's Ann.Labor Code, § 2860.

13. Master and Servant ⇐60

Where former employees who established a competitive business sought out employer's subscribers as their primary source of subscriptions in most towns and it was admitted that such actions were prompted by belief that such subscribers were the best business prospects since they were already familiar with and receptive to the unusual form of advertising sold by employer, all of the employer's subscribers constituted a preferred list of business prospects, in determining whether former

employees were guilty of unfair competition. West's Ann.Labor Code, § 2860.

14. Injunction ⇨128

Master and Servant ⇨66

In action for damages and injunction against former employees who established competing business and engaged in unfair competition in selling a unique advertising medium, evidence that 50% to 70% of former employer's subscribers renewed their contracts, and statements in depositions of several of subscribers gave rise to inference that established business relationship would more often than not continue unless interfered with. West's Ann.Labor Code, § 2860.

15. Master and Servant ⇨60

If continuance of employer's trade depends on keeping secret the names of customers or other valuable information known to employer, his employee, having gained knowledge of such secrets in course of employment, cannot thereafter utilize such knowledge to prejudice of employer. West's Ann.Labor Code, § 2860.

16. Injunction ⇨56

Independent of an express contract, equity will enjoin the disclosure by former employee of confidential knowledge of trade secrets which former employee learned in course of employment. West's Ann.Labor Code, § 2860.

17. Injunction ⇨56

Fact that former employee was employed by former employer for years during which he learned the names, addresses, and requirements of former employer's customers justifies injunctive relief, if former employee undertakes to use such information in unfair competition to detriment of former employer, since such knowledge is a part of the good will of business of former employer and is a trade secret, and for former employee to act on it is an improper use of confidential information and amounts to unfair competition. West's Ann.Labor Code, § 2860.

18. Master and Servant ⇨60

A list of customers is a trade secret entitled to protection by former employer

against subsequent use by former employee if there is confidential information as to such customers, and to act upon it is an improper use of confidential information and amounts to unfair competition, and such rule applies generally to trade route cases as well as others involving a knowledge of customers' buying habits.

19. Injunction ⇨56

Employer was not precluded from obtaining injunction to restrain former employees from competing unfairly with employer on ground that two of former employees had been discharged by employer since whether employee or employer severs relationship is of no consequence, determinative factors being the nature of information employee takes away with him, the use he makes thereof, and his subsequent conduct.

20. Equity ⇨65(2)

A former employer engaged in selling unique advertising medium to merchants was not, under facts, precluded from obtaining injunctive relief against former employees from unfairly competing with employer on ground that employer came into court with unclean hands because on two occasions employer's salesmen visited a merchant who had never before been a subscriber to employer's service but who had recently subscribed to defendants' service and in each instance salesmen expressed belief that book published by defendants would not be published in that area because of quota requirements and existence of temporary injunction against defendants. West's Ann.Labor Code, § 2860.

21. Damages ⇨190

The rule that evidence to establish profits must not be uncertain or speculative does not apply to uncertainty as to amount of the profits which would have been derived, but to uncertainty as to whether the loss of profits was the result of wrong and whether such profits would have been derived at all.

22. Master and Servant ⇨66

In action by former employer against former employees for damages for en-

gaging in unfair competition, court did not err in granting compensatory damages on ground that evidence was too uncertain and speculative to establish loss of profits where evidence showed decline in employer's profits which was directly caused by defendants' wrongful acts.

23. Damages ⇨6

One whose wrongful conduct has rendered difficult the ascertainment of damages cannot escape liability because damages could not be measured with exactness.

24. Master and Servant ⇨66

In action against former employees for damages for unfair competition, evidence supported trial court's award of \$3,500.

Budd W. MacDonald, Berkeley, for appellants.

Charles Hollopeter, Pasadena, for respondents.

FOX, Acting Presiding Justice.

Plaintiffs brought this suit for damages and an injunction against a corporation and several individual defendants. The lower court rendered judgment awarding plaintiffs \$3,500 and enjoining defendants "from soliciting any advertisements or advertising services from any customers of plaintiffs with whom they became acquainted or whose identity or addresses they learned while in and by virtue of, or in the course of, their employment or other official capacity with plaintiffs." Defendants have appealed.

Plaintiffs publish and distribute throughout California and neighboring states an advertising medium for merchants in the form of a green alphabetically indexed book entitled "Names 'N Places." Ostensibly the book is a telephone directory in which the user may keep names, addresses and telephone numbers; however, it also contains a directory of subscribing merchants in the particular community. In addition there is display advertising of said

merchants and detachable gift certificates or other sales inducements. The service is distributed to each new householder who moves into the community, and a copy is also given to each merchant who subscribes to the service. No other persons receive a copy of the booklet. Plaintiffs' advertisers were given plastic decals indicating they were Names 'N Places subscribers; many subscribers display these in their store windows. The obvious purpose of the service is to induce new householders to frequent the places of business of the subscribing merchants.

In the operation of plaintiffs' business there is a contract with each merchant that participates in their program. The contract provides that the merchant shall pay a sum of money computed upon the number of books that are distributed to the householders, and the usual rate is 15¢ per book. Although the contracts do not provide for an expiration date, the service is usually completed within one year or a year and a half. Each merchant's contract would begin and end at the same time as other merchant subscribers in the same community. This was not true with respect to other similar types of services.

Since 1950 the plaintiffs' practice with respect to renewals has been to send their salesmen into a community approximately a month or six weeks before the anticipated completion of the present service in order to renew as many of the accounts as possible. Some 50% to 70% of the advertisers renew their contracts. This early return to a community was also necessary in order that plaintiffs would have sufficient time to print their next publication. Plaintiffs' service was a continuous operation and hence it was not desirable that any time should be lost between publications during which houses would be built and sold.

In order to determine in advance the anticipated expiration date in each community, it was necessary to make reference to a "master chart" prepared by plaintiffs' office manager. Only a few persons in

plaintiffs' organization had access to this chart and similar charts for prior years. One of these persons was defendant Snetsinger. He was plaintiffs' sales manager until his employment was terminated in April, 1955. At that time he had in his possession a copy of the master chart and admittedly used it for "a couple of weeks." He further admitted that he was familiar enough with plaintiffs' customers and method of operation so that he had a good idea of what appeared on the chart even after he disposed of it. He also stated that he was able to determine the approximate expiration date so as to permit his own salesmen to get to a community in advance of plaintiffs'.

Although the anticipated expiration date in one community differed from that in another, plaintiffs have always been able to estimate the contract completion time by use of the master chart. This was, in fact, the purpose for making such a chart. The type of advertising service sold by plaintiffs is somewhat restricted to areas of growth and there is only a small variety of businesses which buy the service. Moreover, plaintiffs can only deal with one merchant in each type of business in each town. In order to warrant the publication of a book for any particular community, 21 accounts were necessary to produce a profit. Inability to maintain the minimum number of contracts in a particular city would result in a border line operation or possibly a loss.

One month after leaving plaintiffs' employ, defendant Snetsinger initiated a publication similar to plaintiffs' and formed the Mass Company, Inc., to run the business. Defendants' publication was called "My Little Red Book." It was similar in all respects to plaintiffs' (personalized telephone directory, coupons, subscribers charged 15¢ per book, et cetera), except that the book was red instead of green. The Mass Company's sales staff consisted of four persons, two of them whom were former employees of plaintiffs. In addition, another former employee was employed in the distribution department.

One of plaintiffs' salesmen, Tom Linthicum, testified that defendant Snetsinger visited him shortly after leaving plaintiffs' employ. Snetsinger stated that he and some other persons, including former employees of plaintiffs, were going to start a competitive business and that there would be an opportunity for Linthicum to have a sales position. Snetsinger further stated to Linthicum that "they were going to take over the accounts in Northern California, they had developed the business, it was their business. They felt that the customers were loyal to them because they didn't know the company [i.e., plaintiffs] but they did know the individual salesmen. They figured that each salesman would take about \$35,000 of the business away from Names 'N Places and in about six months' time there would be no more Names 'N Places in Northern California and possibly nowhere else, that they were going to be in these towns before the time for renewal * * * and be able to take their customers away from Names 'N Places." Snetsinger also said that "he had a friend in the company who knew of all that was going on, he wouldn't say who it was, but that they would know when the towns were ready for expiration and ready for renewal and would keep them fully informed of all the happenings * * *."

Martin Heller, another of plaintiffs' salesman, testified to a similar conversation which defendant Snetsinger had with him.

Snetsinger testified that as manager of the Mass Company, Inc., he sent salesmen into a particular community so that they would arrive before plaintiffs' salesmen. It was his intentional and deliberate practice to have his salesmen call on the merchants who were the customers of Names 'N Places. Snetsinger stated that his primary reason for instructing his salesmen so to proceed was that plaintiffs' customers were often the best prospects and were most likely to want such service. Snetsinger also admitted that in some instances his salesmen would seek out *only* those accounts in a certain type of business

who were already under contract with plaintiffs. Snetsinger estimated that almost 25% of his customers were former customers of plaintiffs; and he stated that as a result of the preliminary injunction issued against him and his company, a substantial loss of business had been sustained. Snetsinger acknowledged the possession of a series of check stubs which indicated the names of all of plaintiffs' subscribers and which were an additional source of information for the contract expiration dates of plaintiffs' subscribers.

Defendant Holland, another former employee of plaintiffs, testified that in one town where he solicited for the Mass Company he had a copy of Names 'N Places with him and used it to find the merchants whom he had previously solicited on behalf of plaintiffs' business but whose names he was unable to remember. He admitted that he would usually solicit merchants who were Names 'N Places subscribers and whose contracts were nearing an end. In one town he called upon all of the Names 'N Places subscribers, with the exception of one subscriber whom he had known as often having been behind in paying the account with plaintiffs.

The depositions of several of plaintiffs' subscribers were introduced in evidence by stipulation of the parties. All of these persons stated that they were satisfied with plaintiffs' service and would have renewed their contracts in the ordinary course of events; that prior to the time that their Names 'N Places subscription expired, a salesman from defendants' service came into their place of business and induced, or tried to induce, them to subscribe to that service. In many instances the salesman was a former employee of plaintiffs. Some of the subscribers were told that Names 'N Places was no longer going to operate in that part of the state and that defendants' service would take its place by mutual agreement; others were led to believe that they were still subscribing to plaintiffs' service but that it was now using a different name. Several of these subscribers entered into contracts for defendants' service.

As a result of defendants' competition plaintiffs' gross sales were reduced from about \$37,000 in the year prior to commencement of defendants' publication to approximately \$20,000 in the following year. This reduction produced a \$7,700 decline in net profits.

Defendants' first contention is apparently that plaintiffs were as a matter of law entitled to no relief. Defendants assert that this case is not governed by the so-called "route cases," such as *George v. Burdusis*, 21 Cal.2d 153, 130 P.2d 399; *California Intelligence Bureau v. Cunningham*, 83 Cal. App.2d 197, 188 P.2d 303; *Wallich v. Koren*, 80 Cal.App.2d 223, 181 P.2d 682. Rather, defendants contend that the facts bring this case within the line of decisions illustrated by *Continental Car-Na-Var Corp. v. Moseley*, 24 Cal.2d 104, 148 P.2d 9; *Aetna Building Maintenance Co. v. West*, 39 Cal.2d 198, 246 P.2d 11; *Avocado Sales Co. v. Wyse*, 122 Cal.App. 627, 10 P.2d 485; *Mathews Paint Co. v. Seaside Paint & Lacquer Co.*, 148 Cal.App.2d 168, 306 P.2d 113.

[1-5] The law governing this problem is clearly stated in *Alex Foods, Inc. v. Metcalfe*, 137 Cal.App.2d 415, 423-424, 290 P.2d 646, 652; "Section 2860 of the Labor Code provides that everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment. A customer list built up by the employer over a period of years is his property, and its use by a former employee for his own advantage will be enjoined. [Citation.] Equity will intervene to restrain an employee from divulging confidential information gained in the course of his employment or using such information to his employer's prejudice. On the other hand, every individual possesses a form of property, the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in

a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, *provided such competition is fairly and legally conducted*. Equity will, to the fullest extent, protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should also be solicitous for the right inherent in all people, not fettered by negative covenants upon their part to the contrary, to follow any of the common occupations of life. [Citation.]” (Emphasis added.)

[6] As a guide in the determination of what constitutes unfair competition by a former employee, the courts have set forth the following elements: “(1) The information was confidential and not readily accessible to competitors; (2) The former employee solicited the customers of his former employer with intent to injure him; (3) The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade; (4) The business is such that a customer will ordinarily patronize only one concern; (5) The established business relationship between the customer and the former employer would normally continue unless interfered with.” *Alex Foods, Inc. v. Metcalfe*, supra, 137 Cal.App.2d at page 425, 290 P.2d at page 653; *Aetna Building Maintenance Co. v. West*, supra, 39 Cal.2d at pages 204–205, 246 P.2d at pages 15–16.

[7–14] While it is obvious that the case at bar does not involve a retail delivery route, we believe that the principles laid down in the “route cases” are here applicable. The factual picture in this case discloses that each of the five elements mentioned above is present. With regard to the first element, it is apparent that defendants made use of information which was confidential and not readily accessible to competitors. Defendants argue that the information concerning plaintiffs’ customers

was not confidential since no lists were furnished to the salesman and since each salesman used obvious methods in choosing prospective customers—telephone directory, newspaper, driving through a town and picking the best looking stores, et cetera. However, these sources would not disclose the persons who ultimately made up the list of plaintiffs’ customers. Some of the merchants approached by plaintiffs’ salesmen declined to purchase this type of advertising. It was the list of persons who *did* purchase plaintiffs’ service that constituted confidential information. *California Intelligence Bureau v. Cunningham*, supra, 83 Cal.App.2d at page 203, 188 P.2d at page 306. Plaintiffs expended considerable time, labor and money in building up a list of subscribers who accepted and subscribed to their unique advertising medium; this group of merchants would be more likely to purchase such a service since they had already been “sold” on its name as a method of advertising. And it is not necessary to show that the employee actually used such a list if he carried it in his mind or memory. *George v. Burdusis*, supra, 21 Cal.2d at page 160, 130 P.2d at page 403; *Alex Foods, Inc. v. Metcalfe*, supra, 137 Cal.App.2d at page 425, 290 P.2d at page 653. Defendants also argue that plaintiffs’ salesmen were in the nature of independent contractors who chose their own customers and established the business relationship between the customer and the advertising service, thus negating the possibility of any confidential information. But it does not matter that the former employee may have originally secured the customer’s business for the former employer; it is the identity of the customers who have been secured that constitutes the confidential information, and “the additional influence of the friendly contact of the former employee with the persons whose business he would carry to his new connection brings the solicitation within the condemnation of unfair competition.” *George v. Burdusis*, supra, 21 Cal.2d at page 163, 130 P.2d at page 404; *Wallich v. Koren*, supra, 80 Cal.App.2d at page

226, 181 P.2d at page 684. While the identity of some of plaintiffs' subscribers may have been easily ascertainable by competitors, it cannot be said that the entire list of plaintiffs' subscribers (who were scattered all over the state) was "readily accessible to competitors." Moreover, even if the customer list does not in itself constitute such a trade secret as would warrant the court's intervention, the list becomes a trade secret when there is other confidential information as to the customers on the list. *George v. Burdusis*, supra, 21 Cal.2d at page 160, 130 P.2d at page 403; *Wallich v. Koren*, supra, 80 Cal.App.2d at page 226, 181 P.2d at page 684; *Alex Foods, Inc., v. Metcalfe*, supra, 137 Cal.App.2d at page 427, 290 P.2d at page 654. Only a few of plaintiffs' employees had access to the master chart which was kept for the purpose of determining the approximate expiration date of the contracts in a particular area. This information was a valuable asset since a salesman was more likely to obtain a subscription to the service he represented by approaching the subscriber when the latter's existing contract was about to expire. It is clear from the facts that defendants used this knowledge to solicit plaintiffs' subscribers in each town even before plaintiffs' salesmen could reach them. The list of plaintiffs' subscribers in conjunction with the date concerning contract expiration dates was not readily accessible to competitors and constituted confidential information the unauthorized use of which a court of equity will prevent. As to the second element, defendants' intent to injure plaintiffs could reasonably be inferred from *Snetsinger's* admissions and from the evidence concerning defendants' methods of obtaining subscribers. On this question the trial court found: "That it is true that each and all of the acts and conduct of the defendants was motivated by express malice and with the express intention of deliberately and maliciously injuring plaintiffs in their business." Defendants do not challenge the sufficiency of the evidence to support this finding. The third element is also present in that

defendants' salesmen sought out plaintiffs' subscribers as their primary source of subscriptions in most towns. It was admitted that these actions were prompted by the belief that such subscribers were the best business prospects since they were already familiar with, and receptive to, this unusual form of advertising. Under such circumstances it may be said that all plaintiffs' subscribers constituted a preferred list of business prospects. See *California Intelligence Bureau v. Cunningham*, supra, 83 Cal.App.2d at page 204, 188 P.2d at page 307. Moreover, it was shown that in one instance a salesman for defendants solicited every Names 'N Places subscriber in a town except one, and that particular subscriber was known by the salesman to be consistently behind in payments. It may thus be inferred that defendants were not merely reaping plaintiffs' particularly profitable harvest; they were separating the wheat from the chaff as well. The information gained at plaintiffs' expense was being used to defendants' advantage. Defendants argue that the identity of plaintiffs' subscribers was no secret, that it was known by each member of the public who had a Names 'N Places book, and that it could be ascertained by any one who would pass a place of business and see a Names 'N Places decal in the window. But it appears that only some of plaintiffs' subscribers displayed decals. And defendants overlook the fact that a different Names 'N Places book was printed for each town. Plaintiffs' business was statewide. The books were distributed only to new householders and to the subscribing merchants. A competitor would have to go to great lengths to obtain a copy of each of the different books which plaintiffs publish. While competing services might have access to the identity of some of plaintiffs' subscribers in a given town, the complete list of such subscribers throughout the state could be learned only by spending much time and money canvassing each town in which plaintiffs operated *or by using information learned by someone while in plaintiffs' employ*. Moreover, the approxi-

mate expiration dates of plaintiffs' contracts, which added substantially to the value of knowing the identity of plaintiffs' subscribers, was obviously unknown to the trade in this field. As to the fourth element, the evidence indicates that a merchant would ordinarily subscribe to only one advertising service of the type involved here. And as to the fifth element the evidence that 50% to 70% of plaintiffs' subscribers renew their contracts and the statements in the depositions of several of plaintiffs' subscribers give rise to the inference that the established business relationship would more often than not continue unless interfered with.

The case most heavily relied upon by defendants (Continental Car-Na-Var Corp. v. Moseley, *supra*) also supports our conclusion that the principles enunciated in the "route cases" govern the instant case. The very grounds upon which that case distinguished the "route cases" indicate the similarity between those cases and the one at bar. The court in the Moseley case, 24 Cal.2d at page 109, 148 P.2d at page 12, stated that: "This case is readily distinguishable from the so-called 'route' cases, where the business of serving the customer is based upon regular calls at definite periods, establishing a business relationship between the customer and the company, which, unless interfered with, normally will continue. Here there is no showing that in the normal course of events, plaintiff would have continued to sell to any of its customers on the list. In the 'route' cases the services rendered or the products sold were essentially the same, and the quality of the service rendered is similar. In the case of a salesman in a commercial field, there is no assurance of an order unless he can satisfy the customer that his merchandise is better, cheaper or more salable than that of his competitor. The customer usually desires to examine, inspect and compare merchandise and prices offered to him. Each sale is a distinct transaction, not necessarily implying that another will follow. [Citation.]" In the instant case the business is based upon mak-

ing regular calls at definite periods, usually once a year. The business relationship, unless interfered with, was shown normally to continue; many of the plaintiffs' subscribers solicited by defendants had more than once renewed their contracts with plaintiffs. The services rendered by plaintiffs and defendants were almost exactly the same, and the quality of the service was likewise similar. While the Moseley case dealt with the question of commercial salesmen who had no assurance of an order unless they could satisfy the prospective buyer that their wares were more desirable than competing products, the case at bar involves a situation where prior dealings did affect the probability of continued contractual relations since a subscriber who was satisfied with plaintiffs' form of advertising was likely to renew his contract with *plaintiffs*. This is unlike the commercial sales situation where each sale is a distinct transaction, not necessarily implying that another will follow. Moreover, in the Moseley case it was not disputed that the names and addresses of businesses using the type of products sold by plaintiff were commonly known to the trade. And the court also relied on the fact that there were no unfair trade practices as were readily apparent in this case. The other cases relied upon by defendants are likewise distinguishable from the present case for many of the reasons just noted.

[15-18] In addition, the observations of the court in Alex Foods, Inc., v. Metcalfe, *supra*, 137 Cal.App.2d at pages 426-427, 290 P.2d at page 654, are particularly appropriate here: "Regardless of the classification into which the facts herein mentioned bring this case, it is clear that if the continuance of an employer's trade depends on keeping secret the names of customers or other valuable information known to such employer, his employee, having gained knowledge of such secrets in the course of his employment, cannot thereafter utilize such knowledge to the prejudice of his former employer. Independent of an express contract, equity will enjoin the disclosure of confidential knowledge of trade

secrets which a former employee learned in the course of his employment. The fact that a defendant was employed by plaintiff for years during which he learned the names, addresses, and requirements of plaintiff's customers justifies injunctive relief where the defendant undertook to use such information in unfair competition to the detriment of plaintiff. Such knowledge is a part of the good will of the business and is a trade secret. *A list of customers is a trade secret if there is confidential information as to such customers. To act upon it is an improper use of confidential information and amounts to unfair competition.* * * * This rule applies generally to trade route cases as well as others involving a knowledge of the [customers'] * * * buying habits. [Citation.]” (Emphasis added.) In the instant case knowledge of the contract expiration dates of plaintiffs' subscribers was the secret to their “buying habits,” since these subscribers would be in the market for such advertising services shortly before their existing contracts were to expire.

In *Wallich v. Koren*, supra, 80 Cal.App.2d at page 227, 181 P.2d at page 685, this court stated: “While the judgment is entitled to affirmance upon the facts above discussed, it is further fortified by evidence which warranted the inference that appellant designedly set out to pirate upon the established reputation and good will of respondent.” The court went on to relate circumstances similar to those in the present case whereby subscribers were led to believe that they were still dealing with plaintiffs' service or that Names 'N Places was being replaced by My Little Red Book with the mutual understanding of all involved. The court thus found that the unfair trade practices which were carried on by the defendant formed an independent basis entitling the plaintiff to injunctive relief. The following statement is applicable to the situation here involved: “There is nothing to be said in extenuation of such deception as was practiced in the cited instances. For the entire course of appellant's conduct the law can offer noth-

ing but censure. Our civilization has passed beyond the era of cutthroat competition. Not only do business men deprecate practices that deprive one's neighbor of his rights, but the ethic that abounds among upright men is to let rivals live and, if a competitor deserves success, so to act as to defeat the piracy of such advantages as he may have honorably acquired.” *Wallich v. Koren*, supra, 80 Cal.App.2d at page 228, 181 P.2d at page 685.

[19] Defendants' second contention is that “equity will not enjoin a former employee from going into business competing with his former employer, and using the knowledge he has gained, where, through no fault of the former employee he is discharged by his former employer” (two of the defendants were originally discharged by plaintiffs). This contention is without merit. Whether the employee or the employer severs the relationship is of no consequence; the determinative factors are the nature of the information the employee takes away with him, the use he makes thereof, and his subsequent conduct. In *Alex Foods, Inc., v. Metcalfe*, supra, the court affirmed an order granting injunctive relief even though it was the former employer who originally severed the relationship.

[20] Defendants' next contention is that plaintiffs should be denied any relief because they did not come into court with “clean hands.” Defendants' evidence in this regard showed that on two occasions in Modesto a salesman from Names 'N Places visited a merchant who had never before been a subscriber to plaintiffs' service but who had recently subscribed to defendants' service. In each instance the salesman expressed the belief that My Little Red Book would not be published in that area because of the quota requirements and the existence of a temporary injunction against defendants; the salesman then persuaded each of these merchants to subscribe to plaintiffs' service on the understanding that the contract was not to take effect unless My Little Red Book was not published in the area.

Each contract expressed this condition on its face. From these facts the trial court could reasonably infer that plaintiffs did come into court with clean hands. The salesman who solicited these merchants had never worked for defendants and had no way of knowing in advance that they had already subscribed to defendants' service. He did not solicit these merchants to take plaintiffs' service *instead of* defendants'; he only requested that they subscribe to Names 'N Places on the condition that My Little Red Book was not published. While these tactics may be disapproved from an ethical standpoint, they are certainly not of the same magnitude as the unfair practices resorted to by defendants. They do not constitute unclean hands so as to prevent equitable relief under the facts in this case.

[21-23] Defendants' final contention is that the court erred in granting compensatory damages because the evidence was too uncertain and speculative to establish loss of profits. Defendants miss the distinction which is pointed out in *Continental Car-Nar-Var Corp. v. Moseley*, supra, 24 Cal. 2d at page 113, 148 P.2d at page 14: "Evidence to establish profits must not be uncertain or speculative. This rule does not apply to uncertainty as to the amount of the profits that would have been derived, but to uncertainty or speculation as to whether the loss of profits was the result of the wrong and whether any such profits would have been derived at all." There is abundant evidence in the present case from which the trial court could infer that the sharp decline in plaintiffs' profits was directly caused by defendants' wrongful acts. It was admitted that defendants' accounts included 58 former customers of plaintiffs; the depositions introduced by plaintiffs indicated that many of these customers would have renewed their contracts

with plaintiffs but for the actions of defendants. Defendants rely on the fact that only 50% to 70% of plaintiffs' customers renew their contracts and argue from this that computation of damages is impossible. But it is clear that some damage to plaintiffs' business was being caused by defendants and "one whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." *Zinn v. Ex-Cell-O Corp.*, 24 Cal. 2d 290, 297-298, 149 P.2d 177, 181.

[24] Defendants also argue that plaintiffs claim as part of their damages the losses suffered in Las Vegas, Nevada, and yet defendants do not publish a book there. But it does not appear that the trial court considered plaintiffs' loss in Las Vegas in awarding damages. The exhibit which shows plaintiffs' losses lists all the cities where plaintiffs operate, Las Vegas included. The sales in Las Vegas declined in the amount of \$384. Even eliminating this figure from the total reduction in net profits, a \$7,300 decrease in such profits remains. If we assume that only 50% of the 58 former customers of plaintiffs who had been persuaded to subscribe to defendants' service would have renewed their contracts with plaintiffs but for defendants' interference, well over half of the decrease in net profits is accounted for. And it should be noted that the 50% estimate appears to be conservative in light of the fact that many of the subscribers upon whom defendants called had more than once renewed their contracts with plaintiffs. The evidence amply supports the trial court's award of \$3,500.

The judgment is affirmed.

ASHBURN, J., and RICHARDS, Justice pro tem., concur.

155 Cal.App.2d 347

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Henry V. FLORES, Defendant and
Appellant.

Cr. 5948.

District Court of Appeal, Second District,
Division 2, California.

Nov. 20, 1957.

Defendant was convicted of burglary and of possession of heroin. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment, and from judgment in the narcotics case and from order denying a new trial therein, the defendant appealed. The District Court of Appeal, Ashburn, J., held that possession and knowledge could be proved circumstantially.

Judgment and order affirmed.

1. Poisons ⇐9

In prosecution for possession of heroin, possession and knowledge by defendant could be proved circumstantially. West's Ann.Health & Safety Code, § 11500.

2. Poisons ⇐9

Evidence was sufficient to sustain conviction for possession of heroin. West's Ann.Health & Safety Code, § 11500.

3. Poisons ⇐4

In prosecution for possession of heroin, which was found in residence of mother of defendant, exclusive possession of the residence by defendant was not necessary, nor was physical possession of the heroin of the essence. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⇐554

In prosecution for burglary and possession of heroin, trial court, as trier of facts, had prerogative of discarding testimony of defendant, who admitted a prior conviction for possession of heroin. West's Ann.

Health & Safety Code, § 11500.

Ernest Best, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

As the result of a non-jury trial of consolidated cases defendant was convicted of burglary, and of possession of heroin (§ 11500, Health & Safety Code) with a previous conviction of the same offense. The prior conviction was admitted. This appeal is taken from the judgment in the narcotics case and order denying a new trial therein. The contention is that the evidence is insufficient.

On December 6, 1956, the police were searching for defendant in connection with the burglary upon which he was later convicted. They called at 1149 Stone Street in the city of Los Angeles, which defendant testified was his mother's residence but not his own. In response to a knock on the door defendant appeared, identified himself and was immediately arrested on suspicion of burglary. The police entered and searched the premises, being interested primarily in finding some keys which had been used in perpetrating the burglary. The keys were found, and in the search considerable heroin and equipment for its use were also uncovered. In a jacket in a closet the officers found 41 capsules of heroin; also in the jacket were two papers which were blank applications connected with a housing project, one of which bore defendant's name; under the wash basin in the bathroom the officers found a portion of a spoon wrapped in brown paper, a medicine dropper, a piece of green plastic containing a hypodermic type needle. Confronted with the narcotic, defendant, previously convicted of a narcotic felony, denied that it was his or that he had any connection with it; he admitted that the papers were his, but said the jacket belonged to his brother who had been in prison for the past nine months. Asked

about the equipment found in the bathroom defendant first denied and then admitted that it was his. Later, at the police station, he stated that the heroin was his, not his mother's. He testified at the trial that one Wells (or Burns), with whom he was found to have been acting in the burglaries, was a narcotic user.

[1-4] The emphasis of appellant's argument is upon the proposition that the evidence does not show possession with knowledge of the character of the drug. Defendant did not claim ignorance of its character, but asserted at the trial that it was not his. The court was free to reject his testimony, also his previous assertions that he did not reside in the place where arrested and that the jacket containing the heroin belonged to his brother. A convicted felon, his evidence was thereby impeached as it was given. The jacket was in the same closet with a pair of pants, confessedly belonging to him, in which the burglary keys were found. He testified that quite a few people had access to the house, which would not of itself give them access to the closets. He did not assert that anyone but his mother resided there. It is a fair inference that defendant did live in that home and that the jacket was his. The heroin and the equipment for its administration were admitted to belong to him. There is no suggestion by defendant that his mother was involved in the crime. He points his finger at no one else. Possession and knowledge may be proved circumstantially and the evidence at bar is sufficient to support those inferences. Exclusive possession of the premises is not necessary nor is physical possession of the drug of the essence. *People v. Ross*, 149 Cal.App.2d 287, 308 P.2d 37; *People v. Van Valkenburg*, 111 Cal.App.2d 337, 340, 244 P.2d 750; *People v. Bagley*, 133 Cal.App.2d 481, 484, 284 P.2d 36. The defense rests solely upon defendant's testimony. When that is discarded, and the trial court had that prerogative, the record leaves defendant in ownership and possession, actual or constructive, of the drug whose character

he could not deny in the face of his equipment for injection which was found in the bathroom.

Judgment and order denying new trial affirmed.

FOX, Acting P. J., and RICHARDS, J. pro tem., concur.



155 Cal.App.2d 315

Joseph DAFT and Frank J. Gomes,
Plaintiffs and Respondents,

v.

Peter ENOS, Defendant and Appellant.
Civ. 17567.

District Court of Appeal, First District,
Division 2, California.

Nov. 19, 1957.

Action to recover a portion of broker's commission. From a judgment of the Superior Court, County of Santa Clara, W. W. Jacka, J., in favor of plaintiffs, defendant appealed. The District Court of Appeal, Dooling, J., held, inter alia, that where first broker received oral listing to sell property and first broker orally listed such property with second broker and second broker informed third broker of such property and agreed with third broker that if he would sell property he would receive 50% of commission, the doctrine of procuring cause of sale was not applicable to such contract in determining whether first and second broker were entitled to share in commission paid to third broker since consideration for third broker's promise to pay one-half of commission was found in second broker's disclosure of availability of the property for sale.

Judgment modified and as modified affirmed.

1. Brokers Ⓒ66

Evidence established an oral agreement between brokers to split commission from sale of property.

2. Brokers Ⓒ66

The rule that oral contract between brokers to share a commission is only enforceable if one of brokers has a binding written contract with principal is inapplicable to case where one broker has actually received a commission from principal although there was no contract in writing between them and in such case oral contract to divide the commission is enforceable.

3. Brokers Ⓒ66

Where first broker received oral listing to sell property, and first broker orally listed such property with second broker, and second broker informed third broker of such property, and agreed with third broker that if he would sell property he would receive 50% of commission, the doctrine of procuring cause of sale was not applicable to such contract, in determining whether first and second broker were entitled to share in commission paid to third broker, since consideration, for third broker's promise to pay one-half of commission, was found in second broker's disclosure of availability of the property for sale.

4. Declaratory Judgment Ⓒ347

Where first and second broker were entitled to share in commission received by third broker, and property owner retained portion of commission and testified that he intended to pay such additional portion, declaratory judgment would be entered that first and second broker were entitled to receive one-half of such unpaid commission, or any part thereof, if and when it was paid by owner to third broker.

5. Trial Ⓒ387(2)

Failure of trial judge to decide case within 30 days, as required by statute, was not error since statute is directory and not mandatory. West's Ann.Code Civ.Proc. § 632.

6. Appeal and Error Ⓒ1047(4)

Defendant was not prejudiced, by court's reserving right in plaintiffs to call one witness after close of their case in chief, where witness was not in fact called and the plaintiffs had already introduced sufficient evidence to make a motion, for nonsuit by defendant, futile.

Watson & Tedesco, Vincent N. Tedesco, San Jose, for appellant.

Machado, Feeley & Machado, San Jose, for respondent.

DOOLING, Justice.

Defendant appeals from a judgment awarding plaintiffs \$4,800.

Appellant and respondents are all licensed real estate brokers. On April 19, 1955 respondent Daft received an oral listing to sell property belonging to two brothers named Renzel for \$265,000. It was orally agreed that if Daft procured a buyer at that price he should receive a \$10,000 commission. Daft in turn orally listed this property with respondent Gomes. Gomes held a written authorization to sell the property of LaBrucherie which adjoined the Renzel property.

Taking the evidence most favorable to the judgment Gomes and appellant had orally agreed to cooperate in the sale of the LaBrucherie property and to divide the commission equally in the event of its sale. Gomes testified that on December 4, 1955 Gomes and appellant met to discuss the sale of the LaBrucherie property. Appellant incidentally informed Gomes that he knew of a man who wished to invest about \$200,000 in orchard property. The Renzel property was largely planted to orchard trees and Gomes told appellant that he had a property which might interest the prospective purchaser mentioned by appellant. Appellant, when he learned that Daft had listed this property with Gomes, asked Gomes: "Is this going to go a three-pay way?" and Gomes replied: "No * * * 50-50. Our office has to work with Mr.

Daft's office, and you'll take care of the other 50."

"Q. In other words, Mr. Enos was to get 50 percent? A. That's right, 50 percent.

"Q. And your office and Mr. Daft's office would get the other 50 percent? A. That's right."

The Renzel property was shown to the prospect by appellant and he purchased it. The Renzels paid \$5,000 to appellant in part payment of his commission for the sale and it was orally agreed that they would pay an additional \$4,600. This \$4,600 was held under writ of attachment levied by respondents upon the Renzels.

[1] Appellant's contention that the oral agreement to split the commission from the sale of the Renzel property with respondents was not proved is answered by the testimony of Gomes outlined above.

[2] Appellant argues that an oral contract between brokers to share a commission is only enforceable if one of the brokers has a binding written contract with the principal. *Aldis v. Schleicher*, 9 Cal. App. 372, 99 P. 526. This rule, however, has been held inapplicable to the case where one broker has actually received a commission from the principal although there was no contract in writing between them. In the latter case the oral contract to divide the commission is enforceable. *Johnston v. Porter*, 21 Cal.App. 97, 131 P. 69; *Jenkins v. Locke-Paddon Co.*, 30 Cal.App. 52, 157 P. 537. In the *Jenkins* case the court stated the rule (30 Cal.App. at page 57, 157 P. at page 539): "* * * [W]hen it appeared that at the time the action was begun there had actually been received by the first agent a fund in the nature of a commission in which the plaintiff could be awarded a share, it was immaterial what sort of a contract, valid or otherwise, the first agent had with his principal, the owner of the property."

[3] The doctrine of procuring cause of the sale is not applicable to this contract, the consideration for appellant's promise

to pay respondents one-half of the commission being found in Gomes' disclosure of the availability of the Renzel property for sale.

[4] As to the \$5,000 actually received by appellant the right of respondents to a present judgment for one-half thereof, i. e. \$2,500, is clear. As to the \$4,600 not yet received it cannot be said to constitute a fund in appellant's hands. While one of the Renzels on the witness stand testified that he intended to pay an additional \$4,600, the contract being oral is still not legally enforceable and until the money is in appellant's hands he should not be compelled to answer a judgment for one-half of it. The rights of the parties have been fully litigated, however, and a declaratory judgment that plaintiffs are entitled to receive one-half of said \$4,600 commission or any part thereof if and when it is paid by the Renzels to defendant will furnish full protection to all parties.

[5] Appellant suffered no legal injury by the failure of the trial judge to decide the case within 30 days as required by Code of Civil Procedure, § 632, since that section has been held to be directory and not mandatory. *Charlton v. Pan American World Airways*, 116 Cal.App.2d 550, 553, 254 P.2d 128.

[6] Nor was appellant prejudiced by the court's reserving the right in respondents to call one witness after the close of their case-in-chief. The witness was not in fact called and respondents had already introduced sufficient evidence to make a motion for nonsuit by appellant futile.

The trial court is ordered to modify the judgment by reducing the principal amount of the recovery from \$4,800 to \$2,500 and by adding thereto a declaration of plaintiffs' rights in the further expected payment of \$4,600 in accordance with this opinion. As so modified the judgment is ordered affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

155 Cal.App.2d 251

**Karol Kay BARTOLD, Plaintiff and
Respondent,**

v.

**Norman BARTOLD, Defendant and
Appellant.**

Civ. 22513.

District Court of Appeal, Second District,
Division 2, California.

Nov. 15, 1957.

Rehearing Denied Dec. 6, 1957.

Hearing Denied Jan. 6, 1958.

Divorce action. From an order of the Superior Court of Los Angeles County, Elmer D. Doyle, J., denying application by father for modification of final judgment of divorce as to custody of minor children, applicant appealed. The District Court of Appeal, Richards, J. pro tem., held that refusal to modify divorce judgment so as to award custody of children to father merely because he was unable to locate children and their mother after diligent effort and hence was deprived of right of visitation was not abuse of discretion.

Order affirmed.

1. Divorce ⇨303(3)

Order relieving divorced father from obligation under divorce judgment to make payments for support of minor children without ruling on his motion for modification of divorce judgment so as to award custody of children to him was equivalent to a denial of motion for change of custody and father was justified in treating it as such.

2. Infants ⇨19

In determining custody of a minor child, the welfare and best interest of child are the paramount consideration.

3. Infants ⇨19

Generally, order relating to custody of minor child will not be modified until some change of circumstances arises which makes modification of former order advisable from point of view of welfare of child.

4. Divorce ⇨303(3)

Record on appeal from order denying motion for modification of divorce judg-

ment so as to award custody of minor children to father did not show that welfare and best interest of children would in any way be enhanced by awarding their custody to father.

5. Divorce ⇨299

Divorced parent who must lose privilege of having custody of minor child for most of the time is generally entitled to have such contact with child as can be afforded, considering the general interest of child.

6. Divorce ⇨296, 312.6(5)

Trial court is vested with very broad discretion in determining who shall have custody of minor children of divorced parents, and reviewing court will not interfere with such determination on appeal, unless a clear case of abuse of such discretion is made out.

7. Divorce ⇨312.6(3)

On appeal from order denying motion for modification of divorce judgment so as to award custody of minor children to father, it must be presumed, in absence of evidence to the contrary that trial court fully and fairly inquired into all the facts and circumstances and was mindful of welfare of children and of fact that father had been deprived of visitatorial rights, and that trial court reached conclusion only after due consideration of entire situation before it.

8. Divorce ⇨303(3)

Refusal to modify divorce judgment so as to award custody of minor children to father merely because he was unable to locate children and their mother after diligent effort and hence was deprived of right of visitation was not abuse of discretion, in absence of showing that welfare and best interest of children would in any way be enhanced by awarding their custody to father.

Joseph W. Fairfield and Ethelyn F. Black,
Los Angeles, for appellant.

No appearance for respondent.

RICHARDS, Justice, pro tem.

Appeal by defendant-husband from an order denying his application to modify the custodial provisions of a judgment of divorce and to award him the custody of the minor children of the parties.

[1] On October 16, 1953, the plaintiff-wife was granted an interlocutory judgment of divorce which awarded to her the custody of the two minor children and granted to the appellant the right of reasonable visitation. The judgment does not prohibit the plaintiff from removing the children from the county of Los Angeles or the State of California. The appellant was ordered to pay \$170 a month for their support. A final judgment of divorce was entered January 5, 1955, incorporating the provisions of the interlocutory judgment as to custody, visitation and child support. On June 6, 1956, the judgment was modified by reducing the support provision for both children to \$25 a week and on November 7, 1956, the support provision was further reduced to \$17 a week. On November 23, 1956, an order to show cause was issued directed to the plaintiff-wife why the amount of the support payments should not be reduced to \$1 a month for each child and why the custody of the children should not be awarded to the appellant. The only change of conditions and circumstances alleged by the appellant in his affidavit in support of his motion to award custody of the children to him was that the support payment sent by him on November 1, 1956, to the last known address of the children in Berkeley, California, was returned to him by the post office, and that the envelope bore a notation of a change of address to Colorado Springs, Colorado, and was returned from there as "Unknown." He further alleged that he was unable to locate the plaintiff or his children in California or anywhere else after making inquiries as to their whereabouts. A hearing was held before a court commissioner who found that neither the appellant nor plaintiff's attorney could locate her or the minor children and recommended that the appellant should be relieved from the child support obligation until fur-

ther order of the court, which recommendation was thereafter approved and ordered by the court. No order was made on appellant's motion for change of custody. However, an order having been made relieving him from child support payments and going no further, it was equivalent to refusal to order a change of custody and appellant was justified in treating the silence of the order as a denial of his motion for change of custody. *Townsend v. Angellotti*, 129 Cal. 466, 468, 62 P. 59. Thereafter appellant filed exceptions to the findings and order on the ground that it had failed to award him the custody of the minor children and, on December 27, 1956, his exceptions were denied and this appeal followed.

It should be stated at this point that the record on appeal does not contain a transcript of the evidence adduced at the hearing before the commissioner and consequently does not allow us an opportunity to fairly review the question presented by this appeal.

[2-4] Appellant contends that the plaintiff having removed the children from the State of California and concealed them, it was an abuse of discretion not to modify the decree so as to award their custody to him. It was not found that plaintiff had removed the children from the State of California and concealed them but only that appellant has been unable to locate the plaintiff and the children after diligent effort. The paramount consideration in determining the custody of a minor child is the welfare and best interest of the child. *Gudelj v. Gudelj*, 41 Cal.2d 202, 208, 259 P. 2d 656; *Lerner v. Superior Court*, 38 Cal.2d 676, 683, 242 P.2d 321; *Prouty v. Prouty*, 16 Cal.2d 190, 195, 105 P.2d 295. The general rule is that the court will not modify a custodial order until some change of circumstances arises which makes a modification of the former order advisable from the point of view of the welfare of the child. *Foster v. Foster*, 8 Cal.2d 719, 726, 68 P.2d 719; *Ashwell v. Ashwell*, 135 Cal. App.2d 211, 213, 286 P.2d 983; *Stagliano v. Stagliano*, 125 Cal.App.2d 343, 347, 270

P.2d 91. There is nothing in the limited record before us to show that the welfare and best interest of the children would in any way be enhanced by awarding their custody to appellant.

[5] Appellant's sole contention is that inasmuch as he cannot locate the children so that he may exercise his right of visitation, he is entitled to an order awarding their custody to him so that he may obtain the assistance of law enforcement agencies to assist him in discovering their present whereabouts. The only authority relied upon in support of this contention is *Ashwell v. Ashwell*, supra. An examination of the decision discloses that the modification order granting custody of the children to the father was reversed for the reason that the evidence did not establish that the mother was unfit to have their continued custody and that the court abused its discretion in granting custody to the father where it further appeared that he was in the army and intended placing the physical custody of the children with their grandmother in Virginia. As previously stated, appellant has not presented any record of the evidence on this appeal and all that is before us are the allegations in his affidavit from which it appears that the children were last known to appellant to be residing in Berkeley, California. How long they lived there or whether appellant ever visited them in that place or anywhere else does not appear. We recognize that "it is generally considered to be the right of the parent who must lose the privilege of having the child for most of the time to have such contact with the child as can be afforded, the general interest of the child considered" (*Exley v. Exley*, 101 Cal.App. 2d 831, 838-839, 226 P.2d 662, 667) and we must assume that in denying the appellant's application for a change of custody the court was not unmindful of and gave due consideration to the appellant's right to maintain his parental relationships with the children.

[6] "It is the settled rule that, in determining who should have the custody of the minor children of the parties to divorce

actions, a very broad discretion is vested in the trial courts. It is only when a clear case of abuse of said discretion is made out that this court will interfere with the determination of the trial court on appeal." *Prouty v. Prouty*, 16 Cal.2d 190, 191, 105 P.2d 295, 296; accord: *Holsinger v. Holsinger*, 44 Cal.2d 132, 135, 279 P.2d 961; *Gantner v. Gantner*, 39 Cal.2d 272, 275, 246 P.2d 923.

[7] It must be presumed, on this appeal, in the absence of any evidence to the contrary, that the trial court fully and fairly inquired into all of the facts and circumstances, that it was mindful of appellant's deprivation of visitatorial rights, as well as the welfare of the children, and that its conclusion was reached only after it had duly considered the entire situation before it. See, *Borgerson v. Borgerson*, 58 Cal. App. 411, 413, 208 P. 991.

[8] No abuse of discretion having been shown, the order is affirmed.

FOX, Acting P. J., and ASHBURN, J., concur.



155 Cal.App.2d 411

Walter W. PATTERSON and Sophia H. Patterson, Plaintiffs and Appellants,

v.

Jack BEAUVELL, Rfa Beauvell, T. L. Preston, also known as Thomas L. Preston, and Jessie Marle Preston, Defendants and Respondents.

Civ. 5585.

District Court of Appeal, Fourth District, California.

Nov. 21, 1957.

Rehearing Denied Dec. 11, 1957.

Hearing Denied Jan. 15, 1958.

Lenders' action to rescind signed request for reconveyance and to restore a trust deed securing promissory note. The Superior Court of Riverside County, John G. Gabbert, J., entered judgment for de-

fendants and lenders appealed. The District Court of Appeal, Griffin, J., held that evidence sustained findings, that lenders were in desperate need of cash at time of proposal to accept one-half of balance due as payment in full, and that makers of note borrowed money and tendered same which was accepted in accordance with terms of proposal without any fraudulent representation to lenders who claimed discount was to inure to benefit of original makers only and not person who lent money to them and then purchased property.

Affirmed.

1. Mortgages ⇨316

In action by lenders to rescind signed request for reconveyance and to restore deed of trust which had secured promissory note held by lenders, evidence sustained findings, that lenders were in need of cash at time of proposal to accept one-half of balance due as payment in full, and that makers of note borrowed money and tendered same, which was accepted in accordance with terms of proposal without any fraudulent representations to lenders, whose claimed discount was to inure to benefit of makers only and not to person who lent money to them and then purchased property.

2. Appeal and Error ⇨939

While question of sufficiency of evidence as a matter of law to support a verdict may be presented to appellate court for review, court's duty stops where it has determined that there is some substantial supporting evidence.

3. Evidence ⇨417(9)

Where lenders gave a written proposal to borrowers to accept one-half of balance due as payment in full of loan secured by deed of trust on property, oral claims of lenders that discount was to inure personally to benefit of borrowers only and not to persons ultimately purchasing property was inadmissible as an attempt to modify terms of written agreement.

Walter W. Patterson and Sophia H. Patterson, in pro. per., for appellants.

Wing, Wing & Brown, by John B. Morgan, Banning, for respondents.

GRIFFIN, Justice.

Defendants and respondents Thomas L. Preston and wife, as joint tenants, owned property in Banning, where they resided. Plaintiffs and appellants, husband and wife, purchased and held the Prestons' promissory note secured by a second trust deed thereon. The unpaid balance in August, 1954, was \$2,007.94, payable at \$50 per month. The San Gorgonio Building & Loan Association held a prior trust deed on said property, executed by the Prestons and secured by a promissory note, and the sum of \$2606.49 was due thereon on January 1, 1954, payable about \$34 per month. Three years delinquent taxes were then unpaid, totaling \$328.79.

It is alleged in the complaint that the property was of the value of \$7,000; that plaintiffs called to the attention of Preston the delinquent taxes and payments past due on the note and trust deed and notified him that he could proceed to sell the property; that Mr. Preston informed plaintiffs he did not have sufficient funds for his family and was unable to support them and pay the debts owing, and that he would be unable to make payments on plaintiffs' trust deed; that for the purpose of enabling the Prestons to reside on the property, plaintiffs offered to pay all taxes and payments due on the first trust deed if the Prestons would pay plaintiff \$65 per month instead of \$50, as of September 1, 1954, and that plaintiffs would allow them a credit of \$2 for every dollar paid in excess of the \$65 per month; that the Prestons asked plaintiffs if they (Prestons) would pay \$1,000 would they give the Prestons credit for \$2,000 on the amount due, and that the plaintiffs orally agreed to this; that a writing was signed by plaintiffs that they would accept one-half of \$2,007.94, or \$1,003.97, as payment in full for their note and trust deed if paid before September 1,

1954; that by said agreement plaintiffs meant that only defendants Preston could take advantage of this offer. It is then alleged that defendants Preston made the offer known to defendants Jack Beauvell and wife, and the Prestons proceeded to negotiate for a sale of said property to them without the knowledge of plaintiffs; that about August 31, 1954, the Prestons informed plaintiffs they had \$1,003.97, and if plaintiffs would go to the office of the building and loan association it would be paid over to plaintiffs by the Prestons; that the parties there met and apparently some escrow arrangements were made concerning the financing and payment of the \$1,003.97; that Beauvell asked that plaintiffs make an assignment of their note and trust deed to him, which plaintiffs refused to do under a claim that they had agreed with the Prestons that it was to be their money that paid off the note and trust deed and not that of the Beauvells; that plaintiffs refused to assign the note and trust deed to them in connection with any sale; that in accepting the lesser amount plaintiffs intended the remittance of the remainder to be a gift to the Prestons and at the same time allow them to retain title subject to the first trust deed; that defendants Beauvell knew of this agreement and fraudulently took advantage of the Prestons to reap the benefit of this discount and to acquire the property.

It is then alleged that the Beauvells and the Prestons, as a subterfuge, presented an unsecured promissory note for \$1,003.97, signed by the Prestons and made payable to the Beauvells, as evidence of a loan to the Prestons to pay off plaintiffs' trust deed and note; that the Prestons tendered the money to plaintiffs and asked them to accept it; that believing these representations that the Prestons had complied with the written offer, according to its terms, and that they were only dealing with the Prestons and their money and only for their benefit, plaintiffs thereupon executed a request for a full reconveyance of said property to the trustee named, marked the secured note paid, and de-

livered them to the Prestons in the office of the building and loan association, and that they actually received the money tendered in the sum of \$1,003.97 under the mistaken belief they were surrendering these instruments to the Prestons and no one else; that in truth and in fact an employee of the building and loan association took said instruments under the direction of Beauvell, placed them in escrow, and completed the sale of the property to the Beauvells by recording the full reconveyance and a grant deed from the Prestons to the Beauvells.

On September 24, 1954, plaintiffs claim they first learned of the true transaction and brought this action to rescind the signed request for a reconveyance, restore thereunder a trust deed signed by the Prestons and to set aside the transaction wherein plaintiffs agreed to accept the \$1,003.97 as full payment on the unpaid balance. It is alleged that notice of such rescission was given together with a tender of said amount, and that the tender was refused. The prayer is that plaintiffs be placed in the same position they were prior to said transaction, showing a valid secured obligation going to plaintiffs on said note and trust deed in the sum of \$2,007.49, or that in case this cannot be done for judgment against defendants for \$2,007.49 and accrued interest.

The answer of the Prestons is that the written offer of plaintiffs to accept \$1,003.97 in full payment of the trust deed was made, as indicated in the written instrument signed by them. It is dated August 30, 1954, and reads:

"To T. L. Preston and Jessie Marie Preston:

"As of September 1, 1954, the unpaid balance on the trust deed we hold on the place where you live is \$2007.94.

"On account of our great desire to get out from under this transaction and our need for cash, we will accept one-half of this balance, which is \$1003.97,

as payment in full if you will pay us \$1003.97 before any further interest accrues, that is to say, on or before September 1, 1954.

"(Signed) Walter W. Patterson
"Sophia H. Patterson."

All other claimed oral agreements and understandings are generally denied. It is then averred that the Prestons accepted said offer in good faith and in satisfaction of plaintiffs' claim.

After trial, the court found generally that the property was valued at a much less sum than \$7,000; that plaintiffs were in need of cash and made the "written offer"; that in fact the Prestons borrowed the money from the Beauvells and tendered it to plaintiffs and that it was accepted by them on September 1, 1954, and plaintiffs executed and surrendered the reconveyance, note and trust deed upon receipt of the money, all in accordance with the terms of the written agreement; that none of the defendants made any fraudulent statements or representations to plaintiffs, and plaintiffs were not misled nor were they damaged; that the Prestons rightfully transferred title to said property to the Beauvells in consideration of being furnished free rent on the premises and being released of any further obligations in reference to it. Judgment was entered in favor of defendants.

[1] Suffice it to say, without setting it forth, the evidence, though contradictory, fully supports the findings. The written instrument itself recites that plaintiffs had a great desire to "get out from under this transaction and our need for cash", and accordingly they would accept one-half of the balance as payment in full.

[2,3] While the question of the sufficiency of the evidence, as a matter of law, to support a verdict or finding may be presented to the appellate court for review, its duty stops when it has determined that there is some substantial supporting evidence. 4 Cal.Jur.2d p. 482, sec. 602. The claim of plaintiffs is an attempt to modify the terms of this written agree-

ment which is not permissible. *Lifton v. Harshman*, 80 Cal.App.2d 422, 432, 182 P.2d 222; 12 Cal.Jur.2d page 339, Sec. 125.

As bearing on the question of damages, it appears plaintiffs did receive and retain one-half of the balance due on the note and trust deed, to wit, \$1,003.97. The evidence shows that upon payment of this amount plaintiffs were willing to forego the payment of the balance; that plaintiffs bought this same trust deed and note from one Pedigos at a discount of \$400 because Preston was in default at that time; that plaintiffs agreed to reduce Prestons' payment on the balance to a smaller sum, and for this the Prestons agreed to and did give them a \$600 bonus in the transaction for this forbearance. Plaintiffs concede these facts. The finding that plaintiffs were not damaged is sustained by the evidence.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



155 Cal.App.2d 444

**William Joseph PIERCE and Lillie Mae
Pierce, Plaintiffs and Appellants,**

v.

**William E. CLEVELAND, Edna L. Cleveland, et al., Defendants and
Respondents.**

Civ. 22283.

**District Court of Appeal, Second District,
Division 3, California.**

Nov. 22, 1957.

Action by landowners for rescission of contract for sale of realty to purchaser who gave in part payment a note which was signed by third persons and which was payable to landowners. The Superior Court

of Los Angeles County, Newcomb Condee, J., rendered judgment of nonsuit, and the landowners appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was insufficient to raise question for trier of fact as to whether purchaser falsely represented that third persons' credit rating was good.

Affirmed.

1. Trial ☞ 163

Where the gravamen of landowners' action for rescission of contract for sale of realty was fraud of purchaser and ground of motion of nonsuit was that if all the evidence and testimony of landowners were true it still would not amount to actionable fraud, the landowners were sufficiently informed of the claimed inadequacy of their evidence.

2. Trial ☞ 163

A party must specify the grounds upon which his motion for nonsuit is based.

3. Vendor and Purchaser ☞ 45

In landowners' action for rescission of contract for sale of realty to purchaser who gave in part payment a note which was signed by third persons and which was payable to landowners, evidence was insufficient to raise question for trier of fact as to whether purchaser falsely represented that third persons' credit rating was good.

4. Brokers ☞ 31

Where landowners sold their property to real estate broker and did not merely list it for sale with broker, landowners could not recover any profit made by broker on his resale.

Matranga & Abrams, El Monte, for appellants.

Anthony & Bereman, Los Angeles, for respondents.

SHINN, Presiding Justice.

In this action for rescission of a sale of real property, and for other relief, upon the ground of fraud, judgment of nonsuit was for defendants and plaintiffs appeal.

Mr. and Mrs. Pierce owned a residence in Los Angeles County of the value of \$10,500 but subject to a trust deed encumbrance of some \$8,700. On September 25, 1954, they executed a grant deed which contained no description of the property or name of a grantee and delivered the same to William E. Cleveland, who was a real estate broker of their acquaintance. An agreement was signed at that time by Mrs. Pierce and Cleveland as set out in the margin.¹ Although it was agreed that Cleveland would transfer and deliver to the Pierces the note of Mr. and Mrs. Conley to him for \$1,200 the Conleys executed another note for \$1,200 payable to the Pierces, who accepted it without any guaranty by Cleveland. On December 22, 1954, the Conleys also executed a third trust deed on property they owned, with the Pierces as beneficiaries, to secure payment of the note. Cleveland sold the Pierce property to Mr. and Mrs. Stovall for about \$10,000. He inserted their names in the deed he had received from the Pierces. The Conleys made one payment of \$20 to the Pierces and defaulted in payments on the prior encumbrances. About four months after the Pierce-Cleveland agreement, when they learned of threatened foreclosure of a prior trust deed, the Pierces gave Cleveland notice of rescission of the transaction with him. They brought this

1. "Received from W. E. Cleveland by Lillie M. Pierce, address 2840 N. San Gab. River Pkway, El Monte, note \$1200 being part payment on property at trade for a note to W. E. Cleveland by Pete and Joyce Conley note payable \$20 per mo. 6%, at price of \$—— payable \$—— cash (including this deposit). Balance payable as follows: Cleveland to assume a loan of ap. 8400.00 payable \$60.00

per m. 6% to Mr. and Mrs. Falla. Mr. & Mrs. Pierce to sign a deed to be put in whoever Cleveland sells the property to. Mrs. Pierce to make monthly payments on same until she gives possession. * * *

"Dated this 25 day of Sept. 1954 at El Monte, California.

"W. E. Cleveland, Purchaser

"Lillie Mai Pierce"

action against Cleveland, his wife and the Stovalls. Upon the trial judgment of nonsuit was granted.

The complaint purported to allege fraud on the part of Cleveland. The allegations differed so widely from the terms of agreement and from the admitted facts that it is unnecessary to enumerate them. It is apparent that counsel who prepared the complaint had not seen the agreement. There was, however, an allegation that Cleveland falsely represented that the Conleys' credit rating was good. Mrs. Pierce testified that Cleveland assured her that he had checked their credit "clear back east" and that "he would be willing to back it one hundred percent." It is apparent that the Pierces entered into the agreement knowingly but that they accepted the Conley note and trust deed in reliance upon their belief that the Conleys could and would pay the note.

[1,2] The ground of the motion for nonsuit was that "if all the evidence and testimony of plaintiffs were true, it still would not amount to actionable fraud." It is contended by plaintiffs that this was an insufficient specification of the insufficiency of their evidence. They cite *Security Investment Co. of San Bernardino v. Bartram*, 54 Cal.App. 540, 202 P. 337 and *Pacific Finance Corp. v. Roffalli*, 98 Cal. App. 198, 276 P. 1064, 1065. In the first of these cases the motion was on the ground "that plaintiff has wholly failed to prove his case" of which the court said "This statement in no way attracts the attention of counsel and the court to the particular matters relied upon, and is insufficient." In the second case the motion was "We move the court for an order nonsuitor the plaintiff in this case upon the ground that the evidence does not show any right of recovery." In each case it was held that the motion was insufficient because it did not point out the particular matters relied upon. Although it is necessary that a party must specify the grounds upon which his motion for nonsuit is based (*Lawless v. Calaway*, 24 Cal.2d 81, 94, 147 P.2d 604) the notice here in question was

clearly sufficient to inform plaintiffs of the claimed inadequacy of their evidence.

[3] The gravamen of the action was fraud. On the motion counsel for defendants properly assumed the truth of the testimony of the plaintiffs and gave them notice of the precise ground of the motion, namely, that plaintiffs' evidence was insufficient as a matter of law to prove the charge of fraud. The court did not rule on the motion without listening to the specific reasons why defendants considered the evidence insufficient, and giving plaintiffs' attorneys ample opportunity to discuss the sufficiency of the evidence. In the discussion plaintiffs were fully advised as to the particulars in which the defendants claimed the evidence to be insufficient. In a common sense view of the situation, the wording of the motion and the discussion which immediately followed should be considered together. During the argument the court stated: "You haven't proved they (Conleys) weren't good for it. Just because they haven't paid it doesn't prove at that time they weren't good to pay for it. There is no evidence that you have tried to find them."

Cleveland introduced Mrs. Conley to Mrs. Pierce the day after the agreement was signed and the two women engaged in extensive conversation. There was no evidence that Mrs. Pierce made any inquiry as to the ability of the Conleys to pay the note. The only evidence with respect to any efforts that were made to contact the Conleys or collect the payments was the testimony of Mr. Pierce "we attempted to locate them one night, but they were not to be found." The mere fact that the Conleys had failed to pay their debts as they fell due, when payment had not been demanded, would not justify a finding that the representation by Cleveland, if made, was false, or not believed by him to be true.

Plaintiffs do not contend in their brief that they produced sufficient evidence to prove the alleged falsity of Cleveland's representation that the credit of the Conleys was good. This was the one important

factual issue in the case. In the light of the evidence the court did not err in granting the motion of nonsuit. We may remark, however, that it would have been better practice for defendants to submit the case on the merits. Mr. Cleveland had testified fully under questioning by plaintiffs' counsel, and the facts had been fully developed. It was apparent that the court was prepared to render judgment for defendants if the case should be submitted.

[4] It was alleged in the complaint that the Pierces did not sell the property to Cleveland but merely listed it for sale with him. Mrs. Pierce's testimony was contrary to this allegation, as was the agreement of sale. In spite of this evidence it is contended in the Pierces' brief that Cleveland should account to them for any profit he made as their agent on a resale. The point scarcely deserves mention.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



155 Cal.App.2d 273

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Elijah WALKER, Defendant and Appellant.
Cr. 2763.

District Court of Appeal, Third District,
California.

Nov. 15, 1957.

Rehearing Denied Dec. 10, 1957.

Hearing Denied Jan. 13, 1958.

Defendant was convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., of robbery in the first degree, and he appealed. The District Court of Appeal, Peek, J., held that court's delegation (pursuant to stipulation) to court reporter of duty to read instructions to jury

would not compel reversal, in absence of showing of prejudice.

Affirmed.

1. Criminal Law §553

It could not be said that testimony was incredible merely because situation revealed thereby was unusual.

2. Criminal Law §742(1)

Credibility of complaining witness and reasonableness of his testimony were matters for determination of jury.

3. Robbery §24(1)

First degree robbery conviction was sustained by evidence.

4. Criminal Law §824(1), 1173(1)

It is incumbent upon court in criminal case to instruct jury, on its own motion, fully and fairly upon law relating to facts of case; but whether failure to instruct constitutes prejudicial error must be determined from circumstances of case.

5. Criminal Law §824(3)

Among those matters necessitating specific request for instruction on part of defendant is an instruction as to lesser degrees of offense charged.

6. Stipulations §14(11)

Court's delegation (pursuant to stipulation) to court reporter of duty to read instructions to jury would not compel reversal, in absence of showing of prejudice. West's Ann.Pen.Code, § 1093.

Peter H. Smurr, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and Lloyd Hinkelman, Deputy Attys. Gen., for respondent.

PEEK, Justice.

Defendant Walker and one Thelma Linigan were charged by an information with the crime of robbery. From a judgment of conviction following jury verdicts finding them both guilty of robbery in the first degree, Walker alone appeals.

Three contentions are made: (1) that the evidence was insufficient to support the judgment of conviction of robbery in the first degree; (2) that the court erred in failing to instruct the jury on larceny as a lesser and included offense; and (3) that the court erred in permitting the court reporter to read the instructions to the jury.

[1-3] The only evidence offered on behalf of the prosecution was the testimony of the complaining witness, Juan Ibanez Munoz, who testified through an interpreter. His testimony was that he was approached by Walker and asked in Mexican if he desired a woman. Upon his affirmative reply he was taken by the defendant to a hotel where he met the defendant Linnigan, a prostitute. Juan and Thelma proceeded to an upstairs room while Walker remained downstairs. During the act of intercourse which followed, Juan heard a noise, turned and saw defendant Walker taking five \$20 bills from Juan's wallet. Upon his demand, defendant returned the wallet but without the money. During the argument between Juan and Walker, Thelma had grabbed Juan's trousers from a nearby chair and had taken approximately \$25 from one of the pockets. When Juan continued his demand for the return of his money, Walker threatened him with a knife, shoved him toward the door and told him to leave.

The only evidence offered by defendants was given by the officer to whom Juan reported the robbery, and through whom they attempted to impeach Juan's testimony upon the basis of ambiguities and inconsistencies in his statements.

The testimony given by the complaining witness was not, as the defendant contends, so contradictory, inconsistent or ambiguous as to be inherently improbable and hence insufficient to support the verdict of the jury. The complaining witness was a 25-year-old Mexican, unable to speak the English language. His testimony, as well as his report to the police, was given through interpreters. Under such circumstances, minor inconsistencies could well

be expected. Likewise it cannot be said that the testimony is incredible because the situation revealed by Juan's testimony was unusual. *People v. Perhab*, 92 Cal.App.2d 430, 206 P.2d 1133. No attempt was made by defendant to contradict it. The credibility of the complaining witness and the reasonableness of his testimony were matters for the determination of the jury. *People v. Jefferson*, 31 Cal.App.2d 562, 88 P.2d 238.

[4, 5] Defendant's second contention is likewise without merit. It is true that it is incumbent upon a court in a criminal case to instruct the jury, on its own motion, fully and fairly upon the law relating to the facts of the case. But it is also true that "the circumstances of the case must determine whether the failure to instruct the jury constitutes prejudicial error." *People v. Putnam*, 20 Cal.2d 885, 892, 129 P.2d 367, 370. It is the further rule that "among those matters necessitating a specific request for instruction on the part of a defendant is an instruction as to lesser degrees of the offense charged." *People v. Dozier*, 35 Cal.App.2d 49, 60, 94 P.2d 598, 604. It follows that in the present case, the jury being fully and fairly instructed on the general principles of law pertinent to the case, the defendant cannot complain of failure to instruct on specific matters since he did not expressly request such an instruction. In the instant case, as in *People v. Perhab*, supra, the prosecution did not seek a conviction on a lesser charge but relied upon its ability to establish all of the elements of the crime of robbery, including force and fear at the time, or in the alternative to accept a verdict of not guilty if it failed to establish such elements. As previously noted, Juan's testimony was not contradicted, no evidence other than that given by the officer was introduced by the defendant, and no instruction on a lesser offense was requested by him. Again, as noted, under the uncontradicted evidence, the money was taken from the complaining witness through force or fear, and hence the evidence would support the conclusion of the jury.

[6] Defendant's final contention is that although counsel who represented him at the time of the trial stipulated that the court reporter could read the instructions to the jury, now such stipulation cannot bind him because of the mandatory duty imposed upon the court under section 1093 of the Penal Code, and that the court's delegation of its duty was unconstitutional under the due process provisions of both the California and the United States Constitutions. The record in this regard shows that before instructing the jury the court informed counsel that the instructions were all prepared and signed, and that he had made an arrangement with one of the court reporters to read the instructions to the jury and asked counsel if they would stipulate to that effect. Both counsel agreed, whereupon the court stated to the jury:

"Now ladies and gentlemen, Mr. Dunn, one of your court reporters, is going to read these instructions to you, and you will receive them the same as though they are being given to you by the Court itself, and attach to them the same authority; and also you are bound by these instructions the same as though the Court had read them."

Counsel's argument in support of such contention is indeed ingenious, nevertheless, whatever may have been the reason for the procedure followed, we cannot say that such fact alone would compel a reversal in the absence of a showing of prejudice. Furthermore, if the manner in which the instructions were given to the jury was susceptible of the various possibilities now posed by counsel, a correction might easily have been made by timely objection. A somewhat similar situation was presented in an early Georgia case, *Dillon v. McRae*, 40 Ga. 107. There a principle of law was read by counsel in the presence and hearing of the jury. Immediately thereafter, in its charge to the jury, the court said that the principle just announced by counsel was the correct rule as applied to the facts of the case and hence it would be unnecessary to repeat the same. Upon appeal it was

held that the trial judge did not err in so instructing the jury.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



155 Cal.App.2d 277

In re HARTNETT'S ESTATE.

In the Matter of the Estate of Leslie Eugene Hartnett, Deceased.

Lauretta Jean HARTNETT, Leona Ellen Hartnett and Leslie Eugene Hartnett, Minors, by Edna Goodwin, Their Guardian ad litem, and Aliene Hartnett Lee, Appellants,

v.

James B. ROLLE, Jr., and Bryant W. Jones, as Executors of the Estate of Leslie Eugene Hartnett, also known as L. E. Hartnett, Deceased, and Lucille Hartnett, Respondents.

Civ. 5561.

District Court of Appeal, Fourth District, California.

Nov. 15, 1957.

Proceeding in the matter of the estate of deceased, wherein executors filed first amended account current and report, in which claim of corporation against estate was allowed and approved by executors. Objection was filed by certain persons to allowance of the corporation's claim. The Superior Court of Riverside County, Hilton H. McCabe, J., entered an order overruling the objection, and they appealed. The District Court of Appeal, Mussell, J., held that where claim of corporation was filed with executors on April 19, 1954, was allowed and approved by executors on May 6, 1954, and was paid in good faith by executors on May 14, 1954, and last day for filing of claims with executors for approval was September 11, 1954, and claim was

justly due, and there was no loss to estate because of payment of claim, objection to allowance of claim, on ground that it was not presented to executors and approved by them and court within time allowed by law for presentation and allowance of claims against estate, was properly overruled, though claim was not allowed and approved by probate judge until May 9, 1955.

Order affirmed.

Executors and Administrators ¶233

Where claim of corporation against estate of deceased was filed with executors on April 19, 1954, was allowed and approved by executors on May 6, 1954, and was paid in good faith by executors on May 14, 1954, and last day for filing of claims with executors for approval was September 11, 1954, and claim was justly due, and there was no loss to estate because of payment of claim, objection to allowance of claim, on ground that it was not presented to executors and approved by them and court within time allowed by law for presentation and allowance of claims against estate, was properly overruled, though claim was not allowed and approved by probate judge until May 9, 1955.

Westover, Mansfield, Westover & Cople, William H. Westover, Yuma, Ariz., and Alexander W. Staples, Indio, for appellants.

Thompson & Thompson, Pasadena, for executors and respondents.

Charles L. Nichols, Beverly Hills, Ivan Miller, Christopher Hall, Los Angeles, and Richard E. Hodge, Beverly Hills, for respondent Lucille Hartnett.

MUSSELL, Justice.

The executors of the estate of Leslie Eugene Hartnett, deceased, filed herein their first amended account current and report of executors in which a claim of the Hartnett Machinery Company, a corporation, in the sum of \$24,898, was allowed

and approved by them on May 6, 1954. Objection was filed by appellants to the allowance of this claim on the ground that it was not presented to the executors and approved by them and the court within the time allowed by law for the presentation and allowance of claims against said estate. This appeal is taken from the trial court's order overruling the objection and no appeal is taken from the remaining portions of the court's order approving the account.

Leslie Eugene Hartnett died on February 5, 1954, and at the time of his death all of the stock of the Hartnett Machinery Company, a California corporation, was registered in his name, with the exception of shares in the names of the directors of the corporation for qualification purposes only. Hartnett was president of the corporation and had complete control and management of it. He was paid a salary of \$25,000 per year for his services by the corporation.

In their account and report the executors stated that they had reported that the estate was chargeable with \$24,898 salary due to Hartnett, that this item was offset by the claim of Hartnett Machinery Company for a like amount, and this was set forth in the report and account as a credit.

The first publication of notice to creditors was made on March 11, 1954, and the last day for the filing of claims with the executors for approval was September 11, 1954. The claim of Hartnett Machinery Company is dated April 18, 1954. It was verified by Lucille R. Hartnett on April 19, 1954, and is endorsed as follows:

"Endorsement:

"Within claim allowed and approved this 6th day of May, 1954, for the sum of \$24,898.00

"James B. Rolle, Jr.
Bryant W. Jones

"Executors

"Allowed and approved this 9 day of May, 1955 for the sum of \$24,898.00

"Hilton H. McCabe
"Judge of the Superior Court."

The record shows that the disputed claim was paid by the executors on May 14, 1954, and a check therefor, payable to Hartnett Machinery Company, bears the notation "Repayment of sums borrowed by L. E. Hartnett." On the same day the claim was paid, the salary due decedent from the company in the amount of \$24,-898 was collected from the company and deposited in the estate account. It appears from the record that the claim of Hartnett Machinery Company was justly due. It was paid in good faith by the executors and the amount paid was the true amount of the indebtedness over and above all payments or offsets. While it is apparent that the disputed claim was not allowed and approved by the probate judge until May 9, 1955, it was allowed by the executors on May 6, 1954, and paid by them on May 14, 1954, well within the time for the filing of claims against the estate.

In Re Estate of Lindauer, 53 Cal.App.2d 160, 164-165, 127 P.2d 589, this court held that where the legal representative, in good faith, makes proper expenditures for the estate, either from his own funds or from estate funds, without order of court, he is entitled to credit and in the absence of bad faith and abuse of discretion by the trial judge, the appellate court will not interfere with the action of the trial judge. Citing Section 929, Probate Code and, In re Estate of Maddalena, 42 Cal.App.2d 12, 108 P.2d 17. It was further held in the Lindauer case, *supra*, 53 Cal.App.2d at page 165, 127 P.2d at page 592, that

"The probate court has exclusive jurisdiction upon the settlement of the account, after notice to the parties interested, to determine what items of expenditure incurred during administration are proper charges against the estate. *Gurnee v. Maloney*, 38 Cal. 85, 99 Am.Dec. 352. The court in passing upon such expenditures is vested with a broad discretion which will not be disturbed on appeal except when abused. In re Estate of Parker, 186 Cal. 668, 200 P. 619."

In the instant case it is clear that no loss resulted to the estate by the payment of the claim involved. The estate was solvent and no abuse of discretion appears from the order under attack.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



155 Cal.App.2d 280

In re HARTNETT'S ESTATE.

In the Matter of the Estate of L. E. Hartnett,
also known as Leslie Eugene
Hartnett, Deceased.

Lucille HARTNETT, Petitioner and
Appellant,

v.

Aliene Hartnett LEE et al. and James B.
Rolle, Jr., et al., Respondents.

Civ. 5701.

District Court of Appeal, Fourth District,
California.

Nov. 15, 1957.

Hearing Denied Jan. 6, 1958.

Proceeding in the matter of the estate of deceased, wherein determination of heirship and character of property of estate of deceased was sought. Surviving wife alleged in her petition that substantially all of the property listed in the inventory of the estate was community property and that it was necessary that character of property be fixed and determined in order that proper distribution might be made, and she also sought in her amendment to the petition to have an adjudication as to property held in joint tenancy. The Superior Court of Riverside County, Hilton H. McCabe, J., entered a judgment and order dismissing the petition for determination of heirship, and the surviving wife appealed. The District Court of Appeal, Mussell, J., held that surviving wife's

claim to community property rights was in privity with the estate and should have been litigated therein, and that fact that she also sought in her amendment to the petition to have an adjudication as to property held in joint tenancy did not oust Superior Court, while sitting in probate, of jurisdiction to determine what was and what was not community property.

Judgment and order reversed.

1. Courts $\S$ 200½

Generally, Superior Court, while sitting in probate, is without power to decide disputed claim between estate and stranger thereto, but if controversy is between estate and those not strangers to probate proceedings relating to estate, Superior Court, sitting in probate, has power to entertain action and adjudicate conflicting claims. West's Ann.Prob.Code, $\S$ 1080.

2. Husband and Wife $\S$ 266

Separate property of husband or wife may be converted into community property or vice versa at any time by oral agreement of parties.

3. Husband and Wife $\S$ 272(5)

Claim of surviving wife to community property rights was in privity with estate of deceased husband and should have been litigated in proceeding to determine heirship, and fact that she also sought in her amendment to petition to have an adjudication as to property held in joint tenancy did not oust Superior Court, while sitting in probate, of jurisdiction to determine what was and what was not community property. West's Ann.Prob.Code, $\S$ 1080.

Chas. L. Nichols, Beverly Hills, Christopher Hall, Los Angeles, Robert R. Mallicoat and Richard E. Hodge, Beverly Hills, for appellant.

Thompson & Thompson, Pasadena, for respondent Rolle, et al.

Westover, Mansfield, Westover & Copple, William H. Westover, Yuma, Ariz., and Alexander W. Staples, Indio, for respondent Lee, et al.

MUSSELL, Justice.

This is a proceeding to determine heirship and the character of the property of the estate of Leslie Eugene Hartnett, deceased. The petitioner, who is the surviving spouse of the decedent, alleged in her petition filed herein on December 7, 1955, that substantially all of the property listed in the inventory of the estate is community property and that it is necessary that the character of said property be fixed and determined in order that proper distribution may be made.

Leslie Eugene Hartnett died on or about February 5, 1954, and on August 25, 1955, his will, dated August 3, 1951, was revoked by order of court as to the petitioner herein since she and decedent were married subsequent to the execution of the will. When the hearing on the petition to determine heirship was commenced, counsel for petitioner moved the trial court to define the issues presented by the petition and stated that the first theory they desired to submit was whether or not all of decedent's property had been transmuted into community property by agreement between the decedent and petitioner. The trial court then stated that they would proceed with the matter of whether or not there was some agreement between the decedent and Lucille Hartnett regarding the property. After hearing testimony on the issue thus defined, the court, on May 31, 1956, made a minute order, in part, as follows: "On the issue as to whether all of the separate property owned by decedent at the time of his marriage to petitioner Lucille Hartnett, was transmuted to community property of decedent and petitioner, Lucille Hartnett, the court finds that all of said property was not so transmuted."

On July 2, 1956, petitioner, Lucille Hartnett, after having obtained leave of court therefor, filed an amendment to her petition, alleging as follows:

"6. Petitioner is informed and believes and upon that ground avers that substantially all of the property listed in such inventory is community property; and further, to the extent that

the Court determines or finds otherwise, the said property is the separate property of Petitioner as surviving joint tenant thereof. Petitioner further avers that it is necessary and appropriate that the precise character of such property as community property or separate property be fixed and determined by this Court in order that proper distribution thereof may be made pursuant to the aforesaid Order of this Court."

After evidence was introduced on the issues raised by the petition and the amendment thereto, the court, on November 26, 1956, made and entered a minute order, which, insofar as it is material here, provides as follows:

"Good cause appearing and it appearing to the court that because of the issues tendered by the petition for determination of heirship as amended, this court does not have jurisdiction, the petition for determination as amended is hereby dismissed without prejudice.

"Good cause appearing and it appearing to the court that because of the issues raised and conditions made by the heirs and legatees no definite instructions can be given to the executors until the issues and contentions are settled, the petition for instructions filed by the executors is hereby dismissed without prejudice."

Lucille Hartnett appeals from this order and from the provisions thereof dismissing the petition for determination of heirship as amended. The notice of appeal does not indicate that petitioner appeals from the order of the court made on May 31, 1956, finding that all of the separate property of the decedent was "not transmuted".

Appellant first contends that the probate court has jurisdiction to determine heirship and character of property by a surviving widow, to adjudicate any or all of the assets of an estate to be the community property of the decedent and the surviving

widow, and we are in accord with this contention.

[1] It is a general rule that the superior court, while sitting in probate, is without power to decide a disputed claim between an estate and a stranger thereto, but if the controversy is between an estate and those not strangers to probate proceedings relating to the estate, the court, sitting in probate, has the power to entertain the action and adjudicate the conflicting claims. This rule is discussed at length in *Central Bank v. Superior Court*, 45 Cal.2d 10, 285 P.2d 906. It is there held (45 Cal.2d at page 17, 285 P.2d at page 910) that a surviving wife's claim to her share of the community property is said to come to her through probate (Prob.Code, Sec. 202) so that her claim is in privity with the estate and should be litigated therein. Citing *In re Burdick's Estate*, 112 Cal. 387, 44 P. 734; *In re Estate of Kurt*, 83 Cal.App.2d 681, 684, 189 P.2d 528; *Colden v. Costello*, 50 Cal.App.2d 363, 122 P.2d 959. In *Re Estate of Roberts*, 27 Cal.2d 70, 75, 162 P.2d 461, 464, it is held that in a proceeding to determine heirship "any person * * * entitled to distribution of the estate or any part thereof" and "praying that the court determine who are entitled to distribution of the estate" (Prob.Code, Sec. 1080) may obtain a decision binding on any other person interested in the estate as to how the estate shall be distributed, and that the court's jurisdiction in a proceeding to determine heirship includes the power to adjudicate community property rights.

[2] It is a settled rule that the separate property of the husband or wife may be converted into community property or vice versa at any time by oral agreement of the parties. *Woods v. Security First Nat. Bank*, 46 Cal.2d 697, 701, 299 P.2d 657. It was also held in that case that the fact that the petition to determine heirship was sought to have the entire estate declared to be community property would not oust the court sitting in probate of

jurisdiction to determine the question of heirship.

[3] In the instant case, petitioner's claim as surviving wife to community property rights was in privity with the estate and should have been litigated therein. The fact that she also sought in her amendment to the petition to have an adjudication as to property held in joint tenancy did not, in our opinion, oust the court of jurisdiction to determine what was and what was not community property. While an extensive hearing was had on the question of transmutation of property and the court found that "all of said property was not so transmuted", no finding was made describing the property transmuted.

We conclude that the court erred in dismissing the petitions under the circumstances shown by the record. The judgment and order dismissing the petition for determination of heirship as amended and dismissing the petition for instructions filed by the executors are reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; McCOMB, J., not participating.



155 Cal.App.2d 192

AMERICAN AUTOMOBILE INSURANCE COMPANY, a corporation, Plaintiff,
Cross-Defendant and Respondent,

v.

SEABOARD SURETY COMPANY, a corporation, and **Republic Productions, Inc.**, a corporation, Defendants, Cross-Complainants and Appellants.

Associated Indemnity Corporation, a corporation, and **Joseph Kaufman Productions, Inc.**, a corporation, Cross-Defendants and Respondents.

Civ. 22294.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1957.

Hearing Denied Jan. 6, 1958.

Action by one insurer against another with respect to their liabilities for loss

covered by policies issued by each of them. The Superior Court of Los Angeles County, Lloyd S. Nix, J., entered judgment determining that each insurer was liable for one-half of loss and defendant insurer appealed. The District Court of Appeal, Ashburn, J., held that where studio facilities were leased to tenant under agreement whereby tenant promised to maintain liability insurance with landlord as additional insured and landlord agreed to keep in force its own policy covering any acts or omissions of its employees, and each policy contained similar excess insurance clauses, each insurer was liable for one-half of judgment procured by tenant's employee against landlord by reason of its negligence.

Affirmed.

1. Insurance ⇨512½

Reciprocal rights and duties of several insurers who have covered the same event, do not arise out of contract, for their agreements are not with each other, and their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden, so that application of principles are not controlled by language of contracts with respective policy holders.

2. Subrogation ⇨1

One having a superior equity growing out of a contract may enforce it, by way of subrogation, although contract was made with a third party.

3. Contracts ⇨189

Language, designed to protect one against his own negligence, must be clearly and explicitly to that effect in order to accomplish the desired end.

4. Indemnity ⇨8

Where agreement, between landlord and tenant, provided that tenant would indemnify landlord against all loss sustained or imposed by reason of injury, damage or death of any employee or other person resulting from tenant's acts or acts of agents arising out of use of premises, but

landlord also agreed to keep in force its own policy covering any acts or omissions of its own employees, agreement was not sufficient to constitute an indemnification against landlord's own negligence.

5. Insurance ⇐512½

Where motion picture studio facilities were leased to tenant under agreement, whereby tenant agreed to maintain liability insurance, with landlord named as an additional insured and landlord agreed to keep in force its own policy covering any acts or omissions of its employees, and each policy contained similar excess insurance clauses, each insurer was liable for one-half of judgment procured against landlord by reason of its negligence.

6. Appeal and Error ⇐171(1), 882(1), 1008(3)

Rule, confining parties upon appeal to theory pursued below, does not apply to a question which is one of law only, and an appellate court is never bound, by concessions of counsel, as to applicable law, or by interpretation of documents made by trial court, upon basis of terms of written instrument without aid of other evidence.

Joseph F. Rank, Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, A. P. G. Steffes, Los Angeles, for respondents.

ASHBURN, Justice.

This is a controversy between two insurance companies as to responsibility for a judgment obtained by one Frances L. Whaley against Republic Productions, Inc. based upon injuries caused by negligence of said Republic. That company was protected by two liability insurance policies covering the Whaley accident. One was issued by Seaboard Surety Company, appellant herein, and the other by American Automobile Insurance Company, respondent.¹ The trial court held that each insurance company must bear and discharge half of

the obligation and rendered judgment accordingly.

In the latter part of 1951 Joseph Kaufman Productions, Inc., being about to produce a motion picture entitled "Sudden Fear" rented studio facilities belonging to Republic under a written agreement. The scope of the rental is described in paragraph 2 of the instrument: "We agree to furnish you such of our studio facilities, services and equipment as may be available and reasonably required for the production of said photoplay, including reasonable stage and office space, physical facilities and equipment, sound recording equipment, all crews and production personnel (excluding producers, writers, actors, actresses, composers, directors and similar professional employees), and the reasonable use of all studio departments including the right to consult with heads of departments, and you agree to use said facilities, personnel and equipment (the foregoing being hereinafter referred to as 'studio facilities') for the production of said photoplay." The present controversy grows out of paragraphs 10 and 11 of that agreement and their application to liability insurance policies which were in force at the time of the accident.

Republic was covered by a Seaboard policy. Kaufman had an American policy which named it as assured and also named Republic as an additional insured; Republic was added to an existing policy at the instance of Kaufman and pursuant to the terms, or supposed terms, of paragraph 11 of the agreement. Kaufman had in its employment as an extra said Whaley who was injured on February 28, 1952, while in the performance of her duties as an employee of Kaufman. She received workmen's compensation from Kaufman's compensation carrier, Associated Indemnity Corporation (hereinafter designated as Associated), and then sued Republic as a third party tortfeasor, obtaining a judg-

1. These corporations will be designated in abbreviated fashion as follows: Republic, Seaboard, American; and Joseph

Kaufman Productions, Inc., will be referred to as Kaufman.

ment for \$4,443.70, upon which Associated fastened a lien for compensation payments made by it exceeding the amount of the judgment. The action was defendant by both American and Seaboard under an agreement that same should be done without prejudice to their respective rights and obligations. After judgment was rendered American paid half of same to Associated and called upon Seaboard to discharge the other half. It having declined to do so, this action was brought for declaratory relief. The court held the two insurers equally liable to pay the judgment and obligated to prorate the loss equally between them, and judgment was awarded in favor of cross-defendant Associated against Seaboard for the sum of \$2,221.85, representing half of the Whaley judgment. Seaboard appeals.

Appellant contends that it is not liable for any portion of the judgment because Kaufman had agreed to indemnify Republic against such a loss as the one in question and to that end had caused American to add Republic to its existing liability policy as an additional insured. Inferentially the argument is that Republic thereby acquired a right to collect from Kaufman anything it might pay upon the judgment, hence its insurer after discharging the debt would have a right of subrogation against Kaufman and its insurer, American, and therefore American must bear and discharge the entire obligation.

If it be assumed that Republic had indemnity against the Whaley judgment (a matter later discussed), the subrogation doctrine of *Continental Cas. Co. v. Phoenix Const. Co.*, 46 Cal.2d 423, 429, 296 P.2d 801, would become applicable. That decision rejected the view, expressed in certain decisions of district courts of appeal, that there is no primary and secondary liability in the law of torts in California and held that, as between master and servant and their respective insurers, the master has a right of indemnification against the servant who has negligently caused an injury for which the master has had to pay and that principles of subrogation afford this same right to the master's insurer against that

of the servant. The court said, 46 Cal.2d at page 428, 296 P.2d at page 804: "Where a judgment has been rendered against an employer for damages occasioned by the unauthorized negligent act of his employee, the employer may recoup his loss in an action against the negligent employee [citations]; that is, as between employer and employee in such a situation, the obligation of the employee is primary and that of the employer secondary. Respondents cite *Consolidated Shippers, Inc., v. Pacific Emp. Ins. Co.*, 1941, 45 Cal.App.2d 288, 293, 114 P.2d 34; *Air Transport Mfg. Co. v. Employers' Liab. Assur. Corp.*, 1949, 91 Cal. App.2d 129, 132, 204 P.2d 647; *Employers Liab. Assur. Corp. of London, Eng. v. Pacific Emp. Ins. Co.*, 1951, 102 Cal.App.2d 188, 192, 227 P.2d 53; and *Traders & General Ins. Co. v. Pacific Emp. Ins. Co.*, 1955, 130 Cal.App.2d 158, 165-166, 278 P.2d 493, as supporting a contrary view; such cases are broadly distinguishable on their facts but it would unduly extend this opinion and serve no useful purpose to individually discuss and differentiate them as any implications therein contrary to the long established rule above stated must be deemed disapproved."

[1] The rationale of the ruling is plain. The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other. See *Offer v. Superior Court*, 194 Cal. 114, 118, 228 P. 11; *Fireman's Fund Ins. Co. v. Palatine Ins. Co.*, 150 Cal. 252, 256, 88 P. 907. Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden. As these principles do not stem from agreement between the insurers their application is not controlled by the language of their contracts with the respective policy holders. The Minnesota Supreme Court, dealing with policies covering two insured persons whose liability for an accident was primary and secondary between themselves, said in *Commercial Casualty Ins. Co. v. Hartford Accident & Indemnity Co.*, 190 Minn. 528, 252 N.W. 434, 435, 253 N.W.

888: "The two contracts of insurance and their interpretation must be the factual basis of decision. But there was no contract and so no contractual relation between the insurers. Neither was beneficiary of the other's contract. Neither having any contract right against the other, but both being under contractual obligations in respect to the same risk, it remains only to determine the respective equities. If they are concurrently liable for the same risk, it is but obvious equity that there should be contribution. Equally plain it is that, if the one paying the whole loss is primarily liable, and the other obligated only secondarily and not otherwise, there should be no contribution. In such case, the position of the defendant is the stronger, and there can be no recovery." The principle of equitable subrogation overrides the terms of the insurance policies.

[2] If Republic had a right to indemnification from Kaufman the Continental case, *supra*, would be controlling. The fact that that right arose from agreement rather than tort would be immaterial. One who has a superior equity growing out of contract may enforce it by way of subrogation although that contract was made with a third party. *F. H. Vahlsing, Inc., v. Hartford Fire Ins. Co.*, Tex.Civ.App., 108 S.W.2d 947, 950; *Standard Acc. Ins. Co. v. Pellicchia*, 15 N.J. 162, 104 A.2d 288, 296-297; *Consolidated Freightways v. Moore*, 38 Wash.2d 427, 229 P.2d 882, 885; 6 *Appleman on Insurance Law and Practice*, § 4051, p. 521; 46 C.P.S. Insurance § 1209, pp. 154-155.

Respondent argues that this rule is inapposite because of the specific terms of the indemnity agreement. In effect counsel contend that Republic (whose negligence gave rise to the Whaley judgment) was not indemnified against its own negligence.

Paragraph 10 of the agreement provides that all equipment, services and facilities furnished to Kaufman by Republic shall be accepted and used by the former at its own risk. Then follows this: "10. * * * You [Kaufman] further agree to and shall indemnify us [Republic] against and shall

save us harmless from all loss, cost (including attorney's fees), damage, expense and/or liability suffered or sustained by or imposed upon us by reason of injury, damage to or death of any of our respective employees or of any other person or by reason of damage to or loss or destruction of any property of any third party resulting from your acts or the acts of your agents or employees or arising out of and in connection with the use by you of our premises and/or studio facilities. 11. You agree to carry normal cast insurance. You also agree to carry Workmen's Compensation, comprehensive public liability and property damage insurance with a company or companies and in an amount or amounts satisfactory to us, written in such manner as to protect both you and us against all liability, expense, loss or damage resulting from injury to, or death of, any person or loss, damage, or destruction of any property caused by any act or omission of any of your agents or employees. At our request, you agree to submit evidence of such insurance to us from time to time. We represent that we maintain like public liability and property damage insurance covering any acts or omissions of our employees and we agree to maintain such insurance in force during the time you use our studio facilities hereunder."

[3,4] It is firmly established in this state that language designed to protect one against his own negligence must be clearly and explicitly to that effect in order to accomplish the desired end. "We epitomize what is there stated, so far as it is here germane and without reference to the authorities cited therein [*Basin Oil Co. of California v. Baash-Ross Tool Co.*], 125 Cal.App.2d [578] at pages 594-597, 271 P. 2d 122: Except where discountenanced by public policy or some statutory inhibition, a party may contract to absolve himself from liability for negligence; the law, however, looks with disfavor on such attempts to avoid liability or secure exemption from one's personal negligence, and construes such provisions strictly against the person relying on them, especially when

he is the author of the document; to be sufficient as an exculpatory provision against one's own negligence, the party seeking to rely thereon must select words or terms clearly and explicitly expressing that this was the intent of the parties; and that seemingly broad language will not be isolated from its context and will be read with due regard to the maxim of strict construction." *Sproul v. Cuddy*, 131 Cal.App. 2d 85, 95, 280 P.2d 158, 164. To the same effect, see *Basin Oil Co. v. Baash-Ross Tool Co.*, 125 Cal.App.2d 578, 594-595, 271 P.2d 122; *Pacific Ind. Co. v. California, Electric Works, Ltd.*, 29 Cal.App.2d 260, 274, 84 P.2d 313; *City of Oakland v. Oakland Unified School Dist.*, 141 Cal.App.2d 733, 736, 297 P.2d 752; *Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp.*, D.C.N.D.Cal., 126 F.Supp. 406, 408; *Standard Ins. Co. of N. Y. v. Ashland Oil & Refining Co.*, 10 Cir., 186 F.2d 44, 46; 26 Cal.Jur.2d § 14, p. 345; 42 C.J.S. Indemnity § 12, p. 581.

The language under discussion does not measure up to this standard. The first quoted sentence relates only to acts or omissions of Kaufman or its servants. This is also true of the second sentence of paragraph 11. The last quoted sentence is the one stressed by respondent. It is an agreement to maintain liability insurance "covering any acts or omissions of our employees",—Republic's own servants. If Republic was to be indemnified against its own wrongdoing there would have been no occasion for this provision or for any agreement to carry this type of insurance. The quoted language is at most "provocative of some doubt" (to borrow the phrasing of *Pacific Ind. Co. v. California Electric Works, Ltd.*, supra, 29 Cal.App.2d 260, at page 274, 84 P.2d 313, at page 320), and hence insufficient to constitute an indemnification against Republic's own negligence. See *Beale v. Joseph Magnin Co.*,

Inc., 139 Cal.App.2d 742, 744, 294 P.2d 43. The question of subrogation thus disappears from the case. Cf. *Builders & Manufacturers Mut. Cas. Co. v. Preferred Auto Ins. Co.*, 6 Cir., 118 F.2d 118, 121-122. And the problem becomes one of adjusting the insurers' equities in the light of the "other insurance" provisions of their respective policies.

[5] That of American provides for pro-rata except in circumstances not here pertinent, as follows: "If the insured has other insurance against a loss covered by this policy, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; * * *" The Seaboard policy contains an excess clause as follows: "In the event that there shall be in effect any other good, valid and collectible insurance insuring to the benefit of the insured, or any additional insured hereunder with respect to loss or claim covered hereby, then this insurance shall be excess insurance only, over and above the amount of any such other good, valid and collectible insurance." The limits of the two policies are the same and substantially in excess of the amount of the Whaley judgment.

This case lends itself to solution upon the basis of these policy provisions independently of the equities which in proper cases, as in subrogation instances, override the exact terms of the policies in the interests of substantial justice. The American provision renders it liable for its pro-rata portion of the loss, in this case one-half, and the insured after paying can collect that much and no more from that insurer. It was so held in *Fidelity & Cas. Co. of New York v. Fireman's F. I. Co.*, 38 Cal.App.2d 1, 5, 100 P.2d 364.* Hence the

2. The holding does not rest upon the fact that both policies there involved had pro-rata "other insurance" provisions, but upon the express agreement between insurer and insured that the former

would pay a specific portion of the loss and no more in the event of the existence of other insurance. "Each of the contracts of insurance is entirely separate and independent of all the others. Each

policy is to that extent "good, valid and collectible" other insurance within the purview of the Seaboard policy, which in that event protects the insured with excess insurance "over and above the amount of any such other good, valid and collectible insurance",—namely, to the extent of one-half of the total loss. This same result was reached, through imposing overriding equitable principles, upon consideration of conflicting prorata and excess clauses in *Air Transport Mfg. Co. v. Employers' Liab. Assur. Corp.*, 91 Cal.App.2d 129, 204 P.2d 647; *Peerless Cas. Co. v. Continental Cas. Co.*, 144 Cal.App.2d 617, 619–623, 301 P.2d 602; and *Canadian Indem. Co. v. Ohio Farmers Indem. Co.*, D.C.N.D.Cal., 140 F. Supp. 437, 439.

These considerations leave Seaboard liable for one-half of the Whaley judgment and the trial court so ruled. However, the findings contain certain erroneous conclusions which should be stricken in aid of affirmance. In paragraph V it is said: "[T]hat Seaboard's liability policy in behalf of Republic was intended to and did cover only Republic's liability on matters pertaining to its own activities as distinguished from any activities it had in, under, or by reason of Kaufman's employee Frances L. Whaley"; said sentence is stricken from the findings. Finding IX is modified by adding to the first subparagraph thereof the words "unless caused by negligence of said Republic or its agents or servants"; also by adding to the second subparagraph thereof the words "unless caused by negligence of Republic or its agents or servants."

[6] If it be said that the views herein expressed depart from the theory upon which the case was tried the answer is that the rule confining the parties upon appeal to the theory pursued below does not apply to a question which is one of law only (*Panopulos v. Maderis*, 47 Cal.2d 337,

341, 303 P.2d 738), and that an appellate court is never bound by concessions of counsel as to the applicable law (*Desny v. Wilder*, 46 Cal.2d 715, 729, 299 P.2d 257) or by the interpretation of documents made by the trial court upon the basis of the terms of the written instrument without the aid of other evidence (*In re Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825; *Continental Cas. Co. v. Phoenix Constr. Co.*, supra, 46 Cal.2d 423, 429–430, 296 P.2d 801). There was no evidence at bar except the written indemnity agreement; other matters were covered by admissions of the pleadings or the briefs.

Judgment affirmed.

FOX, Acting P. J., concurs.



The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Hugh Edward BENFORD, etc., Defendant
and Appellant.*
Cr. 6044.

District Court of Appeal, Second District,
Division 3, California.

Nov. 20, 1957.

Hearing Ordered Jan. 15, 1958.

Defendant was convicted in the Superior Court of San Luis Obispo County, Ray B. Lyon, J., of forgery, and he appealed. The District Court of Appeal, Shinn, P. J., held that to have same charged against state, but is would be a manifest abuse of authority to appoint counsel on appeal and create a charge against state for counsel's compensation, since it appeared from in-

insurer is liable directly to the insured for its proportion of the loss, and the insured can recover from any insurer only such proportion of the loss as it is

liable for under the terms of its policy." *Fireman's Fund Ins. Co. v. Palatine Ins. Co.*, 150 Cal. 252, 256, 88 P. 907, 908.

spection of record that no semblance of meritorious ground for appeal existed.

Affirmed.

1. Criminal Law ☞1077

District court of appeal has authority to appoint counsel on appeal and duty to fix reasonable compensation for appointed counsel and to have same charged against state; but it would be a manifest abuse of that authority to make an appointment and create a charge against state where it appeared from court's inspection of record that no semblance of meritorious ground for appeal existed. West's Ann.Pen.Code, § 1241.

2. Criminal Law ☞1077

Appointment of counsel for indigent litigants on appeal lies within discretion of court, to be exercised to end that no man shall be allowed to suffer from a conviction achieved in disregard of his right to a fair trial according to law of land and law of jurisdiction to which he is subject. West's Ann.Pen.Code, § 1241.

3. Criminal Law ☞1071

Defendant's unsworn statement that he had pleaded guilty upon assurance of public defender that he would receive a county jail sentence did not show meritorious ground for appeal, or for any other relief from judgment entered on guilty plea, where defendant did not assert that he had defense to charge, that he was not guilty of offense charged, or that he had not suffered former convictions as alleged. West's Ann.Pen.Code, § 1241.

Hugh Edward Benford, in pro. per.

Edmund G. Brown, Atty. Gen., H. C. Grundell, Dist. Atty., San Luis Obispo, for respondent.

SHINN, Presiding Justice.

By information filed by the District Attorney of San Luis Obispo County, Hugh Edward Benford was charged with the crime of forgery, consisting of forging and passing a check for \$57, purporting to bear

the signature of George Finucane. It was alleged that the accused had been previously convicted of two offenses of forgery and had served terms in a federal prison therefor. The court appointed the Public Defender as counsel for defendant. When called upon to plead, Benford pleaded guilty and duly admitted having been previously convicted and imprisoned as alleged in the information. Probation was denied and sentence of imprisonment imposed. The court found that the defendant was not an habitual criminal. Benford gave notice of appeal.

Under date of July 31, 1957, defendant addressed a letter to this court requesting the appointment of an attorney upon the appeal. Pursuant to our usual practice of referring such matters to the Los Angeles Bar Association on Criminal Appeals or a like committee of the Criminal Courts Bar Association, we referred the present appeal to the Los Angeles Bar Association Committee. A report has been received from a member of that committee stating that the record shows no meritorious ground for an appeal. The request for appointment of counsel for Benford on the appeal was denied.

[1] The present appeal is one of many in which this court has had the assistance of the bar association committee for the past eight years. The associations and the many members of those committees have been conscious of the duty imposed upon members of the profession by ancient tradition and by the provisions of Section 6068 of the Business and Professions Code to render assistance to the defenseless and oppressed. Although this court has the authority to appoint counsel on appeal and the duty to fix reasonable compensation for appointed counsel which is a charge against the state (Pen.Code § 1241), it would be a manifest misuse of that authority to make an appointment and create a charge against the state where it appears from our inspection of the record that no semblance of a meritorious ground for appeal exists.

Thomas F. FRAZIER, Plaintiff and
Respondent,

v.

UNION PACIFIC RAILROAD CO., a cor-
poration, et al., Defendants and
Appellants.

Civ. 22383.

District Court of Appeal, Second District,
Division 1, California.

Nov. 21, 1957.

[2] The legislature has not made representation by counsel on appeal in a criminal case a matter of right. Appointment of counsel for indigent litigants on appeal lies within the discretion of the court, to be exercised to the end that no man shall be allowed to suffer from a conviction achieved in disregard of his right to a fair trial according to the law of the land and the law of the jurisdiction to which he is subject. We would not be justified in ordering compensation to be paid by the state, nor do we believe that any of the many lawyers who have rendered assistance gratuitously would expect compensation for the examination of a record which shows, upon its face or upon casual inspection, no possible reason for interfering with the judgment of the trial court. This is such a case.

It is the settled practice of this court, where an appellant is not represented by counsel to make an independent examination of the record, and to dispose of the appeal on its merits; appeals in such cases are not dismissed for failure to file an appellant's brief.

[3] In his communication to this court Benford represents that he pleaded guilty upon the assurance of the Public Defender that he would receive a county jail sentence. He does not assert that he had a defense to the charge, that he was not guilty of the offense charged, or that he had not suffered the former convictions as alleged. His unsworn statement as to the reason for his plea of guilty does not carry conviction, nor does it amount to a meritorious ground for appeal, or for any other relief from the judgment entered thereon. *People v. Miller*, 114 Cal. 10, 16, 45 P. 986; *In re Hough*, 24 Cal.2d 522, 531, 150 P.2d 448; *People v. Gottlieb*, 25 Cal.App.2d 411, 415, 77 P.2d 489.

The judgment is affirmed.

VALLÉE, J., Concur.

PARKER WOOD, Justice.

I concur in the judgment and the denial of application for appointment of counsel.

Action by truck driver against railroad for personal injuries sustained as a result of a collision between truck and trailer combination and train. The Superior Court of Los Angeles County, Charles T. Smith, J., entered judgment for truck driver and railroad appealed. The District Court of Appeal, Doran, J., held that mere fact that judge stated that he was surprised at amount of verdict did not mean trial court considered verdict excessive and did not require trial judge to order remission of alleged excess.

Judgment affirmed.

1. Appeal and Error ⇨706(2)

Where record indicated that judge carefully reviewed evidence before denying new trial although trial judge stated he was surprised by amount of verdict in personal injury action, supposition that trial court considered verdict excessive was not supported by record.

2. Railroads ⇨350(16)

In action by truck driver against railroad for personal injuries sustained as a result of collision between truck and trailer combination and train, questions whether truck driver was guilty of contributory negligence in that he did not hear train bell, and did not listen for whistle, were for jury.

3. Appeal and Error ⇨1067

In action by truck driver against railroad for personal injuries sustained as result of collision between truck and trailer combination and train, failure of trial court to instruct on part of Public Utilities Code

which was applicable to a switching operation when it had instructed on another part of Public Utilities Code did not constitute reversible error where no switching operations were being carried out at time in question. West's Ann.Public Utilities Code, § 7604.

4. Trial ⇨194(20)

In action by truck driver against railroad for personal injuries sustained as result of collision between truck and trailer combination and train, instruction to effect that whether or not truck driver was entitled to sum for future detriment would depend on whether or not such future detriment was reasonably certain did not specifically tell jury to include future medical expenses and did not invade jury's province.

5. Railroads ⇨348(1)

In action by truck driver against railroad for personal injuries sustained as result of collision between truck and trailer combination and train, evidence supported finding relating to railroad's negligence and railroad's assertion that there was a flagrant miscarriage of justice was untenable.

E. E. Bennett, Edward C. Renwick, Malcolm Davis, Jack W. Crumley, Los Angeles, for appellants.

Maury, Larsen & Hunt, George R. Maury, Los Angeles, for respondent.

DORAN, Justice.

Plaintiff, a truck driver for the American Pipe and Construction Company, recovered a verdict and judgment against the appellant railroad, in the amount of \$60,000, for personal injuries sustained in a collision between truck and train. The accident occurred at the grade crossing of Artesia Boulevard in Long Beach, about 11:00 a. m. on September 2, 1954. At that time respondent was driving a Sterling Truck Tractor and trailer, loaded with a piece of concrete pipe 16 feet long and 9 feet in diameter. The truck equipment and load weighed some 45 tons, and the overall length was about 60 feet; defendant's train con-

sisted of an engine pulling 19 cars and a caboose. The view of both truck driver and train crew at the crossing was obstructed by buildings of the Mastic Tile Company.

On the day of the Collision the crossing was guarded by a so-called "advance warning" sign about 325-350 feet west of the crossing, and by two "flasher signals", a horizontal sign stating "Stop on Red Signal", and a St. Andrews cross stating "Railroad Crossing". When a train entered the circuit for the signals, the lights would flash alternately. The operation of these signals, and the sounding of any train bell, whistle or horn, were subjects of considerable conflict. Respondent truck driver saw no signals flashing when approaching and slowing down for the crossing, and although familiar with this crossing, had never seen either of the flasher signals working. The respondent heard no bell, whistle or horn.

Upon reaching a point about 60 feet west of the track, respondent first observed the approaching train, immediately applied the brakes, and turned left in an attempt to avoid the collision. The truck slowed down quickly but the oncoming train twice hit the cab in which plaintiff was driving. The train and the truck-trailer combination collided with such force as to derail the locomotive and several box cars; the tractor part of the truck-trailer ended up under the locomotive in a ditch. Plaintiff was thrown clear but sustained serious and permanent injuries.

On the question of extent of the injury, respondent produced two orthopedic surgeons, namely, Dr. Durnin, who had treated respondent from the day of the accident to February 23, 1955; and Dr. Billig who took over the case in January, 1955. Dr. Billig had respondent return 65 times for treatment, and at the time of trial this treatment was still continuing.

Mr. Frazier sustained injuries to head, jaw, chest, shoulders, spine, pelvis, forearm, fractured ribs, and fractures involving the pelvic bone and left hip socket. The conclusion was that the injuries are permanent, that the back and hip joint are deformed,

and that the injuries would necessitate a change to a sedentary occupation. There was evidence that respondent's earnings approximated \$7,000 per year before injury, but that since the injury respondent had not been able to earn more than about \$300 per month, and that only sporadically. Mr. Frazier's life expectancy was 32½ years.

As hereinbefore indicated, a jury returned a verdict in favor of the respondent in the sum of \$60,000; defendant moved for a new trial, asking "the trial court to use its independent judgment as a thirteenth juror with particular emphasis on the contributory negligence of the plaintiff, which defendant feels it proved so convincingly, and on the question of the amount of the damages".

It is appellant's contention that "The trial court abused its discretion in denying appellant's motion for new trial", in its ruling on sufficiency of evidence in respect to liability and damages; that plaintiff "was guilty of contributory negligence as a matter of law"; that "The trial court committed prejudicial error in its instructions to the jury", and that "there has been a flagrant miscarriage of justice in this case".

[1] In part, appellant's argument is based upon an assumption that the trial court did consider the verdict excessive, and that, as respondent's brief states, "if the trial judge had had a different concept of the law, he would have ordered remission of an excess". Neither of these suppositions is borne out by the record.

At the hearing of appellant's motion for a new trial the trial judge said: "You have uncontradicted evidence as to the element of special damages, and insofar as the amount of the verdict is concerned I must confess that I was surprised; I was not shocked. * * * I feel that there is substantial evidence of negligence on the part of the Union Pacific employees, and I figured out in my chambers that if you considered that he has, according to what his own testimony has been, been capable of earning \$300 a month; that is \$3,600—roughly half of what he previously earned—and if you take

his loss of earnings and extend them over a 32-year period that is a substantial chunk of money in itself, not considering the personal injuries which he unquestionably has and not considering the pain and suffering which it seems he will undergo indefinitely because of the injury to his spine and to his pelvic region".

There is nothing to indicate that the trial court was in any manner shocked by the verdict, nor that it was disapproved. That the judge may have been "surprised" at the verdict has no bearing on the matter. Moreover, the record indicates that before arriving at the decision to deny a new trial, the judge carefully reviewed the evidence: "I read over my notes very carefully concerning the testimony at the trial". In so ruling, the judge undoubtedly had in mind the rule expressed in 20 Cal.Jur. 101, that "A new trial may not be granted merely because the verdict seems large, or because it is larger than the court, if sitting as a jury, would have given, but only where it appears that it was 'given under the influence of passion or prejudice'."

[2] Appellant's claim that plaintiff was guilty of contributory negligence as a matter of law, cannot be sustained. In *Loftus v. Pacific Electric Ry. Co.*, 166 Cal. 464, 467, 137 P. 34, quoted in *Lloyd v. Southern Pacific Co.*, 111 Cal.App.2d 626, 633, 245 P.2d 583, 588, the applicable rule is expressed as follows: "'Ordinarily, of course, the question whether a plaintiff has been guilty of contributory negligence is one of fact for the jury. It becomes a question of law for the decision of the court only where the facts are undisputed, and, even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence. * * * 'It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury. * * *'" *Seller v. Market-Street Ry. Co.*, 139 Cal. 268, 271, 72 P. 1006.'"

As hereinbefore indicated, the present record discloses a conflict of evidence on the question whether the crossing signal lights were operating, and the sounding of any warning of the approaching train. There was evidence that respondent was properly operating the truck, applied the brakes immediately upon observing the train, and attempted to avoid the collision by turning the truck. Appellant's contention that "the evidence established that the plaintiff did not hear what he should have heard, and apparently did not even listen for the whistle", is not persuasive. Such matters were for the jury to decide after considering the evidence; this, indeed is the very function of a jury. Certainly the trial court's action in refusing to interfere with the verdict rendered cannot be deemed an abuse of discretion.

[3] No reversible error appears in respect to the court's instructions to the jury, when considered as an entirety and in respect to the evidence presented. Appellant claims that "It was error to instruct on part of Public Utilities Code, Section 7604, and to omit an applicable part". The part stricken out of the requested instruction related to a locomotive engaged in switching operations. No switching operations were being carried on at the time in question, and that portion of the instruction dealing with switching was not germane to the facts as developed in the course of the trial. Although the train crew may have expected that the nearby Mastic Tile Company would require switching operations, such was not the case.

[4] Appellant's complaint that in the instructions, "the jury was specifically told to include future medical expenses in their award", and that the judge thereby invaded the jury's province, is not borne out by the record. As pointed out in respondent's brief, the instruction carefully postulates, "If, under the court's instructions, you should find that plaintiff is entitled to a verdict, you shall determine each of the items of claimed detriment which I am about to mention, provided that you find it to have

been suffered by him", etc. The jury was also told that "whether or not you may award him any sum for future detriment will depend on whether or not you find from the evidence that such detriment is reasonably certain to be suffered".

[5] The record indicates that the defendant was accorded a full and fair trial of all pertinent issues, that the verdict finds ample support in the evidence, and that the instructions were adequate. The assertion that there has been a flagrant miscarriage of justice is found untenable.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



155 Cal.App.2d 201

Charles Byron OSBORNE, Harold G. Osborne, Arminta M. Osborne, Chris Thwalts and Rex Thwalts, Plaintiffs and Appellants,

v.

The SECURITY INSURANCE COMPANY, a corporation, the Connecticut Indemnity Company, a corporation, Defendants and Respondents,

Farmers Insurance Exchange, an Interinsurance exchange, Defendant, Respondent and Appellant.

Civ. 22384.

District Court of Appeal, Second District,
Division 2, California.

Nov. 13, 1957.

Rehearing Denied Dec. 9, 1957.

Hearing Denied Jan. 6, 1958.

Action for declaratory judgment determining respective duties of three automobile liability insurers with respect to personal injury action growing out of collision between two automobiles. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment adverse to insureds and one of the insurers and they appealed. The District Court of

Appeal, Ashburn, J., held, *inter alia*, that where mother gave an automobile to her minor son, but obligated herself to pay full balance of purchase price, and signed son's application for a driver's license, rendering herself liable for damages for injuries caused by his negligence arising out of driving of the vehicle, mother had an insurable interest against such hazards notwithstanding her lack of ownership, and therefore, liability policy issued to mother as named insured covering son's automobile was not void for lack of insurable interest.

Judgment reversed with instructions.

1. Declaratory Judgment ⇨385

It is the duty of a court hearing an action for declaratory relief to make a complete determination of the controversy.

2. Insurance ⇨114, 115(1)

Rule that purchaser of policy must have an insurable interest in subject matter at time of procuring policy pervades entire field of insurance law, including automobile liability protection; the object of such rule being avoidance of wagering contracts, and therefore, any kind of interest in risk attendant upon existence or use of insured property is enough to negate a wager and support the policy.

3. Insurance ⇨115(1)

In all cases other than life insurance, question of insurable interest presents matter of protection against possibilities, contingencies and hazards, rather than inevitable events.

4. Insurance ⇨115(2)

Where mother gave an automobile to her minor son, but obligated herself to pay full balance of purchase price, and signed son's application for a driver's license rendering herself liable for damages for injuries caused by his negligence arising out of driving of the vehicle, mother had an insurable interest against such hazards notwithstanding her lack of ownership, and therefore, liability policy issued to mother as named insured covering son's automobile, was not void for lack of insurable in-

terest. West's Ann. Insurance Code, §§ 250, 281.

5. Insurance ⇨514½, 616½

Obligation to defend named insured, under a liability policy, against a personal injury action, is measured by terms of policy applied to allegation of complaint whether they be true or false, and an insurer who has undertaken such defense is bound by the judgment, and if the defense proves unsuccessful the insurer must pay such judgment.

6. Declaratory Judgment ⇨385

In an action for declaratory judgment determining duties of a liability insurer with respect to a personal injury action against insured, insured was entitled to a declaration of his right to protection against any judgment which might be rendered against him if the defense undertaken by the insurer proved unsuccessful.

7. Insurance ⇨146(3)

Language of an insurance policy is presumed to be that of insurer and when ambiguous it is to be construed in such manner to provide full coverage of indicated risk rather than to narrow the protection.

8. Insurance ⇨146(3)

If an insurer would create an exception to general import of principal coverage clauses, burden rests upon it to phrase that exception in clear and unmistakable language, and if this is not done, any ambiguity or uncertainty is resolved in favor of the insured, and courts will not sanction a construction of insurer's language that will defeat every purpose or object of insurance.

9. Insurance ⇨146(3)

An exception to coverage in policy must be couched in terms which are clear to the ordinary mind, or any doubts as to meaning will be resolved against insurer.

10. Insurance ⇨435.9

Where mother of minor son who owned automobile covered by liability policy naming mother as named insured gave permission to a friend of her son to drive automobile while son was riding along as

a passenger, such permission was enough to satisfy terms of the policy and extend coverage to son under policy definition of insured as including any person "using" automobile with the permission of named insured, and precluded any inquiry as to whether she had a right to control the automobile.

11. Insurance ◊152(3)

Provisions of financial responsibility law prescribing terms of motor vehicle liability policies become implied covenants of all such insurance. West's Ann.Vehicle Code, §§ 410-423.1, 415 and subd. (a) (2).

12. Insurance ◊435.9, 514½

Where named insured in an automobile liability policy gave express permission to a minor to drive automobile owned by named insured's minor son, under policy provision defining insured as any person using automobile with named insured's permission, such driver was covered by the policy, and in view of fact driver's parents signed his application for a driver's license and were thus liable for his negligence, subject to statutory limits, they fell within policy phrase holding insurer liable for any person legally responsible for use of insured automobile due to driver's use of it, and were entitled to a defense and to protection against any adverse judgment up to maximum limit of the statute. West's Ann. Vehicle Code, § 352.

13. Insurance ◊435.2

Where automobile liability policy in extending coverage to use of other automobiles limited definition of word insured, as to such other automobiles, to include named insured and his spouse and any other person or organization legally responsible for the use by such named insured or spouse, such insurance did not cover son of insured while driving an automobile other than one described in the policy. West's Ann.Vehicle Code, § 352 and subd. (d).

Early, Maslach, Foran & Williams, and Harry Boyd, Los Angeles, for appellant Farmers Ins. Exchange.

Eugene S. Ives, Los Angeles, for respondents.

ASHBURN, Justice.

Action for declaratory relief determining the respective duties of three insurance companies with respect to a personal injury action growing out of a collision between a Buick automobile and a Chevrolet on Mill Creek Road in the mountains of San Bernardino County, on August 9, 1952. The plaintiffs and one of the insurers appeal from the judgment.

The Buick was occupied at the time of the accident by five persons named Smith. The Chevrolet was owned by Rex Thwaits and driven by Charles Byron Osborne, both of whom were minors. All of the Smiths sued for damages for personal injuries. They joined as defendants Rex Thwaits and his mother, Chris Thwaits, Charles Byron Osborne and his parents, Harold G. Osborne and Armita M. Osborne. The Thwaits had or thought they had liability coverage under a combination automobile liability policy No. CA 713138 issued jointly by the Security Insurance Company and the Connecticut Indemnity Company, in which the named insured was Chris Thwaits, the mother of Rex Thwaits. The Osbornes had two liability policies, Nos. 9162959 and 16082208 issued by appellant Farmers Insurance Exchange to Harold G. Osborne, the father of Charles and husband of Armita. The Thwaits and Osbornes called upon their respective insurers to defend the Smith action. This the Security and Connecticut refused to do, claiming that the Thwaits policy is void and that if valid its terms do not protect Rex Thwaits or the Osbornes. Farmers took the position that any coverage afforded to Harold G. Osborne and Armita M. Osborne by its policies is excess insurance only and does not cover Charles Byron Osborne at all. The trial court made holdings which require

Hagenbaugh & Murphy, Los Angeles, for appellants Osborne and Thwaits.

a reversal and can be best clarified when considered separately.

Security-Connecticut Policy.

First as to the claims of the Thwaits under the Security-Connecticut policy. The Chevrolet was owned by Rex Thwaits, aged 17, for whom his mother bought it as a present when he graduated from high school; it was registered in his name as owner; it was a new car; his mother traded a 1949 used Ford on account of the purchase price and executed an agreement to pay to General Motors Acceptance Corporation the balance of the purchase price; Rex also signed this document. The insurance policy was already in existence, covering the Ford and designating Chris Thwaits, the mother, as named insured. On the day of its purchase, June 11, 1952, the coverage was transferred to the Chevrolet but the policy remained in the name of Chris Thwaits and Rex was not specifically mentioned therein as additional insured or otherwise. The insurance companies, Security and Connecticut, contended that the policy was thenceforth void because Chris Thwaits was not the owner of the Chevrolet and had no insurable interest in it.

Insurable Interest of Chris Thwaits.

The trial court did not pass upon this question but declared that the policy did not cover any liability of Rex Thwaits and that there was no duty upon the insurance companies to defend him; that they had a duty to defend Chris Thwaits because it was alleged in the Smith personal injury complaint that she was the owner of the car and that it was being driven by her agent, the truth or falsity of these allegations being immaterial. Appellants claim that the court's silence as to the issue of insurable interest was a failure to find upon a material issue and prejudicial error. We are constrained to agree.

[1] It is the duty of the court hearing an action for declaratory relief to make a complete determination of the controversy. *American Enterprise, Inc., v. Van Winkle*,

39 Cal.2d 210, 219, 246 P.2d 935. As to the prejudicial nature of failure to find upon a material issue in any case, see *Parker v. Shell Oil Co.*, 29 Cal.2d 503, 512, 175 P.2d 838; *De Burgh v. De Burgh*, 39 Cal.2d 858, 873, 250 P.2d 598. The grievous nature of this error will become apparent as the discussion proceeds.

[2] The rule that the purchaser of an insurance policy must have an insurable interest in the subject matter at the time of procuring the insurance pervades the entire field of insurance law, not excepting that of automobile liability protection. 44 C.J.S. Insurance § 175, p. 869. The object to be obtained by this rule, the reason for its being, is avoidance of wagering contracts. Williston on Contracts (Rev.Ed.), § 1665A, pp. 4705-4706; 4 Appleman on Insurance Law and Practice, § 2121, pp. 18-19; Annotation, 77 A.L.R. 1256. Hence any kind of an interest in the risk attendant upon the existence or use of the insured property is enough to negate a wager and support the policy. 2 Joyce Law of Insurance (2nd Ed.), § 888, p. 1920; Rest., Law of Contracts, § 520, comment e, p. 1008; Annotation, 77 A.L.R. 1257. This principle has been carried into §§ 250 and 281 Insurance Code, which respectively read as follows: "§ 250. *Events subject to insurance.* Except as provided in this article any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code." "§ 281. *Definition.* Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."

[3,4] Mrs. Thwaits, though she had given the car to her son, signed a conditional sale contract and separately obligated herself to pay to General Motors Acceptance Corporation the full balance of the purchase price; the destruction of the vehicle would subject her to substantial loss

in the absence of protecting insurance. Also, she had signed her minor son's application for a driver's license and thus rendered herself liable for damages for injuries to person or property caused by his negligence arising out of driving the vehicle upon a highway (Veh.Code, § 352(a)). Mrs. Thwaits had an undoubted right to insure against this risk, especially as the car was intended primarily for the son's use upon the highway. The argument that it does not appear that he was driving (actually or constructively) or even present at the time of the accident seems to be contrary to the record and in any event is misplaced. In all cases other than life insurance the question of insurable interest presents the matter of protection against possibilities, contingencies and hazards, not inevitable events. Mrs. Thwaits was insuring against these hazards generally, not that of one specific trip. That she had a cognizable insurable interest appears from perusal of the following authorities, all of which proceed upon the basis that ownership is not an exclusive test of insurable interest: *Davis v. California Highway Indem. Exch.*, 118 Cal.App. 403, 405-406, 5 P.2d 447; *American Surety Co. of New York v. Heise*, 136 Cal.App.2d 689, 289 P.2d 103; *Fageol Truck & Coach Co. v. Pacific Indemnity Co.*, 18 Cal.2d 731, 738, 117 P.2d 661; *Pratt v. Hanover Fire Ins. Co.*, 50 R.I. 203, 146 A. 763, 764; 28 Cal.Jur.2d § 508, p. 256; 44 C.J.S. Insurance § 177, p. 873; 5 Am.Jur. § 513, pp. 793, 794; Annotation, 77 A.L.R. 1256. It thus appears that Mrs. Thwaits had an insurable interest in the subject matter of the insurance, the policy is not void and the court should have so determined.

Security-Connecticut Obligation to Protect Chris Thwaits.

[5,6] The court properly held that Security and Connecticut were obligated to defend Mrs. Thwaits because she was charged in the personal injury action with ownership of the Chevrolet and operation of same through her agent. That obligation is measured by the terms of the policy

applied to the allegations of the complaint whether they be true or false. *Ritchie v. Anchor Casualty Co.*, 135 Cal.App.2d 245, 250, 286 P.2d 1000; *Lamb v. Belt Cas. Co.*, 3 Cal.App.2d 624, 630, 40 P.2d 311. An insurer who has undertaken such defense is bound by the judgment (45 C.J.S. Insurance § 933, p. 1055), and if the defense proves unsuccessful the insurer must pay the judgment. This latter phase of Mrs. Thwaits' right to protection was not declared in the judgment but that should have been done.

Security-Connecticut Obligation to Protect Rex Thwaits.

Security and Connecticut were obligated to protect Rex Thwaits. Their refusal to do so stemmed, at least partially, from the faulty view that the policy is void. Reliance is also placed by respondents upon III of the insuring agreements, which says: "With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'Insured' includes the named Insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named Insured or with his permission."

Mrs. Thwaits was named insured; Rex Thwaits and Charles Osborne were using the automobile; Rex was responsible for its use by Osborne; and that use was with the permission of Mrs. Thwaits, the named insured. The trial judge found: "that the words 'using the car' clearly means driving the car; that Rex Thwaits was not driving the car on August 9, 1952 at the time of the accident." Also, "[a]s the Named Insured, Chris Thwaits, was not the owner of the 1952 Chevrolet automobile, she could not give permission for its use." It is immediately apparent that herein some fundamental principles of insurance law were overlooked.

[7-9] They are thus stated in *Continental Cas. Co. v. Phoenix Constr. Co.*, 46 Cal. 2d 423, 437, 296 P.2d 801, 809: "It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy

is to be resolved against the insurer. [Citations.] If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. [Citation.] If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against [citations], the amount of liability [citations] or the person or persons protected [citations], the language will be understood in its most inclusive sense, for the benefit of the insured." The language of the policy is presumed to be that of the insurer and when ambiguous it is to be construed in such manner as to provide full coverage of the indicated risk rather than to narrow the protection. If the insurer would create an exception to the general import of the principal coverage clauses, the burden rests upon it to phrase that exception in clear and unmistakable language. *Pendell v. Westland Life Ins. Co.*, 95 Cal.App.2d 766, 770, 214 P.2d 392. If this is not done any ambiguity or uncertainty is resolved in favor of the policyholder. The courts will not sanction a construction of the insurer's language that will defeat the very purpose or object of the insurance. *Miller v. United Ins. Co.*, 113 Cal. App.2d 493, 497, 248 P.2d 113; *Narver v. California State Life Ins. Co.*, 211 Cal. 176, 180, 294 P. 393, 71 A.L.R. 1374. Indeed an exception must be couched in terms which are "clear to the ordinary mind" (*Pendell v. Westland Life Ins. Co.*, supra, 95 Cal.App.2d at page 770, 214 P.2d at page 395), or any doubts as to meaning will be resolved against the insurer.

[10] That the word "using" is not necessarily synonymous with "driving" plainly appears from the discussion in *Souza v. Corti*, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861, which arose under § 402, Vehicle Code, the permissive use statute. The owner had entrusted his car to his son to be used by him; the son loaned the car to his friend who was driving at the time

of the accident. Section 402 imposes upon the owner liability for negligence of one "using or operating" the car with his permission express or implied. The court drew a clear distinction between using and operating and held that the son was at all times using the car though not in physical possession of it or driving it at the time of the accident. The concurring opinion of Mr. Justice Schauer is to the same effect. In the case at bar it was stipulated at the trial that "at the time of the accident of August 9, 1952, and immediately prior thereto, Charles Byron Osborne, the driver of the 1952 Chevrolet automobile previously referred to, asked permission of Rex Thwaits to drive said Chevrolet automobile at the time of the accident referred to." Rex Thwaits thus became legally responsible for the use of the car by Charles Osborne, for it was with his permission and in his immediate presence; he became liable on two theories, permission and agency. See 7 Cal.Jur.2d § 321, p. 194; *Souza v. Corti*, supra, 22 Cal.2d 454, 461-462, 139 P.2d 645; *Prosser on Torts* (2nd Ed.), p. 368; *Ray v. Hanisch*, 147 Cal.App.2d 742, 748, 306 P.2d 30.

The idea that Mrs. Thwaits, though she was the named insured, could not give permission to use the Chevrolet because she was not the owner also disregards principles governing construction of insurance policies. The language in question plainly refers to actual consent, not some theoretical concept. Mrs. Thwaits had told Charles Osborne, who was an intimate friend of her son and a daily visitor in their home, that he could drive the Chevrolet any time he wished, and had done so a dozen or more times; she was present at the start of the particular trip and gave Osborne permission to drive. This was permission in fact, enough to satisfy the terms of the policy and to preclude any inquiry whether she had a right to control the car.

This is not a question of imputed liability under the consent statute (Veh. Code, § 402), but if it were, the case of *Patchen v. Eichmeyer*, 101 Cal.App.2d 652,

225 P.2d 976, would be persuasive. In that case a minor had purchased a motorcycle which he kept at the home of his parents where he resided; the mother had signed his application for a permit to operate. At page 655 of 101 Cal.App.2d, at page 978 of 225 P.2d the court said: "The matter of the parents' consent to the son's operation of the motorcycle is likewise a question of fact. From evidence that the parents had permitted William to buy and use the vehicle for more than a year and that the motorcycle could have been taken away from the son if the parents objected to its use, coupled with the fact that the mother signed the application to operate a motor vehicle, an inference of consent to its use can hardly be deemed unsupported." In the present instance Rex, aged 17, lived at home and kept the Chevrolet there; his mother had signed his application for a driver's license and undoubtedly had the legal right to control her son's use of the vehicle either through causing his license to be cancelled (Veh.Code, § 353), or exercising general parental control over him (37 Cal.Jur.2d § 10, p. 149), such as forbidding his use of it.

Norris v. Pacific Indemnity Co., 93 Cal.2d 420, 247 P.2d 1, is not opposed to the views just expressed. In that case a permittee, who had been instructed to let no one else drive the car, loaned it to a friend who when driving was involved in an accident. It was held that he was not an additional insured within the terms of a covering insurance policy because he had no permission in fact, express or implied, from the owner. The court distinguished Souza v. Corti, supra, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861, upon the ground that it involved imputed liability under § 402 Vehicle Code, saying at page 424 of 39 Cal.2d, at page 3 of 247 P.2d: "Section 402 is not involved in the present case. The plaintiffs are not concerned with fastening imputed liability on the owner. They are not the beneficiaries of any statutory created liability. The plaintiffs seek to apply the poli-

cy language as a source of financial discharge of Irvin's [driver's] liability to the persons injured through his own negligence." At page 426 of 39 Cal.2d, at page 5 of 247 P.2d: "The matter of the owner's imputed liability is not involved here; and the question of the operator's coverage under the owner's policy was not involved in the Souza case. Since there is neither express nor implied permission for Irvin's use of the automobile, he is not protected by the omnibus clause in the policy of the owner."

Wilcox v. Berry, 32 Cal.2d 189, 191, 195 P.2d 414, does not support respondents' position. That case presented the question of whether a wife was liable under § 402, Vehicle Code, for her husband's negligence in driving an automobile which was owned as community property, this upon the theory that she had consented thereto. It was held that he had full control of community property and she could not give him permission to do what he already had a right to do. That has no pertinence to the interpretation of an insurance policy.

Rex Thwaites was covered by the Security-Connecticut policy and it should have been so adjudged.

Security-Connecticut Obligation to Protect Charles Byron Osborne.

The Osbornes claim that they are also covered by the said Security-Connecticut policy. The court held against this contention and ruled that there was no duty on either of those insurers to defend any of the Osbornes.

[11,12] First, as to Charles, the minor son, who was driving the Chevrolet at the time of the accident. He falls within this phrase of III of the policy (quoted above), "any person while using the automobile * * * with his [named insured's] permission." While the significance of the word "using" is not confined to operating, the latter act undoubtedly is included within the term "using." Again, Charles Osborne is covered because condition (8) of

the policy¹ incorporates by reference the financial responsibility law of this state (Veh.Code, §§ 410-423.1, especially § 415). Since the decision of *Continental Cas. Co. v. Phoenix Constr. Co.*, supra, 46 Cal.2d 423, 434, 296 P.2d 801, it has been established law that the provisions of that statute prescribing the terms of motor vehicle liability policies become implied covenants of all such insurance. One of those requirements is: "Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured." Veh.Code, § 415(a) (2). Clearly, Charles Osborne was using this Chevrolet and was doing so with the express permission of the assured. He is entitled to defense by Security and Connecticut and protection to the extent specified in the statute.

Security-Connecticut Obligation to Protect Senior Osbornes.

The parents, Harold G. Osborne and Armintha M. Osborne, are likewise protected by III of the same policy. The son, Charles, falls within the description "any person while using the automobile" with the permission of the insured. The parents had signed his application for a driver's license which he had at the time of the accident, thus becoming liable for his negligence (Veh.Code, § 352) subject to the statutory \$5,000 and \$10,000 limits. They therefore fall within the policy phrase "any person * * * legally responsible for the use thereof" because Charles was using it and they were obligated under the statute. They are entitled to a defense and to

protection against any adverse judgment up to the maximum limit of the statute. The contrary holding of the trial court was erroneous.

Re Farmers Insurance Exchange Appeal.

[13] The court found that Farmers is not bound to defend or protect Charles Byron Osborne under its policy and no party claims error in that ruling. As to his parents the court ruled that Farmers had a duty to defend them because they signed Charles' application for a driver's license and the Smith complaint alleged that the Chevrolet was being driven by Charles as their agent; "that these allegations are sufficient allegations of a claim for 'damages * * * caused by accident and arising out of * * * use * * * of the automobile', as set forth in coverages A and B of Insuring Agreement I of said policies which is made applicable to 'any other automobile' with respect to the 'Named Insured' and his 'spouse' by Insuring Agreement V relating to 'use of other Automobiles' as these words are used in said policies." It is urged by appellant Farmers that the court erred in failing to declare that its policies furnish only excess coverage for Mr. and Mrs. Osborne and that liability under the Security-Connecticut policy should be exhausted before that of Farmers becomes available. We have held that these two Osbornes are covered by the Security Connecticut policies and hence this argument as to excess insurance of the Farmers policy. Coverages A and B of insuring agreement I, also Condition (16) and insuring agreement V(a) thereof are set forth in the margin.²

1. "8. *Financial Responsibility Laws—Coverages A and B.* Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required

by such law, but in no event in excess of the limits of liability stated in this policy. * * *

2. "*Coverage A—To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.*"

It is essential to determination of the question of excess insurance to ascertain whether Farmers policies do protect the senior Osbornes with respect to this accident. This we must do independently of any concessions of counsel as to the legal effect of the policy (*Desny v. Wilder*, 46 Cal.2d 715, 729, 299 P.2d 257). If the parents are not covered, the question of excess insurance does not arise. Careful scrutiny of the quoted portions of the policy discloses that the insurer studiously refrained from protecting any driver of an automobile other than the named Ford except Harold G. Osborne and his spouse, or to protect them or either of them against liability for driving such "other automobile" by any other person. The statute (Veh. Code, § 352) imposed liability upon them for the son's negligence, unless perchance he was acting as the agent or servant of another person (subd. (d)), but that fact does not enlarge the carefully restricted coverage of the insurance policy. This line of thought is emphasized by the discussion in *Norris v. Pacific Indemnity Co.*, supra, 39 Cal.2d 420, 424, 247 P.2d 1. The question of excess insurance did not properly arise and the failure to determine it did not constitute error.

"Coverage B—To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile."

"(16) Other Insurance—Coverages A, B, C, D, E, F and F-1. If the insured has other insurance against a loss covered by this policy the Exchange shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an in-

No other points require discussion.

The judgment is reversed with instructions to the lower court to amend the findings and conclusions and enter judgment consonant with the views herein expressed.

FOX, Acting P. J., concurs.



155 Cal.App.2d 373

John P. O'SHEA et al., Plaintiffs and Respondents,

v.

TILE LAYERS UNION, LOCAL 19, et al., Defendants and Appellants.

Civ. 17386.

District Court of Appeal, First District,
Division 2, California.

Nov. 21, 1957.

Rehearing Denied Dec. 20, 1957.

Hearing Denied Jan. 15, 1958.

Action under Cartwright Act to enjoin picketing of tile contractors' business places by union members and to enjoin union and defendant tile contractors' association from enforcing agreement between them that no

sured under a policy applicable with respect to said automobiles or otherwise."

"V. Use of other automobiles. If the named insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions: (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance."

tile would be applied in any shower, tub back, or other area, exposed to water unless setting beds were first installed in mortar backing by qualified tile layers. The Superior Court, Alameda County, Charles Wade Snook, J., issued preliminary injunction and defendants appealed. The District Court of Appeal, Draper, J., held that evidence warranted issuance of temporary injunction prohibiting a strike or picketing by union for purposes of securing or enforcing such agreement against plaintiffs, but that plaintiffs were not entitled to temporary injunction barring union and defendant tile contractors' association from enforcing the agreement in effect between them.

Injunction modified, and as modified, affirmed.

1. Monopolies ⇨24(7)

Injunctive relief is available to one injured by a violation of the Cartwright Act. West's Ann.Bus. & Prof.Code, §§ 16700-16758.

2. Commerce ⇨43

Monopolies ⇨24(7)

Under Cartwright Act which prohibits a combination of capital, skill or acts to create or carry out restrictions in trade or commerce, the business of installing tile is itself trade or commerce and tile contractors could bring action to enjoin picketing of their business places by union members and to enjoin union and another tile contractors' association from enforcing agreement allegedly restricting business of installing tile. West's Ann.Bus. & Prof.Code, §§ 16720(a), 16750.

3. Monopolies ⇨12(2)

The Cartwright Act embraces far more than the mere sale of tangible commodities. West's Ann.Bus. & Prof.Code, §§ 16700-16758.

4. Appeal and Error ⇨1010(1)

On appeal from the grant or denial of a preliminary injunction trial court's determination of fact issues is binding, if supported by substantial evidence.

5. Injunction ⇨135

On application for preliminary injunction, a broad discretion is vested in the trial court as to the action to be taken upon the facts it finds.

6. Appeal and Error ⇨948

On appeal from the grant or denial of a preliminary injunction, the appealing party has the burden to make a clear showing that the trial court abused its discretions in granting or denying the preliminary injunction.

7. Injunction ⇨158

The ultimate rights of the parties are not determined by granting or denial of a preliminary injunction.

8. Monopolies ⇨24(7)

In action by tile contractors' association under Cartwright Act to enjoin picketing of tile contractors' business places by union members and to enjoin union and defendant tile contractors' association from enforcing agreement between them that no tile would be applied in any shower, tub back, or other area, exposed to water unless setting beds were first installed in mortar backing by qualified tile layers, evidence warranted issuance of temporary injunction prohibiting a strike or picketing by union for purpose of securing or enforcing such agreement against plaintiff tile contractors. West's Ann.Bus. & Prof.Code, §§ 16720(a), 16750.

9. Monopolies ⇨24(7)

Tile contractors who brought action under Cartwright Act to enjoin picketing of tile contractors' business places by union members and to enjoin union and defendant tile contractors' association from enforcing agreement between them that no tile would be applied in any shower, tub back, or other area, exposed to water unless setting beds were first installed in mortar backing by qualified tile layers, were not entitled to temporary injunction barring union and defendant tile contractors' association from enforcing such agreement. West's Ann. Bus. & Prof.Code, §§ 16720(a), 16750.

P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson, San Francisco, for appellants.

Wallace B. Colthurst, Oakland, Orlando J. Bowman, Oakland, for respondents.

DRAPER, Justice.

This is an action for injunction and damages under the Cartwright Act (Bus. & Prof.Code, §§ 16700-16758). Plaintiffs are tile contractors, and are nine of the approximately 25 members of Tile Contractors Association of Northern California, Inc. (hereinafter called "association"). Defendant Peninsula Tile Contractors Association has about 30 tile contractor members, who do business principally in San Mateo, Santa Clara and San Benito counties. Defendant Tile Layers Union, Local 19, has jurisdiction extending to 16 counties of Northern California. The remaining defendants are officers and members of defendant union. Upon affidavits and brief oral testimony preliminary injunction was issued. Defendants appeal from that injunction and the order granting it.

Association and union were parties to a collective bargaining agreement which was to expire March 31, 1956. The agreement between union and Peninsula, by its terms, was to continue into 1957. However, it was reopened a year before its expiration date, and the parties then added a provision that "in order to protect the public from failures resulting from inferior installations, no tile will be applied in any shower, tub back, or other area exposed to water unless setting beds are first installed in mortar backing by qualified tile layers." In its negotiations with association, the union sought a comparable provision, which association refused. Picketing of respondents' business places began, and this action was commenced.

It appears that the "conventional" method of installing ceramic tile is in mortar. In recent years, a method of installing tile by use of mastic adhesives has been developed. This method permits use of gypsum and plasterboard backings. Many pages of the affidavits in this case are

devoted to the respective merits of the two methods. Appellants do not object to the use of mastic, but contend that affixing of tile to plasterboard and gypsum backings results in "failures" because the backings deteriorate when water reaches them. Respondents assert that, when properly used, this method results in fewer failures than does the mortar backing method. Each side insists it is serving the public interest, appellants in preventing the falling of the homeowner's shower tile, and respondents in saving him money while preventing the addition of tile to his bathwater. It would seem that this issue should be determined by the building codes or in the market, rather than the courts. However, to the extent that it is relevant, the issue has been determined against appellants in the trial court. Under long established rules, it is the trial, rather than the appellate, court which resolves the fact issues.

[1] The statute here in question prohibits "a combination of capital, skill or acts * * * to create or carry out restrictions in trade or commerce" (Bus. & Prof.Code, § 16720(a)), and authorizes civil action by "any person who is injured in his business or property" by such combination (Bus. & Prof.Code, § 16750). Although the act does not specifically provide for injunctive relief, such relief is available to one injured by a violation of the Cartwright Act (*Kold Kist v. Amalgamated Meat Cutters*, 99 Cal.App.2d 191, 221 P.2d 724).

In the case at bar, there is some evidence that it was Peninsula which sought and secured the contract provision limiting use of mastic adhesives upon plasterboard or gypsum backings. There is also some evidence that respondents compete with the members of Peninsula, and that their competition will be restricted if they are unable to use the assertedly cheaper method of plasterboard backing. On appeal from granting of a preliminary injunction, we do not have the benefit of findings. There was evidence contradicting that summarized above, but we must assume that the trial court resolved the conflict in respondents'

favor. The evidence, thus viewed, could warrant an inference that appellants' combination was formed to restrict trade.

[2,3] Appellants argue that the restriction here is merely upon the use of mastic adhesives, and not upon trade or commerce in them. They cite federal cases (Industrial Association of San Francisco v. United States, 268 U.S. 64, 54 S.Ct. 403, 69 L.Ed. 849; United States v. Bay Area Painters, D.C., 49 F.Supp. 733) for the rule that restriction of the use of a commodity is not restriction upon its sale. But those cases deal with the federal anti-trust acts, and hold that limitation upon local use of a product manufactured outside this state is not a restriction upon interstate trade in the product. Here the gravamen of the complaint is not the limitation of sales of mastic adhesives, but is the restriction of use of a construction method in the building of houses. The business of installing tile is itself trade or commerce. The Cartwright Act embraces far more than the mere sale of tangible commodities (Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867). Of course, whether that trade or commerce is restricted turns upon fact issues.

Appellants also argue that the Cartwright Act does not apply to a combination of laborers for the purpose of improving conditions of employment. "[L]abor * * * is not a commodity" within the meaning of the act (Bus. & Prof.Code, § 16703). Full freedom of employees to associate to negotiate the terms and conditions of their employment is the declared policy of this state (Lab.Code, § 923). These provisions have been held to except from the operation of the Cartwright Act combinations of laborers for the purpose of furthering their interests (Schweizer v. Local Joint Executive Board, 121 Cal.App.2d 45, 262 P.2d 568), and this exception is recognized where the object of the labor combination is reasonably related to wages, hours, or conditions of employment (C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414; Los Angeles Pie Bakers

Ass'n v. Bakery Drivers, 122 Cal.App.2d 237, 264 P.2d 615).

There is evidence that the use of mortar setting beds in tile laying requires more time than the use of board backings and mastic adhesives. The federal rule appears to be that it is a legitimate labor objective to oppose the use of time-saving devices which will reduce employment (United States v. Bay Area Painters, supra, 49 F. Supp. 733; United States v. Carrozzo, D. C., 37 F.Supp. 191 [affirmed without opinion in United States v. International Hod Carriers, etc., 313 U.S. 539, 61 S.Ct. 839, 85 L.Ed. 1508]). However, the particularly strange anomaly of this case is that respondents plead and offer proof that the union's objection is based upon the theory of preserving work time, while appellants plead and offer proof to the contrary. We can only assume that the trial court decided the issue in favor of respondents, although against their contention. Appellants do argue that their purpose is to improve the quality of tile work afforded to the public, that this is a legitimate labor objective, and that thus this agreement is excepted from the operation of the Cartwright Act. The cases cited for this view do not appear to support it. Minkoff v. Jaunty Junior, Sup., 36 N.Y.S.2d 507, upheld a collective bargaining contract which provided for contributions from employers and union to support an advertising campaign to increase public use of garments manufactured in the New York area. Bay Area Painters, etc., Committee v. Orack, 102 Cal.App.2d 81, 226 P.2d 644, upheld an agreement of employers for the purpose of policing their industry to assure that contractors lived up to the terms of their collective bargaining agreements. Neither situation is comparable to that presented here. In any case, the evidence was in conflict as to the relative advantage to the purchaser of the two methods, and this conflict was resolved against appellants.

[4-7] Upon appeal from the granting or denial of a preliminary injunction, not only is the trial court's determination of fact issues binding, if supported by sub-

stantial evidence (Palm Springs, etc., Co. v. Kieberk Corp., 37 Cal.App.2d 642, 100 P.2d 346), but a broad discretion is vested in the trial court as to the action to be taken upon the facts it finds (People v. Gordon, 105 Cal.App.2d 711, 234 P.2d 287, People v. Black's Food Store, 16 Cal.2d 59, 105 P.2d 361). Still further, the burden is upon the appellant to make a clear showing of abuse of that discretion (Remillard Brick Co. v. Dandini, 47 Cal.App.2d 63, 117 P.2d 432; People v. Gordon, supra). In the light of these principles, reversal is not warranted here. Of course, nothing herein contained is to be construed as expressing any view as to the weight of the evidence, or as to the proper ultimate disposition of the action. The ultimate rights of the parties are not determined by granting or denial of a preliminary injunction (27 Cal. Jur.2d 114). Appeal from such granting or denial can settle little in a case where the trial court's exercise of its discretion rests in any substantial part upon the determination of fact issues. In the end, the case is returned to the trial court for the full trial which has not yet been had, with the prospect of still another appeal from that judgment. In view of the priority accorded such actions, the case could be disposed of in the trial court and be well on the way to final disposition long before the appeal relating to the preliminary stages is completed. The value of injunctive relief as a means of settling labor disputes has been doubted (Park & T. I. Corp. v. International Brotherhood of Teamsters, etc., 27 Cal.2d 599, 608, 609, 165 P.2d 891, 162 A.L.R. 1426).

Appellants also contend that their demand for restriction of use of plasterboard backing is a legitimate labor objective because of a proposed contract provision that defects must be repaired by the workman on his own time. But the only fair construction of this provision is that it applies only where the workmanship is faulty, and not where the material is inadequate. Thus the burden on the employee is unrelated to the backing used.

[8,9] Appellants also assert that the injunction issued is too broad in its scope.

On its face, the injunction would prohibit any strike or picketing by appellant union, even for objectives wholly unrelated to the issue here in dispute. The prohibition should be limited to such strike or picketing as is for the purpose of securing or enforcing the disputed Section 2(a) of the proposed agreement (Park & T. I. Corp. v. International Brotherhood of Teamsters, supra). Also, the injunction bars the union and Peninsula from enforcing the agreement now in effect between them. That agreement is not the subject of attack in this action. Indeed, respondents allege that it is the extension of like provisions to them which will diminish competition, and the inference is inescapable that enforcement of the existing agreement will have the opposite effect. Thus respondents are not parties injured by the Peninsula agreement, if it be not extended to them. This prohibition should be eliminated.

The preliminary injunction is modified in the respects just outlined. As so modified, the injunction and the order granting it are affirmed. In accordance with stipulation on file, each party shall bear his own costs.

KAUFMAN, P. J., and DOOLING, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



155 Cal.App.2d 328

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James WILLIAMS, Defendant and
Appellant.

Cr. 3303.

District Court of Appeal, First District,
Division 2, California.

Nov. 20, 1957.

Hearing Denied Jan. 15, 1958.

Defendant was convicted of second degree robbery. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered judgment, and defendant

appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Kaufman, P. J., held that the jury could have inferred intent to rob from defendant's statement to prosecutrix, "It is a stick-up".

Judgment and order affirmed.

1. Robbery ☞26

In prosecution for second degree robbery, evidence raised question for jury as to whether defendant had specific intent to rob.

2. Criminal Law ☞742(1), 745

It is for jury to determine credibility of witnesses and reasonable inferences that can be drawn from their testimony.

3. Robbery ☞24(2)

The normal implication of the words "This is a stick-up" is an intent to rob.

4. Criminal Law ☞788

In second degree robbery prosecution, evidence did not disclose such willful suppression of evidence as to require giving of requested instruction that if stronger and more satisfactory evidence could have been produced, weaker and less satisfactory evidence should be viewed with distrust.

5. Criminal Law ☞824(9)

In second degree robbery prosecution, where circumstantial evidence was merely incidental or corroborative and was not relied upon for proof of guilt, the trial court did not err in refusing on its own motion to instruct the jury on circumstantial evidence.

6. Criminal Law ☞986

Where defendant did not assert at the time the judgment was rendered that he was improperly arraigned for judgment in violation of statute, the matter was waived. West's Ann.Pen.Code, § 1200.

7. Criminal Law ☞911, 1156(1)

The granting of motion for new trial is a matter within sound discretion of trial

court and cannot be disturbed except for clear abuse of discretion.

James Williams, Represa, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Appellant James Williams was found guilty by a jury of robbery in the second degree. He appeals from the judgment of conviction and from the order denying his motion for a new trial, contending that the evidence is insufficient to support the verdict, that the trial court erred in refusing his requested instruction on the failure to produce stronger evidence; that the trial court erred in refusing on its own motion to instruct the jury on circumstantial evidence; that the trial court improperly arraigned him for judgment in violation of Penal Code, section 1200; and that the trial court did not fully consider his motion for a new trial.

The facts as revealed by the record are as follows: The prosecutrix, Mrs. Leige, testified that about 9 p. m. on March 31, 1956, she was walking alone on Turk Street, carrying a rather large purse containing a hairnet, about \$9 in cash, and a wallet containing pictures of her daughter and granddaughter as well as various identification cards. As she walked along, she saw the appellant coming toward her. When the appellant reached her, he threw his hand around her neck and said, as he pushed her into an alley between Turk and Divisadero Street, "It is a stickup, and goddamn it, you better not holler or else I will cut your throat." She did not see a knife in the appellant's hand but could feel the blade at her neck. She screamed and appellant slashed at her, snatched her purse and ran out of the alley. She then ran behind him screaming, "Call the law." Her screams caught the attention of two men in a nearby church, who came out and ran after the appellant. During the

chase they lost sight of the appellant but then saw him again near the scene of the crime. When Mrs. Leige saw the appellant she told the two men, "That is the man right there." As she said this, appellant ran, but was captured and turned over to the police officer who had arrived. In the appellant's pocket were found a hairnet, a wallet containing the cards and pictures belonging to Mrs. Leige and a pocket knife. In searching the area, the police could not find Mrs. Leige's purse or the \$9. When the appellant was asked where he had obtained the items found in his pocket, he at first made no reply but later answered that he had found them on Eddy Street. Mrs. Leige, in the presence of the police and the appellant, accused the appellant of taking her purse by threatening her life with a knife. Appellant answered, "I ain't got no knife."

[1-3] All of the above facts were revealed by the testimony of the prosecutrix and the two police officers who made the arrest. Appellant offered no evidence on his behalf. Appellant first contends that the evidence is insufficient to support the judgment as the specific intent element of the crime of robbery was not proved, and Mrs. Leige's testimony that she had left her granddaughter with a friend and walked to the grocery to buy a soft drink was inherently improbable. "* * * 'We must assume in favor of the verdict the existence of every fact which the jury could reasonably have deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.'" *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780. It is for the jury to determine the credibility of the witnesses and the reasonable inferences that should be drawn from their testimony. *Dillard v. McKnight*, 34 Cal.2d 209, 209 P.2d 387, 11 A.L.R.2d 835. The normal implication of the words "This is a stick-up" is an intent to rob. *People v. Chessman*, 38 Cal.2d 166 at page 187, 238 P.2d 1001 at page 1014. The jury could have drawn such an inference from Mrs. Leige's testimony and found nothing unusual about her activities on the evening

in question. There is therefore no merit in the appellant's first contention.

[4] Appellant next contends that the trial court erred in not giving the following requested instruction: "If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point," charging that the prosecution deliberately concealed as witnesses the two men who captured the appellant and turned him over to the police. The court refused the above instruction and gave instead the following: "Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence."

As recently pointed out in *People v. Chapin*, 145 Cal.App.2d 740 at page 750, 303 P.2d 365 at page 372, the instruction requested by the appellant should not be given unless the evidence indicates a willful suppression of evidence. We do not think that the circumstances of this case warranted the instruction. It is stretching the credibility of this court to ask it to believe, as appellant does in his brief, that actually he was taken for \$90 by Mrs. Leige and the two men, by the "Pocket Book Pigeon Drop Bunco Game" and for this reason was in possession of the articles in Mrs. Leige's pocketbook. Nor was there, as appellant alleges, prejudicial error in the court's giving of the portion of the instruction above quoted. In an earlier portion of the same instruction, the trial court adequately covered the matter requested.

[5] Appellant further contends that the trial court erred in refusing on its own motion to instruct the jury on circum-

stantial evidence as follows: "If the circumstantial evidence relied upon in a case is such that it may reasonably lead to two opposite conclusions, one pointing to the guilt of the defendant, and the other to his innocence, then it is not sufficient to convict upon, for in such event, the jury must adopt the hypothesis of innocence, and find the defendant not guilty;

"If proof of a significant element of a charge depends upon circumstantial evidence, then to justify a conviction thereon the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." Appellant relies on *People v. Yrigoyen*, 45 Cal.2d 46, 286 P.2d 1, which held that the instruction is applicable only in cases where circumstantial evidence is relied upon for proof of guilt and is not merely incidental or corroborative. We think the instant case falls within the latter category. As pointed out in *People v. Borbon*, 146 Cal.App.2d 315, at pages 321 and 322, 303 P.2d 560, at page 564: "As to appellant, the People did not rely solely or even substantially on circumstantial evidence to convict him. He was identified directly by the victim as the person who actually perpetrated the crime, and the court is not required to instruct, as indicated, where the circumstantial evidence produced is only incident to or corroborative of direct evidence connecting the defendant with the crime charged. *People v. Harmon*, 89 Cal.App.2d 55, 59, 200 P.2d 32; *People v. Monge*, 109 Cal.App.2d 141, 144, 240 P.2d 432; *People v. Jerman*, 29 Cal.2d 189, 197, 173 P.2d 805; *People v. Hatchett*, 63 Cal.App.2d 144, 155, 146 P.2d 469." In *People v. Thompson*, 147 Cal.App.2d 543, at pages 547 and 548, 305 P.2d 274, at page 277, the court in rejecting defendant's claim of error in refusing an instruction substantially identical to the one here involved stated: "The instruction * * * is proper only when the prosecution relies either wholly or substantially upon circumstantial evidence. (Citing cases.)" *People v. Mueller*, 147 Cal.App.2d 233, 305 P.2d 178

is to the same effect. Nor can it be said that the failure to give the instruction was prejudicial to the appellant here. *People v. Shannon*, 147 Cal.App.2d 300, 305 P.2d 101. There is therefore no merit in appellant's third contention.

[6] Appellant's next contention is that the trial court improperly arraigned him for judgment in violation of Penal Code, section 1200, which states: "When the defendant *appears* for judgment he must be informed by the Court, or by the Clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." (Emphasis supplied.) The record shows that the appellant was arraigned for judgment on July 19. In *People v. Sauer*, 67 Cal.App.2d 664 at page 669, 155 P.2d 55 at page 57, the court in interpreting the above provision said: "There is nothing in section 1200 which requires that the defendant be informed of the nature of his charge and of his plea immediately before the sentence is actually pronounced, and no possible prejudice could result from the fact that this was done here a few minutes before the judgment was pronounced and during the same proceeding and in connection with the very matter for which the appellant had come into court with his attorney." Furthermore, this matter does not appear to have been raised at the time the judgment was rendered and was therefore waived.

[7] The final contention of the appellant, that the trial court did not fully consider his motion for a new trial is not supported by the record. The granting of a motion for a new trial is a matter within the sound discretion of the trial court and cannot be disturbed except for a clear abuse of discretion. *People v. McGarry*, 42 Cal.2d 429, 267 P.2d 254. We find no abuse of discretion in the instant case.

No prejudicial error appearing in the record before us the judgment and order

denying the motion for new trial must be affirmed.

Judgment and order denying motion for new trial affirmed.

DOOLING and DRAPER, JJ., concur.



155 Cal.App.2d 225

D. H. BELL, Plaintiff and Respondent,

v.

Annabelle TOWNE, also known as Annabelle Towns, also known as Annabell Towns, and Stonewall Towne, also known as Stonewall Towns, Defendants,

Annabelle Towne, Appellant.

Civ. 22531.

District Court of Appeal, Second District,
Division 1, California.

Nov. 14, 1957.

Hearing Denied Jan. 6, 1958.

Action to quiet title to land. The Superior Court of Los Angeles County, Wallace L. Ware, J., rendered judgment in favor of plaintiff, and one of the defendants appealed. The District Court of Appeal, Fourn, J., held that a prima facie case in favor of plaintiff was established by pleadings and proof of final judgment in prior action between the same parties quieting title to same land in plaintiff and enjoining appellant from claiming any right, title or interest in the land and that the evidence was insufficient to establish title in appellant by adverse possession.

Judgment affirmed.

1. Judgment ⇨948(1)

Former judgment, which is properly pleaded in a complaint, may be considered by trial court in determining whether such judgment is res judicata of plaintiff's alleged cause of action.

2. Judgment ⇨564(1)

Generally, where trial court had jurisdiction, final judgment is res judicata of issues involved therein.

3. Judgment ⇨540, 720

Under "res judicata" doctrine, former judgment operates as a bar against subsequent action upon the same cause, and in a subsequent action upon a different claim or cause of action, former judgment operates as an estoppel or conclusive adjudication as to such issues in second action as were actually litigated and determined in first action.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Judicata".

4. Judgment ⇨501

In action to remove cloud on title to land caused by recording of quitclaim deed by which a defendant in former action between the same parties to quiet title to same land had conveyed such land to codefendant after judgment in former action became final, judgment in former action quieting title to land in plaintiff was not subject to collateral attack on ground that defendant grantor was a disbarred attorney and therefore could not represent defendant grantee in former action, where both defendants were in court in propria persona in former action.

5. Judgment ⇨957

In action to quiet title to land, pleading judgment and reviewing court's opinion in prior action between the same parties and introducing in evidence files of prior action, including judgment which established that plaintiff was owner of the land and that defendant had no right, title or interest therein and was enjoined from claiming any, established a prima facie case in favor of plaintiff and the burden shifted to defendant to affirmatively establish any interest in the land.

6. Appeal and Error ⇨840(1)

On appeal from judgment quieting title to land in plaintiff, the primary question for determination was the validity of plaintiff's title, that is, the sufficiency of evidence to

support finding that plaintiff had title to the land, and not the strength or weakness of defendant's title.

7. Adverse Possession ⚡85(1)

Where plaintiff in action to quiet title to land showed legal title thereto in herself, it would be presumed that she was possessed of the land within the time required by law and occupation thereof by defendant would be deemed to have been in subordination to plaintiff's title unless adverse possession by defendant for the statutory period was shown, and defendant had the burden of affirmatively establishing such adverse possession.

8. Deeds ⚡8

Quitclaim deed by which defendant in action to quiet title conveyed her interest in the land to codefendant after judgment quieting title to land in plaintiff became final was worthless, since such judgment established that grantor had no interest in the land which she could transfer to grantee.

9. Adverse Possession ⚡13

To establish title by "adverse possession," claimant's possession must be by actual occupation under circumstances constituting reasonable notice to owner and hostile to owner's title, claimant must claim property as his own either under color of title or claim of right, his possession must be continuous and uninterrupted for five years, and he must pay all taxes levied and assessed against property during such period.

See publication Words and Phrases, for other judicial constructions and definitions of "Adverse Possession".

10. Adverse Possession ⚡16(1)

"Actual possession" necessary to establish title to realty by adverse possession means subjection to claimant's will and dominion, and must be coupled with acts of ownership proclaiming to world and bringing notice to owner that a right is claimed in realty.

See publication Words and Phrases, for other judicial constructions and definitions of "Actual Possession".

11. Adverse Possession ⚡114(1)

In action to quiet title to lands, commenced approximately three and one-half years after judgment in prior action between the same parties quieting title to same land in plaintiff became final, evidence was insufficient to establish title in defendant by adverse possession.

Willedd Andrews, Los Angeles, for appellant.

Leo Goodman and Gizella L. Allen, Los Angeles, for respondent.

FOURTH, Justice.

This is an appeal from a judgment in favor of the plaintiff quieting her title to two vacant lots.

This action was filed November 20, 1953. In 1946, the plaintiff herein filed an action, which will hereinafter be referred to as the "first action", to quiet title to the same two lots involved in the present action. The matter was heard in the same court, against the same defendant-appellant, her husband, and Catherine A. McKenna, and plaintiff received a judgment quieting the title in plaintiff, which judgment was sustained on appeal in 95 Cal.App.2d 398, 213 P.2d 73, and became final on May 25, 1950. In the first action the appellant herein appeared and answered in propria persona and testified at the trial that she did not own any part of either lot and that she only claimed the right to take care of the lots for Mrs. McKenna. The judgment in the first action was in the usual form.

The present action was filed about three and one-half years after the judgment in the first action became final. The complaint in the present case set forth and pleaded a copy of the judgment in the first action, as well as a copy of the opinion of the district court of appeal. The appellant answered by denying that the plaintiff owned the property, but made no denial of the record of the first action. She further answered, by way of a special defense, that she was the owner

of the property in question. There was no plea of the statute of limitations.

The evidence disclosed that the first time appellant saw or communicated with plaintiff, or anyone representing her, following the first action was in the fall of 1953, at which time a representative of the plaintiff called on appellant to discuss the sale of the lots to appellant, and plaintiff through her representative thereupon discovered for the first time subsequent to the first action, that appellant claimed an interest in the lots. A title search was requested and plaintiff ascertained that a quitclaim deed dated April 28, 1952, from a Catherine A. McKenna to the appellant Towne had been recorded on April 29, 1952. Plaintiff then brought this action to remove the cloud on the title caused by the recording of the quitclaim deed, and also to remove any other possible claim of the appellant.

[1,2] At the trial there was received into evidence the file of the first action, which included the exhibits, pleadings, judgment and a copy of the opinion of the district court of appeal. It has been held that, "When a former judgment is properly pleaded in a complaint, such judgment may be considered by the trial court in determining whether it is *res judicata* of a plaintiff's alleged cause of action" and, "* * * it is the general rule that a final judgment is *res judicata* of the issues involved therein where the trial court had jurisdiction." *Weil v. Barthel*, 45 Cal.2d 835, 837, 291 P.2d 30, 31.

[3] It was stated in *Todhunter v. Smith*, 219 Cal. 690, at pages 694-695, 28 P.2d 916, at page 918, as follows: "By virtue of the doctrine of *res judicata* the final determination of a court of competent jurisdiction necessarily affirming the existence of any fact is conclusive evidence of the existence of that fact when it is again in issue in subsequent litigation between the same parties in the same or any other court. The facts decided in the first suit cannot be disputed or relitigated, although the later suit is upon a different cause of action. (Citing cases and authority.) The doctrine

of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action."

The *Todhunter* case is cited with approval in *Taylor v. Hawkinson*, 47 Cal.2d 893, 895, 306 P.2d 797.

[4] The appellant made an effort to attack collaterally the judgment in the first action by attempting to show that McKenna was a disbarred attorney and therefore court in *propria persona*, as was McKenna. The record discloses that appellant was in court in *propria persona*, as was McKenna. No such collateral attack can be permitted. *Hollyfield v. Geibel*, 20 Cal.App.2d 142, 148, 66 P.2d 755; *Westphal v. Westphal*, 20 Cal.2d 393, 397, 126 P.2d 105.

[5-7] The plaintiff established a *prima facie* case in her favor when she pleaded the judgment and the appellate court opinion, and at the trial caused to be received into evidence the file of the first action (including the judgment which established that she was the owner of the property in question, and that the appellant had no right, title or interest in the property, and that she was enjoined from claiming any). The burden then shifted to the appellant. It was appropriately stated in *Madden v. Alpha Hardware & Supply Co.*, 128 Cal.App.2d 72, at page 75, 274 P.2d 705, at page 706:

"It should be noted that the primary question for determination is the validity of plaintiffs' title, if any—not the strength or weakness of defendant's title; in other words, the sufficiency of the evidence to support the finding of the trial court that plaintiffs have title to the property in question.

"The plaintiffs, having shown legal title in themselves, it is presumed that they were possessed of the property within the time required by law and that the occupation thereof by defendant is deemed to have been in

subordination of plaintiffs' title, unless it be shown that defendant's possession was adverse for the statutory period. Section 321, Code of Civil Procedure. Thus the burden was cast upon defendant to affirmatively establish its alleged adverse possession. *Westphal v. Arnoux*, 51 Cal.App. 532, 197 P. 395." See, also, *Cory v. Hotchkiss*, 31 Cal.App. 443, 444, 160 P. 841.

[8] The quitclaim deed which the appellant secured from McKenna was worthless. The court in the first action decreed that McKenna had no interest in the property, and therefore she had no interest which she could transfer to the appellant herein.

[9,10] Appellant did pay some of the taxes on the property but she did not pay all of them. In *West v. Evans*, 29 Cal.2d 414, at page 417, 175 P.2d 219, at page 220, it is set forth:

"To establish title by adverse possession, the claimant must establish five elements in connection with his occupancy of the property. *Unger v. Mooney*, 63 Cal. 586 * * *; see Code Civ.Proc. § 321 et seq. (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. (Citing cases.) (2) Possession must be hostile to the owner's title (Citing cases.) (3) The holder must claim the property as his own, either under color of title, or claim of right. (Citing cases.) (4) Possession must be continuous and uninterrupted for five years. (Citing cases.) (5) The possessor must pay all of the taxes levied and assessed upon the property during the period. (Citing cases.) Unless each one of these elements is established by the evidence, the plaintiff has not acquired title by adverse possession.

"Actual possession, said Chief Justice Field, means 'a subjection to the will and dominion of the claimant'. *Coryell v. Cain*, 16 Cal. 567, 573. It is established not alone by the assertion of title, but it must be coupled with acts of ownership which proclaim to the world, and bring notice to the owner, that a right is claimed in the land over which the claimant is seek-

ing to exercise dominion. *Hart v. Cox*, 171 Cal. 364, 367, 153 P. 391. * * *

[11] In the present case the evidence disclosed that appellant failed to establish the requirements numbered (1), (2), (4), and (5) above mentioned.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.



155 Cal.App.2d 469

Ray F. CASTILLO and Claudia M. Castillo,
Plaintiffs and Respondents,

v.

Lucille CELAYA, Defendant and Appellant.
Civ. 5562.

District Court of Appeal, Fourth District,
California.

Nov. 22, 1957.

Action by property owner to establish easement for roadway purposes over portion of defendant's property. The Superior Court of Orange County, Kenneth E. Morrison, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Mussell, J., held that there was substantial evidence to sustain finding that plaintiffs using roadway over defendant's land, which provided plaintiffs with only access to highway, for approximately 15 years had established actual, open, notorious and peaceable use of the roadway involved, but judgment would be modified to establish roadway of width asked for in complaint.

Judgment as modified, affirmed.

I. Easements 37

. Questions of whether the use of easement is adverse and under a claim of right,

or permissive with the owner's consent, and whether nature of user is sufficient to put owner on notice, are questions of fact.

2. Appeal and Error ☞931(1)

On appeal all conflicts in evidence must be resolved in favor of prevailing party and evidence viewed in the light most favorable to him.

3. Easements ☞36(3)

In action to establish easement over defendant's land which provided plaintiffs with their only access to highway, evidence sustained finding that plaintiffs' using roadway for approximately 15 years had established actual, open, notorious and peaceable use of roadway involved and supported inference that use was adverse and not permissive.

4. Appeal and Error ☞1152

Where plaintiffs brought action to establish a 12 foot wide easement over defendant's property and trial court in finding for plaintiffs entered judgment establishing a 15 foot wide easement, even though evidence supported adverse use of roadway, judgment on appeal would be modified to limit easement to 12 feet in width.

Ferguson & Judge, Fullerton, for appellant.

Samuel Hurwitz, Orange, for respondents.

MUSSELL, Justice.

This is an action in which plaintiffs seek to establish an easement for roadway purposes over the westerly 12 feet of defendant's property in Orange county to recover damages, and for injunctive relief. The 12-foot strip of land involved extends northerly from what is known as the Placentia-Yorba Road to the property owned and occupied by plaintiffs and lies along the easterly boundary of property owned by one J. Coleman Travis. Plaintiffs used the area involved for roadway purposes, as a means of ingress to and egress

from their property from the Placentia-Yorba Road, continuously and without interruption from 1938 to November 27, 1954, when the defendant erected a fence across the roadway, placed a gate thereon and prohibited plaintiffs from using the road. This action followed and the trial court found, inter alia, that at all times since 1938 and continuously to the time of trial plaintiffs have openly and notoriously and adversely to defendant claimed the right to the use and ownership of said roadway as being appurtenant to their land and under a claim of right; that at all times since 1938 plaintiffs have openly and notoriously maintained and repaired the said roadway and have kept the same in condition for the use of said plaintiffs; that the defendant on or about November 27, 1954, wrongfully obstructed the use of said roadway by plaintiffs by erecting a fence across said right of way and that plaintiffs have suffered damages in the sum of \$250 by reason of said obstruction. The court granted a perpetual easement and right of way to plaintiffs over a roadway 15 feet in width, instead of 12 feet as claimed in the complaint. Defendant was ordered to remove the said obstruction and plaintiffs were awarded damages in the sum of \$250. Defendant appeals from the judgment and her principal contention on appeal is that the evidence does not support a finding that the use of the roadway by plaintiffs was adverse and under a claim of right rather than permissive.

[1, 2] The questions whether the use of the easement is adverse and under a claim of right, or permissive and with the owner's consent, and whether the nature of the user is sufficient to put the owner on notice, are questions of fact and if there is any substantial evidence to support the judgment, it must be affirmed. All conflicts must be resolved in favor of the prevailing party and the evidence viewed in the light most favorable to him. *O'Banion v. Borba*, 32 Cal.2d 145, 147-148, 195 P.2d 10; *Arnold v. City of San Diego*, 120 Cal.App.2d 353, 356, 261 P.2d 33. In *Clark v. Clark*, 148 Cal. App.2d 223, 306 P.2d 556, it was held that

the user, in order to initiate and ultimately establish a prescriptive easement, must be in hostility to the legal title, and must be under a claim of right actually or impliedly communicated to the owner of the land; that the adverse user must exist for five years and the proof must overcome presumptions that occupation by the claimants is in subordination to the legal title, and that whether or not the user made was a matter of neighborly accommodation or was adverse is a question of fact to be determined by the trial court in the light of the relations of the parties, their conduct, the situation of the property and all the surrounding circumstances.

In *Mathews v. Brinton*, 132 Cal.App.2d 433, 438, 282 P.2d 93, 96, it was held that "The question as to the effect of any presumption that the use is under a claim of right and adverse to the owner of the land, must be considered along with the showing as to the nature of the use during the prescriptive period, with all other facts of the case, and is one of fact for the trial court which must decide whether the proven facts do or do not justify an inference showing the required elements."

In *Jones v. Young*, 147 Cal.App.2d 496, 498, 305 P.2d 286, it was held that where the evidence sufficiently proved actual, open, notorious, continuous and peaceable use of the property the trial court could infer that the user was adverse and that therefore a prescriptive right to the use of the land had been acquired.

[3] Testing the record by these rules, we find substantial evidence supporting the trial court's findings and judgment that the use of the roadway by plaintiffs was adverse and not permissive.

Defendant testified that the roadway was built by plaintiffs in 1938 and she first interfered with its use by plaintiffs in 1954; that the first time she ever talked to plaintiffs about the roadway was in 1954. Plaintiff Ray Castillo testified that he had built a home on his property in 1938 and had lived there continuously until October, 1954; that the roadway involved provided

the only access to his property from any highway; that he and his family, guests, relatives, and customers buying poultry raised by him and sold on his property, had used the roadway continuously and without interruption or interference from 1938 to November 27, 1954, and that he, alone, had maintained it during that period of time; that prior to November, 1954, the defendant had never discussed with him the use of the roadway; that he had never received any notice from her not to use the roadway, and that he never asked her or anyone else for permission to use it; that in 1954, before defendant placed a fence and gate across the road and while plaintiffs were temporarily away from their property, defendant informed plaintiffs that there were people "running in and out of there" and requested plaintiffs to erect a fence to keep them out; that plaintiffs refused to comply with defendant's request as they required the use of the roadway for hauling supplies in connection with the construction of a new residence on the property. Other witnesses corroborated plaintiff's testimony as to the continuous use of the roadway and to maintenance by plaintiffs. While the defendant testified that plaintiff Ray Castillo had asked her for permission to use the road and she agreed he could use it, Castillo's testimony was that no permission was sought by him and that his use of the roadway was never discussed by him with defendant. The testimony of the defendant in this connection merely created a conflict in the evidence and the trial court resolved the conflict in plaintiffs' favor.

There is ample substantial evidence that plaintiffs proved actual, open, notorious and peaceable use of the roadway involved. This evidence supports an inference that the use by plaintiffs was adverse and not permissive. *Jones v. Young*, *supra*.

[4] Defendant contends that the judgment gave excessive relief to plaintiffs in establishing a 15-foot easement over defendant's property and we agree with this contention. The roadway described in the complaint is only 12 feet in width and there was no evidence introduced at the trial to

support a judgment establishing an easement for a roadway in excess of that width. The judgment is therefore modified so as to limit plaintiffs' easement to a roadway 12 feet in width over the westerly 12 feet of defendant's property, as described in the complaint. *Frost v. Mighetto*, 22 Cal.App. 2d 612, 71 P.2d 932; *Meisner v. McIntosh*, 205 Cal. 11, 269 P. 612. As so modified, the judgment is affirmed. Respondents to recover costs.

BARNARD, P. J., and GRIFFIN, J., concur.



155 Cal.App.2d 493

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Richard LUNA, Defendant and Appellant.
Cr. 2764.

District Court of Appeal, Third District,
California.

Nov. 25, 1957.

As Modified Dec. 3, 1957.

Defendant was convicted of possession of heroin. The Superior Court, Sacramento County, James H. Oakley, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that where a police officer had obtained information that defendant was in possession of heroin, police officers were justified in entering defendant's apartment forcibly without search warrant and heroin found as result of search of apartment was admissible notwithstanding defendant was not in apartment and was arrested later when he returned to apartment because search conducted prior to arrest was incidental thereto.

Judgment affirmed.

Arrest ⇨71

Criminal Law ⇨395

Where police officer had information from informant that defendant possessed narcotics in his apartment, police officer was justified in directing other officers to forcibly enter apartment without search warrant and heroin found in search of apartment was admissible in evidence notwithstanding fact that defendant was not in apartment when forced entry was made and he was not arrested until later when he returned to apartment because, under circumstances, search conducted prior to arrest was incidental thereto. *West's Ann. Health & Safety Code*, § 11500; *West's Ann.Pen.Code*, § 836.

Milton L. Baldwin, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment of conviction of possession of heroin in violation of Section 11500 of the Health and Safety Code and from an order denying a motion for a new trial.

Upon appellant's request for counsel to aid him in his appeal, this court appointed Milton L. Baldwin, Esquire, a member of the local bar to represent him. Mr. Baldwin has advised the court that after a careful study of the record he is of the opinion there is no ground for appeal.

Since the record disclosed a search and seizure of evidence used at the trial without the issuance of a search warrant, Mr. Baldwin states that he particularly investigated the possibility that it could be meritoriously contended appellant's conviction was so far based upon evidence illegally obtained as to warrant reversal. He has further stated that after such study of the record and of applicable decisions he has concluded there would be no merit in that contention. This court has made an independent study of the record and has

come to the conclusion that there is no merit in this appeal.

Capsules of heroin and other incriminating evidence were introduced into evidence over the objection that they had been obtained by unlawful search and seizure. The following showing was then made as justifying the conduct of the arresting officers. Inspector House, then acting supervising inspector of the State Bureau of Narcotic Enforcement, knew appellant to be a drug addict and he had been advised that appellant had, in the past, received narcotics through one Contreras. The night before appellant's arrest, Inspector House received information to the effect that appellant had obtained a large supply of narcotics. Inspector House took no action at that time. On the following morning however, a reliable informant telephoned him stating that the informant had just purchased a capsule of heroin from appellant in appellant's apartment. Inspector House immediately sent three officers to the apartment with instructions to place appellant and Contreras also under arrest. The officers arrested Contreras on the street. They knocked on the door of appellant's apartment, but there was no response. The officers then telephoned Inspector House asking further directions, and were told to enter the apartment. This they did by forcing the back door. Inside the apartment the officers found the heroin, portions of which were introduced in evidence. The officers waited in the apartment until appellant returned and then took him into custody. At that time, he admitted that the narcotics found in his apartment were his. Inspector House testified that he ordered the entry into appellant's apartment without a search warrant as he deemed the situation made if necessary to take immediate action.

Inspector House, at the time he ordered the officers to enter the apartment forcibly, had reasonable cause to believe that appellant had made an illegal sale of heroin in the apartment and that he was keeping an additional supply of heroin there. In view of the information he had obtained from the informant he could reasonably infer that notwithstanding there was no response when the officers knocked on the door of the apartment that appellant was in the apartment and simply refusing to indicate his presence. Under these circumstances it cannot be said that the search conducted prior to the arrest was other than incidental thereto nor can it be contended that there was anything unreasonable or unlawful in the conduct of the officers. In such cases "the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest. * * *" (People v. Simon, 45 Cal.2d 645, 648, 290 P.2d 531, 533.) "* * * it has been held that it is not significant whether the search precedes or follows the arrest." (Id. 45 Cal.2d at page 648, 290 P.2d at page 533.) "A peace officer may make an arrest * * *, without a warrant, * * * when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it," or "On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested." Pen.Code, sec. 836; People v. Simon, supra. We hold that there was no illegal search or seizure and that the judgment appealed from ought to be affirmed.

The judgment and the order denying the motion for a new trial are affirmed.

PEEK and SCHOTTKY, JJ., concur.

155 Cal.App.2d 613

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Roger S. VALDES, Defendant and
Appellant.

Cr. 5896.

District Court of Appeal, Second District,
 Division 3, California.

Nov. 27, 1957.

Defendant was convicted of forgery. The Superior Court of Los Angeles County, Allen T. Lynch, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that since defendant had been authorized by borrower to do whatever was necessary to pay proceeds of loan obtained from defendant's business associate for purpose of purchasing television set to dealer, evidence did not warrant inference that defendant knew that he was acting without authority when he endorsed borrower's name on check issued by lender and cashed check or inference that in so doing defendant acted with fraudulent intent, though he subsequently used proceeds of check for his own purposes when borrower, having rescinded purchase and desiring to rescind loan transaction, refused to accept proceeds of check.

Judgment and order reversed with instructions to dismiss.

1. Forgery ⚡35

Ordinarily, intent to defraud may be, and often must be, inferred from the circumstances in which false instrument is executed or issued. West's Ann.Pen.Code, § 470.

2. Forgery ⚡5

Whether defendant, without authority, signed the name of another person, or of a fictitious person, with intent to defraud within meaning of forgery statute depends upon the facts of the particular case. West's Ann.Pen.Code, § 470.

3. Forgery ⚡44(1)

To support conviction for forgery, evidence must justify reasonable conclusion that defendant had knowledge of his lack of authority to sign the name of another and intended to commit a fraud. West's Ann.Pen.Code, § 470.

4. Forgery ⚡44(1)

Where defendant, being authorized by borrower to do whatever was necessary to pay to dealer proceeds of loan obtained from defendant's business associate for purpose of purchasing television set, signed borrower's name and his own name, as endorsers, and cashed check payable to borrower and subsequently used proceeds of check for his own purposes, when borrower, having rescinded purchase and desiring to rescind loan transaction, refused to accept proceeds of loan, evidence did not warrant inference that defendant knew he was acting without authority in endorsing and cashing check or inference that he acted with fraudulent intent, and hence was insufficient to support conviction for forgery. West's Ann.Pen.Code, § 470.

5. Forgery ⚡27

In prosecution for forgery based on endorsement and cashing of check payable to one for whom defendant had made application for loan, evidence that it was customary for defendant to act in attorney-in-fact capacity for customers was relevant on question of whether defendant possessed or believed he possessed authority to cash check. West's Ann.Pen.Code, § 470.

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Bonnie Lee Hansen, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Roger S. Valdes was accused of an offense of grand theft and two offenses of forgery. The transaction involved in the charge of grand theft concerned the sale of a residence by Valdes to one Giron in which

Valdes was accused of the theft of \$900; the second concerned the endorsement of the name of Delia P. Miranda upon a check payable to her, and the third count accused Valdes of forging the name of Ralph V. Garcia by endorsement upon a check for \$150 payable to Garcia. In a non-jury trial Valdes was acquitted upon Counts I and II and convicted on Count III of forging the name of Garcia. He was sentenced, execution of sentence was suspended, he was fined \$500, placed on probation and he appeals from the judgment and from an order denying his motion for a new trial.

The evidence relating to the Garcia transaction was the following: In the eastern part of Los Angeles, on First Street, was a storeroom in which were four private offices. Valdes used one of these and a man named Salot used another. This was the headquarters of the Owl Mortgage Company which was a fictitious name, and nothing more. Salot was a realtor who traded in real estate and loaned money. Valdes had been a broker but had "inactivated" his license. He accepted applications for loans made to Owl Mortgage, prepared papers, traded in real estate, acted as escrow holder and handled the detail work. There seemed to be no definite ownership of the Owl Mortgage Company, although Valdes and Salot made use of the name; when an application for a loan was received it went to Salot, and if he approved it he made the loan and received the security. A man named Macias, who ran a television store, brought Garcia to Valdes seeking a loan of \$150 with which Garcia intended to buy a television set. Garcia offered to give a second trust deed upon his half interest in property as security. Salot approved the loan, Garcia executed a note and trust deed in favor of Salot for the amount of \$260, a title search was made and the trust deed was recorded. The difference between the amount of the loan and the amount of the note represented vaguely described expenses. Salot issued his check for \$150 payable to Garcia and gave it to Valdes, who signed the name of Garcia and his own

name as endorser, and cashed the check. This act was the basis of the charge of forgery.

The crucial questions were whether Valdes knew he was acting without authority and whether the endorsement and cashing of the check were done for the purpose of defrauding Garcia, Salot, or the bank.

If forgery was committed it was by violation of that portion of Section 470 Penal Code reading: "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do * * * is guilty of forgery."

[1,2] The appeal presents only the question of the sufficiency of the evidence. It calls for no dissertation on the law of forgery but only the consideration of facts which, as we shall see, are unique. "Normally an intent to defraud may be, and often must be inferred from the circumstances in which a false instrument is executed or issued. *People v. Horowitz*, 70 Cal.App.2d 675, 687, 161 P.2d 833; *People v. Adair*, 3 Cal.App.2d 323, 39 P.2d 274." *People v. Crowder*, 126 Cal.App.2d 578, 585, 272 P.2d 775, 779. This is the rule upon which the Attorney General relies for affirmation of the judgment. The substance of his contention is that Garcia testified that he did not give Valdes permission to endorse the check and that a fraudulent intent must be inferred from the unauthorized signing of Garcia's name. The contention is entirely too broad. Each case rests upon its own facts. Because of its unique facts the present case stands apart.

[3] There can be no forgery unless the evidence justifies reasonable conclusions that the signer had knowledge of his lack of authority and intended to commit a fraud.

[4] We have concluded that the evidence was legally insufficient to prove the offense of forgery. It will clearly appear from our discussion of the evidence, when it is given interpretation and effect most favorable to the People, that it furnished

no basis for an inference that Valdes knew he was acting without authority or an inference that he acted with fraudulent intent.

[5] The testimony of Garcia given at the preliminary was used by the People at the trial, under stipulation. He testified that his only purpose in borrowing the money was to purchase the television set from Macias; that he knew the money would come to Valdes in the form of a check and he told Valdes to do whatever was necessary in order to pay Macias the \$150 being borrowed from Salot. Valdes went to Macias after he had cashed the check, intending to pay him the money, and was informed that the television set had been sent to Garcia's home and that Garcia had refused to accept it. Garcia testified that he notified Valdes that he had had a disagreement with Macias and did not propose to acquire the television set, and that Valdes had already cashed the check. Valdes testified that he offered to give the money to Garcia but that Garcia declined it and asked that he be given back his trust deed. Garcia's testimony was to the same effect, namely, that he did not want to go through with the deal, asked for the return of his trust deed and he testified "I didn't want no money from him at all." Valdes testified that he found himself "in the middle," which is a fair description of his position. He told Garcia he would pay the money to him or to Salot, but Garcia did not want the money, nor did Salot, who then held the note and the recorded deed of trust. At this point Salot sold Garcia a residence. There was testimony that in this transaction Garcia paid off his trust deed of \$260 and also that he was given credit for \$150. The testimony concerning this transaction was hazy and we attach no importance to it. Valdes was not relieved of his responsibility to pay over the money to or for the benefit of Garcia. He did not do this. Several weeks later he voluntarily went to Garcia, told him that he had spent the money for groceries, and that he was sorry. He commenced to pay Garcia at the rate of \$25 per month and paid him altogether \$75. Garcia tes-

tified that Valdes paid him money but he did not state the amount. Undoubtedly Valdes had used the money for purposes of his own. We may disregard his testimony that he had Garcia's permission to use it. Valdes testified that he had been a licensed realtor, but had "inactivated" his license; that thereafter he took from each of his customers a power of attorney, that Garcia had executed a power of attorney in his favor and that it was with the files of the defunct Owl Mortgage Company, which were not in his possession. Garcia denied having executed a power of attorney, but there was independent evidence that Valdes did hold powers of attorney from other customers. The fact that it was customary for Valdes to act in an attorney-in-fact capacity was relevant to the question whether he possessed or believed he possessed authority to cash the check. We mention the manner in which Valdes was accustomed to act for his customers merely as a circumstance to be taken into account. It was not necessary for him to prove that he held a power of attorney. It would have added nothing to the authority clearly implied in the oral instructions he had received from Garcia. The following facts were established without dispute: Garcia borrowed the money for the sole purpose of paying it to Macias for the television set; he knew the money would come by check to Valdes; he told Valdes to do whatever was necessary in order to pay Macias the \$150; he decided he did not want the set and refused to accept it from Macias; he so informed Valdes, and declined to accept the money, but asked for the return of his security and release from the transaction. When Valdes cashed the check Macias was expecting the money, Garcia was expecting to receive the television set, and Salot, a business associate of Valdes, was expecting Valdes to pay to Macias the money that had been loaned on the trust deed. These, we say, were the admitted facts, and we find in them no basis whatever for a belief that when Valdes cashed the check he intended to steal the money. Garcia testified that he did not give Valdes

permission to endorse the check, but he also testified, as previously stated, that he authorized and expected him to pay the money to Macias and to do whatever was necessary for that purpose. He was not surprised nor did he protest when he learned that Valdes had cashed the check. That Valdes knew, after being instructed as he was, that he had no authority to cash the check is incredible. That with three men looking on, waiting and watching, he intended to steal the money and incur their wrath is contrary to reason. It was unfortunate that Valdes was carrying around money which neither Garcia nor Salot was willing to receive, and more unfortunate that, some weeks later, he gave in to the temptation to spend it, as he told Garcia, for groceries. But from this wrongful act of misappropriation, alone, a deduction could not reasonably be drawn that the check was cashed with the fraudulent intent of stealing the money. The record discloses a conviction of forgery upon evidence of the commission of no more than petty theft.

The judgment and order denying motion for new trial are reversed with instructions to the court to dismiss the action.

PARKER WOOD and VALLÉE, JJ.,
concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Maxine Caroline CHIUMINATTA, Defendant and Appellant.

Cr. 1168.

District Court of Appeal, Fourth District,
California.

Nov. 29, 1957.

Rehearing Granted Dec. 11, 1957.

Prosecution for perjury. The Superior Court of Riverside County, Russell S.

Waite, J., found defendant guilty on one count and granted probation to defendant on certain conditions; and defendant appealed. The District Court of Appeal, Barnard, P. J., held that although under statute an order granting probation shall be deemed to be a final judgment giving a right of appeal, defendant could not appeal from judgment which was never entered.

Appeal dismissed.

1. Criminal Law ⇨1023(10)

While an order granting probation is deemed to be a final judgment within meaning of statute giving right of appeal from final judgment, defendant against whom an order of probation had been entered could not elect not to appeal from that order but from a judgment which had never been entered. West's Ann.Pen.Code, §§ 245, 1103a, 1237.

2. Criminal Law ⇨1114(3), 1144(13)

Where insufficiency of evidence was claimed it was incumbent upon appellant to furnish a record from which necessary facts can be determined, and where there was no evidence in record to support sole contention made, which was insufficiency of evidence, usual presumptions in support of action of trial court applied. West's Ann.Pen.Code, §§ 1103a, 1237.

Hennigan, Ryneal & Nixen, Riverside,
for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth
Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was indicted by the grand jury on three counts of perjury. In the first count she was charged with falsely swearing to a complaint charging her husband with a violation of section 245 of the Penal Code. In the second count she was charged with falsely swearing at the preliminary hearing of the case against her husband that her husband, on January 27, 1957, had hit her about the face and head

while she lay on the floor and had dragged her through the house by her hair. In a third count it was charged that she wilfully committed perjury at the trial of her husband in the Superior Court by falsely testifying that on that occasion her husband did not hit her about the face and head while she was on the floor, and that he had not dragged her through the house by her hair, when she knew this testimony was false and untrue.

The defendant pleaded not guilty to each count and on motion of the district attorney the first count of the indictment was dismissed. At the time set for trial it was stipulated that the cause be tried by the court without a jury, and that it be submitted on the transcript of the proceeding before the grand jury. The court found the defendant not guilty on the second count of the indictment and guilty on the third count. A probation officer's report was ordered. At the time set for pronouncing judgment the court ordered that further proceedings be stayed for the purpose of granting probation, and granted probation to the defendant on the conditions that upon her release she seek psychiatric treatment, that she not leave the state, that she violate no law, and that she report to the probation officer once a month. The defendant, through her counsel, filed notice that she "appeals from the judgment of conviction in this action". A request was also filed that "in addition to the normal reporter's transcript that said transcript include the argument of the district attorney at the conclusion of the case". The record shows no request that the transcript of the proceedings before the grand jury, which was the only evidence produced before the trial court, be included in the record. No transcript of those proceedings has been furnished to this court or made a part of the record before us.

The sole point raised on the appeal is that the evidence was not sufficient to prove a corpus delicti in this case or to sustain the conviction of the defendant. It is argued

that the evidence was not sufficient to meet the requirement of section 1103a of the Penal Code, which provides that perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances; and that there was no direct evidence as to which of the conflicting statements made by the defendant was in fact true.

[1] It has frequently been held that where no final judgment has been entered a purported appeal from the judgment must be dismissed. *People v. Guerrero*, 22 Cal.2d 183, 137 P.2d 21; *People v. Leach*, 90 Cal. App.2d 667, 203 P.2d 544. Section 1237 of the Penal Code giving a right of appeal from a final judgment, was amended in 1951 to provide that an order granting probation shall be deemed to be a final judgment within the meaning of that section. This appears to mean that an order granting probation is now an order from which an appeal may be taken. It does not necessarily follow however that this was intended to mean that the appellant need not appeal from that order but may elect to appeal from a judgment which was never entered. Instead of appealing from that order the defendant here attempted to appeal from a judgment when no such judgment had been entered.

[2] A further consideration is that while we are asked to reverse the conviction because of the insufficiency of the evidence there is no record before us which in any way discloses what evidence was before the trial court. Where insufficiency of the evidence is claimed it is incumbent upon an appellant to furnish a record from which the necessary facts can be determined. There being no evidence in the record before us to support the sole contention made, the usual presumptions in support of the action of the trial court apply.

The purported appeal here taken is dismissed.

GRIFFIN and MUSSELL, JJ., concur.

155 Cal.App.2d 353

Sarah SHAPIRO, Plaintiff and Appellant,**v.****Zeena BOOKSPAN and Saul Bookspan,
Defendants and Respondents.**

Civ. 22148.

District Court of Appeal, Second District,
Division 3, California.

Nov. 20, 1957.

Suit for personal injuries sustained by mother while riding in automobile owned by defendants, daughter and son-in-law, and driven by daughter when automobile collided at intersection with another automobile. From adverse judgment entered in Superior Court, Los Angeles County, Kenneth N. Chantry, J., mother appealed. The District Court of Appeal, Shinn, P. J., held that question whether mother who was being driven to her home after baby-sitting for daughter was passenger or guest, was for jury.

Affirmed.

1. Automobiles ⇨245(24)

In suit for personal injuries sustained by mother while riding in automobile owned by defendants, daughter and son-in-law, and being driven by daughter when automobile collided at intersection with another automobile, question whether mother who was being returned to her home after baby-sitting for daughter was passenger or guest, was for jury. West's Ann.Vehicle Code, § 403.

2. Automobiles ⇨181(1)

A driver is liable to his passenger for injury caused by the driver's ordinary negligence.

3. Automobiles ⇨181(2)

A "passenger" is one who gives compensation for a ride.

See publication Words and Phrases, for other judicial constructions and definitions of "Passenger".

4. Automobiles ⇨181(2)

Where the driver has received a tangible benefit, monetary or otherwise, which is

a motivating influence for furnishing the transportation, "compensation" may be said to have been given, with result that rider is passenger and driver is liable to him for simple negligence.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

5. Automobiles ⇨245(24)

In determining whether rider is passenger or guest, question whether rider conferred a benefit or whether ride was merely of social nature is ordinarily for jury; it is only where admitted facts can give rise to but one reasonable conclusion that question of rider's status becomes one of law.

6. Evidence ⇨590

In suit for personal injuries sustained by mother while riding in automobile owned by defendants, daughter and son-in-law, and driven by daughter when automobile collided at intersection with another automobile, jury was required to take into consideration interests of the parties in the outcome of case and any statements made by either of them in conflict with their testimony in considering weight to be given to testimony of mother and daughter in determining whether mother who was being taken to her home after baby-sitting for daughter was passenger or guest.

7. Automobiles ⇨181(2)

The payment of compensation which furnishes the test between status of guest and passenger is something more than a mere exchange of favors and this is especially true of favors exchanged between members of a family when neither of the persons involved would entertain a thought of compensation.

8. Automobiles ⇨181(2)

It cannot be said as a matter of law that if a mother or daughter visits the home of the other to render assistance in the domestic duties that pertain to the operation of a household, the one who furnishes assistance becomes a paying passenger if it is part of arrangement that she will be driven home in the other's automobile.

9. Trial ⇨29(1)

In suit for personal injuries sustained by mother while riding in automobile owned by defendants, daughter and son-in-law, and driven by daughter when automobile collided at intersection with another automobile, trial judge's comments did not mislead jury into believing that wilful misconduct of daughter was only issue in case where jurors stated that they understood issues as framed by instructions relating specifically to passenger status and liability for simple negligence.

Louis S. Edelberg, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondents.

SHINN, Presiding Justice.

By amended complaint, plaintiff Sarah Shapiro sought to recover \$150,000 damages from her daughter, Zeena Bookspan, and her son-in-law, Saul Bookspan, for personal injuries allegedly sustained as the result of a collision which occurred while plaintiff was riding in an automobile owned by the defendants and which was being driven by Zeena.

The amended complaint stated two causes of action. In the first count it was alleged that plaintiff was a guest in Zeena's automobile and that her injuries were proximately caused by her daughter's wilful misconduct in driving at a reckless rate of speed and in proceeding through a main intersection without stopping, although the intersection was controlled by red flashing danger signals which required Zeena to stop. In the second count it was alleged that plaintiff was a passenger in Zeena's automobile in that she had acted as a baby sitter for Zeena upon Zeena's express promise that she would drive plaintiff back to her own home, and that plaintiff's injuries were proximately caused by Zeena's negligence. The answer admitted that a collision had occurred and that plaintiff had suffered injury, but denied the other material allegations of the amended complaint.

Trial was to a jury which returned a verdict for the defendants. Plaintiff appeals from the judgment entered upon the verdict of the jury.

The following facts were developed in the evidence. The accident occurred shortly after midnight on April 18, 1954, while Zeena was driving her mother home after spending the evening at the Bookspan residence. On the preceding day, Zeena telephoned plaintiff, who was a 68-year old widow, and asked plaintiff to come to her house in West Los Angeles and baby sit for her 7-year old son, Mark, while she and her husband went out for the evening to celebrate the confirmation of a new position Mr. Bookspan had obtained in Toledo, Ohio. Plaintiff agreed to come, but she told Zeena that she was very tired and would do so only on condition that Zeena would drive her home so that she could sleep in her own bed. Zeena consented.

That afternoon Zeena called for her mother and took her to the Bookspan house, where a party in celebration of Mark's seventh birthday was in progress. After the party Zeena took her mother grocery shopping and ran some errands of her own; she occasionally drove her mother to the market because plaintiff did not have a car. After passing by plaintiff's house to drop off the groceries, they returned to Zeena's home. Plaintiff helped Zeena prepare dinner. The Bookspans left around 8 p.m. and returned sometime after eleven; plaintiff stayed with her grandson.

Plaintiff testified that prior to April 17th she had gone to her daughter's house to baby sit on an average of once a month. Zeena stated that her mother sometimes took the bus to get to her house but that she always drove plaintiff to her own home to spend the night, except on one occasion when a heavy rain had caused the streets to flood. Plaintiff stated that she went to her daughter's home on April 17th only for the purpose of baby sitting and that she did so solely in order to save Zeena the expense of hiring a professional baby sitter. Zeena was her only daughter; being a widow, she lived alone. On cross-examination she ad-

mitted that she enjoyed visiting her daughter and grandson.

After the Bookspans returned, Zeena started to drive plaintiff to her residence, which was located on Cattaraugus Street in Culver City, a few blocks south of Venice Boulevard. Plaintiff stated that Zeena was driving south on Cattaraugus at an excessive rate of speed and that she told her daughter several times to slow down. The accident occurred at the intersection of Venice Boulevard and Cattaraugus. At the location of the accident, Venice is divided by an island, some 70 feet wide, which was formerly used as a streetcar right-of-way. There are four westbound lanes on Venice directly north of the island and four eastbound lanes directly south. The island was covered with weeds which, on April 18th, were three feet high and made it difficult for drivers going south on Cattaraugus to see the eastbound traffic on the south side of the island. There was a stop sign at the northern entrance to Venice Boulevard and entrance into the southern half of Venice was controlled by a system of flashing red lights. Traffic proceeding east on Venice was governed by a system of flashing yellow lights.

The testimony as to the events which immediately preceded the collision was conflicting. Plaintiff testified that Zeena did not come to a full stop before entering Venice, but drove across the northern half of the boulevard and continued past the island into the eastbound lanes without stopping for the flashing red lights. The car was struck broadside by an eastbound automobile which was being driven by Alvin Blue. Blue testified that he first saw Zeena's car when he was about 20 or 25 feet from the intersection as it suddenly sped across his path; the cars collided before he could apply his brakes. Charlie Rickels, a pedestrian who was standing on the southwest corner of Venice and Cattaraugus, testified that he saw Zeena's car stop before crossing into the eastbound lanes on Venice and that Blue was ap-

proaching the intersection at a high rate of speed. Zeena stated that she made a complete stop at the entrance to the intersection, then crossed the westbound lanes of Venice Boulevard and proceeded past the island without coming to a full stop before entering the south half of Venice. The weeds obstructed her vision of traffic going east on Venice. As she started across the southern half of the boulevard she saw the lights of Blue's car and accelerated, so as to cross the street ahead of it. Plaintiff was severely injured in the accident and was confined to the hospital for 101 days.

Plaintiff urges two grounds for reversal of the judgment: (1) The court erred in refusing to instruct the jury that plaintiff was a passenger as a matter of law and that Zeena owed to her mother the duty of exercising ordinary care in the operation of the automobile; (2) The jury was improperly reinstructed as to the issues involved in the case. It is not contended that the evidence was insufficient to support the verdict.

[1] The first contention to be considered is that the court erred in refusing to give two instructions proposed by plaintiff which would have told the jury that plaintiff was a passenger in her daughter's car and that at the time of the collision Zeena owed her mother the duty to exercise ordinary care. Plaintiff argues that under the undisputed evidence the ride home was in payment for services she rendered to Zeena as a baby sitter and that her services constituted compensation for the ride; it is her position that as a matter of law the guest statute was inapplicable. Zeena argues, on the other hand, that the evidence was susceptible of two opposing and equally reasonable interpretations or inferences and that the question of plaintiff's status was properly left to the jury. We agree. In our opinion, the court did not err in refusing to instruct the jury that plaintiff was a passenger as a matter of law.

[2-5] While a driver is liable to his passenger for injury caused by the driver's ordinary negligence, the guest statute limits

the liability of a driver for injury to his guest to cases where the injury was the result of the former's intoxication or wilful misconduct. Veh.Code § 403. A passenger is one who gives compensation for a ride. *Follansbee v. Benzenberg*, 122 Cal.App.2d 466, 471, 265 P.2d 183, 42 A.L.R.2d 832. Where the driver has received a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, compensation may be said to have been given, with the result that the rider is a passenger and the driver is liable to him for simple negligence. *Martinez v. Southern Pacific Co.*, 45 Cal.2d 244, 288 P.2d 868. But whether the rider conferred a benefit or whether the ride was merely of a social nature is ordinarily a question of fact for the jury. *Gosselin v. Hawkins*, 95 Cal.App.2d 857, 861, 214 P.2d 110; *Follansbee v. Benzenberg*, supra, 122 Cal. App.2d 466, 471, 265 P.2d 183, and cases cited. It is only where the admitted facts can give rise to but one reasonable conclusion that the question of the rider's status becomes one of law. *Winn v. Ferguson*, 132 Cal.App.2d 539, 543, 282 P.2d 515, and cases cited.

[6] Since plaintiff was suing her daughter for large damages their testimony invited close scrutiny. Their credibility was of the utmost importance. It was a fair inference that the daughter was not at all averse to having a judgment rendered against her. Her testimony as to the special arrangements that she was to drive her mother home was elicited only by means of bold leading questions on re-direct examination. She testified that she did not bring her car to a full stop as she entered the south half of Venice. On cross-examination she readily admitted that she had made a report to the police in which she stated that she had brought her car to a stop at that point. She also admitted that she had on several occasions made the same statement to the attorney who was representing her at the trial. In considering the weight to be given to the testimony of the mother and daughter the jury was required to take

into consideration their interest in the outcome of the case and any statements made by either of them in conflict with their testimony. Essential facts were whether the daughter was guilty of negligence and whether there was a special agreement that the mother would take care of the child only if she was given a ride home. In our opinion the testimony mentioned was not such as to require the jury to give it full faith and credit. The case differs from those in which the facts are admitted or established beyond question.

[7,8] Even if the jury believed that Zeena had made a specific promise to drive her mother home it was not a necessary inference from that fact that the mother was a passenger. The evidence would have warranted the jury in concluding that Mrs. Shapiro was a guest in her daughter's automobile. There was no agreement for compensation passing between the mother and daughter. The mother was acting as baby sitter for the daughter's child as a matter of convenience and accommodation, just at the daughter occasionally drove the mother about in order that she might go shopping. A reasonable view of the situation would be that the mother's caring for the child was gratuitous in every respect, and motivated by the love and affection she had for her daughter and the pleasure she derived from the child's company. Such family amenities are rendered without expectation of compensation and a jury could well have concluded that neither mother nor daughter expected, nor would have been willing to receive, any compensation from the other. It certainly was not a necessary conclusion that the mother was taking care of the child because of a promise of a ride home in the daughter's car or that the ride was any form of compensation. That could have been deemed a mere matter of accommodation, prompted by the same motives that induced the mother to look after the child. The payment of compensation which furnishes the test between the status of guest and passenger is something more than a mere exchange of favors, and this would be especially true of favors exchanged be-

tween members of a family, when neither of the persons involved would entertain a thought of compensation. We are concerned only with the contention that plaintiff's status as a passenger was established as a matter of law. Certainly it cannot be said as a matter of law, and in all cases, that if a mother or daughter visits the home of the other to render assistance in the domestic duties that pertain to the operation of a household the one who furnishes the assistance becomes a paying passenger if it is a part of the arrangement that she will be driven home in the other's car. The circumstances in which one person is riding in the car of another are infinite. When the status is established beyond reasonable dispute by the evidence and the reasonable inferences the question is one of law. Otherwise it becomes a question of fact. *Duff v. Schaefer Ambulance Service, Inc.*, 132 Cal.App.2d 655, 283 P.2d 91. We take it to be a common practice to provide transportation for paid baby sitters. We would call attention to the fact that our conclusions in the present case are applicable to the precise factual situation we have described, and should not be considered as applicable to baby sitters in general. Upon the evidence we have stated it did not appear as a matter of law that plaintiff was her daughter's passenger, and it was not error to refuse the requested instructions.

After the court had ruled that plaintiff's status as a guest or a passenger was a question of fact for the jury, her counsel submitted an instruction which required the jury to determine whether plaintiff was a passenger or a guest, and fully stated the rules pertaining to liability, which would apply when it was found that she occupied one status or the other. The instruction was a proper one, and together with the other instructions given by the court, it was sufficient as a statement of the applicable law. Defendants make the point that in requesting the instruction of which she now complains, plaintiff waived her right to assign error in the refusal of the instructions she had proposed. Plaintiff contends

that she did not thereby waive her right to complain of those instructions for the reason that when a party is unable to convince the court to instruct the jury according to his conception of the law, the fact that he requests instructions in accordance with the court's ruling does not preclude him from assigning error. However, in view of the conclusion we have reached, it is unnecessary to decide this question.

The other contention to be considered is that the court answered a question by one of the jurors by a statement which improperly limited the issues.

[9] Shortly after the case was submitted, the jurors sent word that they wished to have re-read to them the court's instructions on wilful misconduct. The court re-read the instructions which counsel asked to have read. These included instructions on the passenger and the guest status and the law pertaining to the same, and instructions on wilful misconduct, which were the ones the jurors desired to have re-read. Thereupon the following occurred:

"Juror No. 1: I want to ask you something, your Honor. Can the Plaintiff collect if the Defendant is found guilty of negligence? If she's found guilty of negligence, can she get anything for her pains or aches?"

"The Court: Well, I don't think I can answer that question. I think you're going to have to decide that. Don't you understand the issues of the case with respect to the passenger and the guest?"

"Juror No. 1: That's right."

"Juror No. 9: Your Honor, we're to decide whether she was guilty of wilful negligence? Is that the thing?"

"The Court: What was the question?"

"Juror No. 9: Are we to decide whether the Defendant was guilty of wilful negligence? Is that what the case is all about, if it was wilful negligence?"

"The Court: Wilful misconduct. I'd like to be able to talk to you ladies and gentlemen of the jury, but the law does not permit it unless I had elected to comment to

the jury, which I did not. Is that all right with counsel now?

"Mr. Breslin: I think so, your Honor.

"The Court: All right."

The jury then retired for further deliberation and returned within an hour with its verdict.

It is earnestly argued in plaintiff's briefs that the court's answer to the question of Juror No. 9 was misleading and prejudicial, that it conflicted with instructions previously given by the court and that it had the effect of withdrawing from the jury the issue whether plaintiff was a passenger or a guest. We think not.

The language of the court, when considered in its context, cannot be deemed to have had the effect of telling the jury that the only issue in the case was whether Zeena was guilty of wilful misconduct. The court asked the jurors whether they understood the issues as framed by the instructions that were re-read and received an affirmative reply. It appears that the language complained of was pertinent to the request for a re-reading of the instructions on wilful misconduct. In answering the juror's question the court was not required to repeat the instructions on other issues that had just been read. We cannot believe that the jurors were misled into thinking that they were to disregard the detailed instructions which related specifically to the passenger status and liability for simple negligence. Further, when the court asked "Is that all right with counsel now?" plaintiff's attorney did not request the court to correct what is now urged to have been a prejudicially erroneous statement. We may assume that it was not considered erroneous at the time. There is no substance to the assignment of error.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.

155 Cal.App.2d 532

**In the Matter of the ESTATE of Joseph
RUPLEY, Deceased.**

William A. RUPLEY, Appellant,

v.

Elmer O. RUPLEY, Respondent.

Civ. 9240.

District Court of Appeal, Third District,
California.

Nov. 26, 1957.

Proceeding on a petition to determine heirship. The Superior Court, El Dorado County, Robert E. Roberts, J., dismissed the petition, and the petitioner appealed. The District Court of Appeal, Warne, J. pro tem., held that the trial court should have proceeded to determine the issues presented even though the petition may show on its face that the petitioner is not a person entitled to distribution of any part of the estate.

Order reversed.

Descent and Distribution ⇐71(7)

Where petition to determine heirship and answer of the administrator was sufficient to invoke the jurisdiction of the court, the court should have proceeded to determine the issues presented and enter a decree even though the petitioner's petition may show on its face that he is not an heir of the decedent or person entitled to distribution of any part of the estate. West's Ann.Prob.Code, § 1080.

H. D. Jerrett, Sacramento, for appellant.
Busick & Busick, Sacramento, for respondent.

WARNE, Justice pro tem.

This is an appeal from an order dismissing a petition to determine heirship filed pursuant to the provisions of Section 1080 of the Probate Code. The trial court dismissed the petition on the ground that it was

insufficient to invoke the jurisdiction of the court in an heirship proceeding.

Section 1080 of the Probate Code provides:

"When four months have elapsed after the first publication of notice to creditors, and a petition for final distribution has not been filed, the executor or administrator, or any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim or reason and praying that the court determine who are entitled to distribution of the estate. * * *

Appellant's petition shows that the decedent, Joseph Rupley, died testate and that his will is in the process of probate; that Elmer O. Rupley was, at the time of filing of the petition, the administrator of the estate of said decedent; that decedent made no bequest to appellant; that at the time of the death of decedent, Charles Joseph Rupley, a son of decedent and father of petitioner, was alive; and that Charles Joseph Rupley is now deceased. Appellant further alleged in his petition that he, as a grandson of the decedent, is entitled to $\frac{1}{2}$ s share of his estate.

Elmer O. Rupley, administrator of the estate of said decedent, filed an answer to said petition wherein he denied that petitioner is an heir, devisee or legatee of decedent and alleged that petitioner was not entitled to have distributed to him any part of said estate. He also alleged his own right as an heir to distribution of a share in said estate and set out the proper distribution of the whole of the distributable property of said estate as he contended it should be, and prayed for a decree accordingly. No other appearance was made. The petition of appellant and the answer of Elmer O. Rupley were sufficient to invoke the jurisdiction of the trial court under the provisions of Section 1080 of the Probate Code, and the trial court should have proceeded to determine the issues presented and entered a decree accordingly

even though appellant's petition may show on its face that he is not an heir of decedent or a person entitled to distribution of any part of said estate. By failing to do so and dismissing the petition, the trial court committed prejudicial error.

The order dismissing the petition is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



155 Cal.App.2d 618

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles E. DAVIS, Defendant and
Appellant.

Cr. 5943.

District Court of Appeal, Second District,
Division 3, California.

Nov. 27, 1937.

Defendant was convicted of attempted extortion. The Superior Court, Los Angeles County, Maurice C. Sparling, J., entered judgment, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Parker Wood, J., held that evidence disclosed that defendant had guilty knowledge and intent when he delivered letter which demanded money from branch bank assistant manager under pain of death.

Judgment and order affirmed.

1. Threats ☞7

In prosecution for attempted extortion, evidence disclosed that defendant had guilty knowledge and intent when he delivered letter which demanded money from branch bank assistant manager under pain of death.

2. Criminal Law ☞317

Where defendant fails to testify and to explain the evidence presented against

him, judge trying case without jury may consider such failure as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are more probable.

Thomas Higgins, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Morris Schachter, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of attempted extortion. Trial by jury was waived. Defendant was adjudged guilty. He appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the evidence was insufficient to support the judgment.

Mr. John Schneider testified that he is assistant manager of a branch bank in Los Angeles; on his desk at the bank there was a name plate which could be seen by customers in the bank; on October 29, 1956, at 11 a. m., he was in the bank and at that time the defendant called him by name, handed a sealed envelope to him, and said that someone had asked him (defendant) to deliver the envelope; then he (witness) turned around to go to his desk to open the envelope and as he looked up the defendant was gone; less than a minute elapsed from the time the witness turned to open the envelope until he noticed that defendant was gone; he (witness) read the letter that was in the envelope.

The letter stated in part: "Mr. Schneider * * * Read this very carefully. It is a matter of life or death to you. * * * You will have *Twenty Thousand dollars* ready for us by your lunch time. * * * When your lunch hr. arrives you will bring the money in a package or Briefcase to Coffee Dan's [restaurant] across the street. * * * A boy will pick up the money there. * * * These directions must be followed to the letter. Or—you will die."

Mr. Schneider testified further that after he read the letter he showed it to Police Officer Hancock and they discussed a plan about meeting someone; then the witness placed four one-dollar bills in an envelope and put the envelope and bills in his lunch sack; before he put the bills in the sack he recorded the serial numbers of the bills on a slip of paper; about 1 p. m., he left the bank and went across the street to Coffee Dan's restaurant and sat at the counter and put the lunch sack on the counter beside him; before he entered the restaurant he saw one Weber who was sitting on a bus bench in front of the restaurant; after the witness was at the counter, Weber went to him and said, "Mr. Schneider, I understand I have a package to pick up from you"; the witness replied, "There it was"; Weber took the package and walked away; as Weber left the restaurant Officer Munkres arrested him.

Officer Munkres testified that on October 29, 1956, about 12:45 p. m., he saw Weber who was sitting on a bus bench in front of Coffee Dan's; about 1 p. m., of that day he saw Mr. Schneider enter the restaurant and sit at the counter; then he saw Weber enter the restaurant and go to the men's room; about four minutes later Weber went to Mr. Schneider and apparently had a conversation with him; then Weber reached over and picked up the paper bag; the witness arrested Weber.

Officer Munkres also testified that on November 29, 1956, about 11:30 a. m., he arrested defendant in a liquor store; at the police station the witness told defendant that he was under arrest for extortion, that defendant and Weber had planned a \$20,000 extortion from the Security-First National Bank in Hollywood, that Weber had written a note and that defendant had delivered it to Mr. Schneider in the bank; then the witness asked defendant if he had ever been in that bank located at the corner of Hollywood Boulevard and Highland Avenue (the bank where the letter was delivered); defendant replied, "No"; the witness asked defendant if he was acquainted with Stanley Weber; he replied "No";

the witness asked defendant if he had gone into a hot dog stand next to the Hartford Theatre with Weber; he replied that he had not been there and he did not know a person by the name of Weber; the witness asked defendant about the note, and about the delivery of the note, demanding \$20,000 from the bank; he replied that he knew nothing about it and he did not deliver it; on December 3, while the witness, the defendant, and Officer Hancock were on the way to the arraignment, defendant said that on October 29 he had gone into the bank and had delivered an envelope to Mr. Schneider for a friend by the name of Weber, and that he had not received any money or anything of value for delivering the note; the witness asked defendant if he knew the contents of the note he delivered; he replied that he did not know the contents.

Stanley Weber was called as a witness by the People. A deputy public defender was present as counsel for Weber, while Weber was a witness. Weber testified that he attempted to extort \$20,000 from Mr. Schneider on October 29, 1956; he wrote the letter to Mr. Schneider; he did not deliver the letter to Mr. Schneider; he was sitting on a bench "across from Coffee Dan's" about 1 p. m. on October 29; he saw Mr. Schneider at the bank on October 29; he knows the defendant; he saw the defendant on the morning of October 29 in the Hollywood area. When the questions which preceded the above answers were asked, Weber said that he asserted his privilege against self-incrimination and on that ground refused to answer. The objections to those questions were overruled and the witness was directed to answer. (Prior to those rulings, the deputy district attorney asked the court to take judicial notice of the fact that in case No. 186569 Weber had pleaded guilty to the charge of attempted extortion, the same charge that is against defendant Davis.)

Defendant did not testify or call any witness in his behalf.

[1] Appellant's argument, regarding insufficiency of the evidence, is that there was

no showing that he knew the contents of the letter or that he had the intent to commit the crime; that all the acts of defendant, "with the exception of his first conversation with the police officer later supplanted with a second conversation," could be the acts of an innocent person, and the evidence being susceptible of two reasonable interpretations one of which points to guilt and the other to innocence, the court should have adopted the interpretation that pointed to defendant's innocence. Appellant also argues that since the prosecution introduced statements of defendant to the effect that defendant's acts were harmless, the prosecution is bound by those statements in the absence of proof to the contrary. The statements so referred to (made in the second conversation, on the way to the arraignment) were that defendant had delivered the envelope for a friend, and defendant did not receive any money or thing of value for delivering the envelope, and he did not know the contents of the note. With reference to the prosecution being bound by said statements of defendant, it appears there was evidence to the contrary of those statements. In the first conversation between the officers and defendant, the defendant said he had never been in the bank, he did not know Weber, he did not know anything about the note, and he did not deliver the note.

In *People v. Turner*, 86 Cal.App.2d 791, 195 P.2d 809, the defendant Nickson told the officers that he was not present at the shooting and was not aware of the shooting until the next day when he returned to get his lunch pail. At the trial therein the defendant testified that he was present and he fired the shots in self-defense. In that case it was said 86 Cal.App.2d at page 801, 195 P.2d at page 815: "Guilty knowledge, as well as intent to violate the law, may be shown by the facts and circumstances in the case, including the conduct of an accused, and any false or misleading statements he may make to the arresting officers or others with relation to material facts, for the purpose of misleading, or warding off suspicion."

In *People v. Roche*, 49 Cal.App.2d 459, at page 462, 121 P.2d 865, at page 866 it was said: "It was in evidence that appellant at first denied to the officers but later admitted that she was driving the car that was involved in the accident. Her contradictory statements were admissible as tending in some degree to prove a consciousness of guilt."

In *People v. Donnolly*, 143 Cal. 394, 77 P. 177, wherein the defendant was accused of murder, a man had been killed pursuant to prearrangement among several persons. The man had been riding on a streetcar and when he alighted some persons, who had been on the streetcar, followed him and killed him. The defendant Donnolly told the officers, at the time of the arrest, that he was not on the streetcar; but later, at the jail, he said he was on the streetcar. The court therein said 143 Cal. at page 397, 77 P. at page 178: "If the defendant in this case had been simply a passenger on the car, innocent of any intended crime, he certainly would have had no reason for denying that he had gone out as he did; but, when confronted by Buckley and Moran, the proved conspirators, he was driven to the necessity of admitting the truth of the statement of Buckley that he had accompanied them out there. From these circumstances the jury had a right to infer that it was the sense of his own guilt that compelled him to deny that he went out with the other parties, and that he was one of the party that committed the crime."

In the present case the trial judge could reasonably have inferred from defendant's contradictory statements that he delivered the letter with guilty knowledge and with intent to commit the crime.

[2] Furthermore, defendant failed to testify and explain the evidence presented against him. Under such circumstances, the trial judge might consider such failure "as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." *People v.*

Adamson, 27 Cal.2d 478, 490-491, 165 P.2d 3.

The evidence was sufficient to support the judgment.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



155 Cal.App.2d 669

Fred R. STEPHENSON and Edna M. Stephenson, Plaintiffs and Respondents,

v.

J. Dudley LAWN et al., Defendants,

J. Dudley Lawn and Frances M. Lawn, Defendants and Appellants.

Civ. 9179.

District Court of Appeal, Third District,
California.

Dec. 2, 1957.

Rehearing Denied Dec. 30, 1957.

Hearing Denied Jan. 28, 1958.

Action against defendants as endorser of a promissory note secured by a deed of trust. Judgment for plaintiffs in the Superior Court, Merced County, R. R. Sischo, J., and the defendants appealed. The District Court of Appeal, Peek, J., held that where the property mortgaged was sold under a deed of trust that the original makers of the note were not served as defendants would not relieve endorser from liability.

Judgment affirmed.

1. Bills and Notes ☞48, 243, 281

The promise of a maker of a note and the promise of the endorser are different things; one is primary and the other is secondary; and one is absolute, and the other turns upon conditions.

2. Bills and Notes ☞256, 301

In action against endorser of a note secured by deed of trust where property

was sold under power of sale contained in a deed of trust and original makers of the note were not served, the endorsers were not relieved of liability.

3. Bills and Notes ⇐442

Mortgages ⇐375

Where suit was brought against defendants on their separate liability as endorsers of a note secured by a deed of trust, liability of the endorsers was a separate and distinct obligation, and one which was not a deficiency judgment, within the statute respecting enforcement of deficiency judgment. West's Ann.Code Civ.Proc. §§ 580b, 580d.

Gilbert Moody, Turlock, for appellants.

Winton & Edlefsen, Merced, for respondents.

PEEK, Justice.

Defendants appeal from a judgment in favor of plaintiffs in an action brought against defendants as endorsers of a promissory note secured by a second deed of trust.

The evidence, which is without conflict, shows that the defendants sold certain real property to Donald C. and Wanda I. Lindell, and on the same date, and as part of the same transaction, the buyers gave defendants a promissory note secured by a second deed of trust. Thereafter, defendants transferred the note to plaintiffs for value by a special endorsement as follows: "Pay to the Order of Fred R. Stephenson and Edna M. Stephenson as joint tenants," and assigned the second deed of trust to plaintiffs. Subsequently the property was sold under the power of sale contained in the first deed of trust, and this action followed. The original makers of the note, the Lindells, were not served and judgment was against the defendants Lawn alone.

[1] It has long been the rule that: "The promise of a maker of a note is one thing, and the promise of an endorser is another. One is primary and the other is secondary; one is absolute, the other turns upon con-

ditions; * * *." Vandewater v. McRae, 27 Cal. 596.

[2] In the case of Kinsel v. Ballou, 151 Cal. 754, 91 P. 620, it was argued by the defendant-appellant that by reason of the existence of the mortgage, the liability of the makers was not absolute but was contingent upon a failure to realize from foreclosure of the mortgage on the property an amount sufficient to pay the note, and that the endorsement of the defendant imposed upon him no greater liability than that of the original mortgagors and that so long as no sale of the mortgaged property had taken place, the defendant's obligation had not become fixed. In answer to such contentions the court held: "It is no doubt true that, so far as the mortgagors themselves were concerned, an action to recover the amount of the note could not have been maintained apart from a foreclosure of the mortgage. As to them the mortgaged property constituted a primary fund for the discharge of the debt, and no personal judgment could have been entered against them, unless after foreclosure the deficiency had appeared. [Citations.] But the defendant was not the mortgagor. His contract of indorsement was collateral to the original obligation of the mortgagors, and was not secured by the mortgage." 151 Cal. at page 761, 91 P. at page 622.

The Ballou case is authority for the further rule that " * * * the creditor loses no rights against the indorser, whose liability has become fixed, by mere failure to enforce his lien against the property mortgaged for security for the debt." 151 Cal. 761, 91 P. 623.

[3] The defendants' final contention, that this action is in the nature of a deficiency judgment and hence is controlled by subsections b and d of section 580 of the Code of Civil Procedure [§§ 580b, 580d], is likewise without merit. As previously noted this is not an action against the original maker or the party primarily liable. It is a suit against the defendants Lawn on their separate liability as endorsers and hence was a separate and a distinct obligation and

one which can in no way be construed as a deficiency judgment. As the court noted in *Hatch v. Security-First Nat. Bank*, 19 Cal.2d 254, 120 P.2d 869, the provisions of the Code of Civil Procedure above noted have to do solely with actions for recovery of deficiency judgments on the principal obligation after sale under trust deed as distinguished from an endorser's obligation. Thus, the only person coming within the protective provisions of those sections is the principal debtor.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J.,
concur.

Hearing denied; SCHAUER, J., dissenting.



155 Cal.App.2d 480

**John W. GOLDEN, doing business as Equip-
ment Service Company, Plaintiff and
Respondent,**
v.

**STANSBURY, Incorporated, Defendant and
Appellant.**
Civ. 5704.

District Court of Appeal, Fourth District,
California.
Nov. 22, 1957.

Action for work performed. The Justice Court of Barstow Judicial Township, San Bernardino County, entered judgment for plaintiff and defendant filed notice of appeal. The Superior Court, San Bernardino County, Jesse W. Curtis, Jr., J., granted dismissal of appeal, and defendant appealed. The District Court of Appeal, Griffin, J., held that it did not have appellate jurisdiction to review decision of Superior Court on appeal from justice court judgment, and that final determination of appeal was in Superior Court.

Appeal dismissed.

1. Appeal and Error ⇐23

Although neither party raised question of jurisdiction of District Court of Appeal to review decision, court could not assume jurisdiction unless authorized by Constitution. West's Ann.Const. art. 6, § 4b.

2. Appeal and Error ⇐32

District Court of Appeal did not have appellate jurisdiction to review decision of Superior Court on an appeal from justice court judgment, and final determination of appeal was in Superior Court. West's Ann.Code Civ.Proc. §§ 974, 980c, 981; West's Ann.Const. art. 6, §§ 4b, 5.

3. Appeal and Error ⇐802

Ordinarily, it is not function of reviewing court to direct procedure of a litigant.

4. Appeal and Error ⇐4

If an order is not appealable, a reviewing court has no jurisdiction to hear appeal, although same question may be susceptible of determination by issuance of an appropriate writ.

Ball, Hunt & Hart, Long Beach by Donald B. Caffray, Long Beach, for appellant.

Mahlum & DeBord, Barstow by T. L. DeBord, Barstow, for respondent.

GRIFFIN, Justice.

On September 27, 1956, a money judgment was rendered, on account of work performed by plaintiff for defendant, in the Justice Court of Barstow Judicial Township, San Bernardino County, in favor of plaintiff. On October 11, 1956, a notice of appeal was filed by defendant in said Justice Court and a copy was served on plaintiff through his attorneys of record. No notice of rendition of judgment was served or filed. On November 5, 1956, counsel for defendant received a letter from the clerk of said Justice Court reading in part:

"I have all the papers pertaining to the case of John W. Golden vs. Stansbury, Incorporated, ready to send to the County Clerk on your Appeal.

"At this time I am waiting for the \$9.00 dollar filing fee that has to go with the papers, if you will send a cashier's check made out to the Clerk of the Superior Court, I will send it with the balance of the papers and not send it thru the trust fund."

Pursuant to said letter, counsel for defendant, on November 6, 1956, sent to the clerk of said Justice Court a cashier's check for \$9, payable to the clerk of the Superior Court of San Bernardino County. A letter dated November 9, 1956, was received by counsel for defendant from plaintiff's counsel, reciting:

"I have been advised that you have recently paid the Superior Court filing fee in the appeal of the above cited decision.

"I have advised the Clerk of the Justice Court that the payment of this fee is not timely and that the appeal cannot proceed * * *.

"If you still wish to have this appeal made to the Superior Court, please advise the Clerk of the Justice Court who, on my request, is holding the matter in suspense."

Thereafter, counsel for defendant telephoned the clerk of the Justice Court and ordered the papers sent forward to the clerk of the Superior Court. She then forwarded the necessary papers and cashier's check made payable to the Clerk of the Superior Court. On November 16, the clerk of the Justice Court sent counsel for defendant a letter indicating that the County Auditor's office advised her the Superior Court could not accept a filing fee directly from counsel's office, and it must go through the Justice Court office, into a trust fund, and then be transferred to the Superior Court. The clerk of the Justice Court admitted she was not acquainted with the proper procedure in this respect. The clerk of the Superior Court held the papers pending this transaction. Counsel for appellant then forwarded a money order for \$10 covering necessary costs payable to the clerk of the Justice

Court. The clerk of the Justice Court then forwarded the necessary fees to the clerk of the Superior Court. When they reached said Superior Court clerk it was more than 30 days after the filing of the notice of appeal. Thereafter, plaintiff filed in the Superior Court a notice of motion to dismiss the appeal on the ground the payment of the fee to the Superior Court was not timely. On January 21, 1957, the judge of the Superior Court held that the error of the Justice Court Clerk in demanding the wrong amount and in designating the wrong payee was an error not committed in the performance of a ministerial act and could not excuse defendant in perfecting its appeal by payment of the filing fee to the Superior Court within the time required by law. He relied upon sections 974 and 981 of the Code of Civil Procedure; *Simmons v. Superior Court*, 30 Cal.App. 252, 254, 157 P. 817; *Johnson v. Superior Court*, 28 Cal.App. 618, 153 P. 404; *Bray v. Redman*, 6 Cal. 287; and *Gunn v. Superior Court*, 73 Cal. App.2d 564, 567, 166 P.2d 906.

It is defendant's contention that the appeal was perfected when the clerk of the Justice Court received the \$9 cashier's check payable to the Clerk of the Superior Court, on a day well within the 30-day limitation; that the Justice Court waived the additional transfer fee of \$1 by failure to demand it; and that the appeal was perfected so as to vest jurisdiction in the Superior Court, and that such jurisdiction could not be lost by mere failure of the Justice Court Clerk to transmit the filing fees to the Clerk of the Superior Court, citing *Pacific States Corporation v. Superior Court*, 72 Cal.App. 241, 244, 236 P. 938; and *Nay v. Superior Court*, 72 Cal.App. 443, 237 P. 566.

[1,2] Although neither counsel raised the question of the jurisdiction of this court to review a decision of the Superior Court on an appeal from a Justice Court judgment, we cannot rightfully assume jurisdiction unless authorized by the Constitution of this State (Art. VI, sec. 4b; *Unemployment Reserves Comm. v. St. Francis Homes Ass'n*, 58 Cal.App.2d 271, 137 P.2d 64.)

This section of the Constitution provides that the appellate jurisdiction of this court is limited to certain cases including cases at law where the Superior courts are given *original jurisdiction*. It is apparent that the case out of which this order arose originated in the Justice Court, and the ruling here attempted to be reviewed arose out of that proceeding. The final determination of such an appeal is in the Superior Court. Article VI, section 5, California Constitution; Section 980c, Code of Civil Procedure; Unemployment Reserve Comm. v. St. Francis Homes Ass'n, *supra*; Portnoy v. Superior Court, 20 Cal.2d 375, 125 P.2d 487; Thomasian v. Superior Court, 122 Cal.App.2d 322, 265 P.2d 165.

Directly in point is *McMurtry v. Lucero*, 122 Cal.App.2d 636, 265 P.2d 164, involving an order of dismissal of an appeal from the Justice Court by the Superior Court for a similar reason. The court quoted from *Raisch v. Sausalito Land & Ferry Co.*, 131 Cal. 215, 63 P. 346, which said:

"The appellate jurisdiction of this court over the judgments of the superior court is limited to the cases in which that court is entitled to exercise original jurisdiction, and does not extend to a review of its action in which it exercises only an appellate jurisdiction." (See also 3 Cal.Jur.2d p. 451, sec. 38.)

[3,4] Ordinarily, it is not the function of a reviewing court to direct the procedure or policy of a litigant. If an order is not appealable, a reviewing court has no jurisdiction to hear the appeal, although the same question may be susceptible of determination by the issuance of an appropriate writ. *Unemployment Reserves Comm. v. St. Francis Homes Ass'n*, 58 Cal.App.2d 271, 137 P.2d 64. The attempted appeal from the judgment and order must be dismissed.

Appeal dismissed.

BARNARD, P. J., and MUSSELL, J., concur.

155 Cal.App.2d 486

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Ronald Otto WITZEL, Defendant and
Appellant.

Cr. 6018.

District Court of Appeal, Second District,
Division 2, California.

Nov. 25, 1957.

Defendant was convicted of certain offenses and he appealed from judgment of Superior Court, Los Angeles County, and from an order denying motion for new trial, Beach Vasey, J. The District Court of Appeal, Ashburn, J., held, *inter alia*, that where one count of information charged defendant with manslaughter by automobile, and second count charged violation of section 501 of Vehicle Code in driving while under influence of intoxicating liquor causing injury to another, and jury found defendant guilty of manslaughter and of violating section 502 of Vehicle Code, a lesser but necessarily included offense charged in second count, defendant was not entitled to reversal on theory that conviction of violation of section 502 was an acquittal of charge laid under section 501, and that acquittal of 501 charge was inconsistent with conviction of manslaughter and that inconsistent verdicts were void.

Affirmed.

I. Criminal Law Ⓒ200(1), 1209

Where one count of information charged defendant with manslaughter by automobile, and second count charged violation of section 501 of Vehicle Code in driving automobile under influence of intoxicating liquor causing injury to another, and jury found defendant guilty of manslaughter and of violating section 502 of Vehicle Code, and court granted probation on each count, contention on appeal that conviction of violation of section 502 was an acquittal of charge laid under section 501, and that acquittal of section 501 was in-

consistent with conviction of manslaughter and that inconsistent verdicts were void did not present any problem of double jeopardy or of double punishment. West's Ann.Pen.Code, §§ 192, 654; West's Ann. Vehicle Code, §§ 501, 502.

2. Criminal Law ⚡878(3)

While verdicts are inconsistent as a matter of law when one verdict is a finding which, if true, of necessity makes the other verdict impossible, the rule has no application to a case in which but one crime has been committed but offense is charged in two or more counts under authority of section 954 of Penal Code, and where offense is thus pleaded in alternative a verdict of acquittal under one count is merely a finding that all of elements of corpus delicti of offense therein charged have not been proved and such verdict is not a finding as to any of elements of corpus delicti of offense charged in another count, of which the jury by verdict has found defendant guilty. West's Ann.Pen.Code, § 954.

3. Criminal Law ⚡878(4)

Where one count charged defendant with manslaughter by automobile, and second count charged violation of section 501 of Vehicle Code in driving while under influence of intoxicating liquor causing injury to another, and jury found defendant guilty of manslaughter and of violating section 502 of Vehicle Code, a lesser but necessarily included offense charged in second count, defendant was not entitled to reversal on theory that conviction of violation of section 502 was an acquittal of charge laid under section 501, and that acquittal of

501 charge was inconsistent with conviction of manslaughter and that inconsistent verdicts were void. West's Ann.Pen.Code, § 192; West's Ann.Vehicle Code, §§ 501, 502.

4. Criminal Law ⚡878(4)

The question of identity of offenses charged in same information or indictment is no longer determinative of propriety of verdicts, though actually inconsistent in view of statutory provision that verdicts may be sustained even if they are inconsistent in fact. West's Ann.Pen.Code, § 954.

Albert C. S. Ramsey and Milton Emlein, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Dep. Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant was tried upon an information containing two counts. The first alleged manslaughter (Pen.Code, § 192)¹ in that defendant did, "without malice, while engaged in the driving of a vehicle in the commission of an unlawful act not amounting to a felony, with gross negligence, and while in the commission of a lawful act which might produce death, in an unlawful manner, with gross negligence, kill Roy B. Sumner." The second charged violation of § 501, Vehicle Code,² that defendant "did willfully, unlawfully and feloniously drive a certain vehicle, to wit, an automobile, while under the influence of intoxicating liquor, and in an unlawful manner, proximately causing bodily injury to

1. Pen.Code § 192.

"Manslaughter is the unlawful killing of a human being without malice. * * *

"3. In the driving of a vehicle—

"(a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

"(b) In the commission of an unlawful act, not amounting to felony, without

gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence."

2. Veh.Code § 501. "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony * * *."

Roy B. Sumner." A jury found defendant "guilty of manslaughter as charged in count one of the information without gross negligence," and "guilty of violation of section 502 Vehicle Code,³ a misdemeanor, a lesser but necessarily included offense charged in count two of the information." The court suspended proceedings upon each count and granted probation on each. Defendant appeals from the "judgment of conviction" (pursuant to Pen.Code, § 1237, subd. 1) and from an order denying his motion for new trial.

His sole contention on appeal is that a conviction of violation of § 502, Vehicle Code, is an acquittal of the charge laid under § 501; that acquittal of the 501 charge is inconsistent with a conviction of manslaughter; that inconsistent verdicts are void and therefore must be reversed.

[1] This argument does not present any problem of double jeopardy (see *People v. Chessman*, 38 Cal.2d 166, 193, 238 P.2d 1001; *People v. Severino*, 122 Cal. App.2d 172, 184, 164 P.2d 656), or of double punishment for a single act contrary to Penal Code, § 654 (see *People v. Stangler*, 18 Cal.2d 688, 696, 117 P.2d 321), for defendant was tried in a single hearing upon an information containing two separate counts and has not been sentenced.

Section 954, Penal Code, was amended in 1927 by adding the sentence: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." This probably was prompted by the decision in *People v. Andursky*, 75 Cal.App. 16, 241 P. 591, upon which appellant relies, and other similar cases theretofore decided. See *People v. Amick*, 20 Cal. 2d 247, 250, 125 P.2d 25, 26. It was held in the *Andursky* case that inconsistent verdicts will not support a judgment of conviction. That ruling was shown in *People v. Amick*, supra, to be no longer the law. In the last mentioned case defendant was charged with manslaughter, violation of § 480, Vehicle Code ("hit and run" sec-

tion), and of § 500, Vehicle Code, the negligent homicide section, which seems to be the predecessor of § 192, subdivision 3, Penal Code. See *People v. Mitchell*, 27 Cal.2d 678, 684-685, 166 P.2d 10. Defendant was found guilty upon the last count (§ 500) and acquitted on the others. "The sole point raised by appellant is that the verdict acquitting him of manslaughter is inconsistent with the verdict of guilty of negligent homicide, since both charges grew out of the same act which resulted in the death of the same individuals; that an acquittal upon a count in an information charging manslaughter is inconsistent with a conviction on another count charging homicide in the same information and amounts to a complete acquittal of the accused." *People v. Amick*, supra, 20 Cal. 2d 247, 249-250, 125 P.2d 25, 27. The court then distinguished cases such as *Andursky*, supra, both those decided before and those decided after the amendment of § 954, and continued as follows: "We believe the effect of the amendment of section 954 of the Penal Code in 1927 was given careful consideration in the case of *People v. Ranney*, 123 Cal.App. 403, 11 P.2d 405, 406, where a similar argument was presented. It was there said: 'The disposition of one count had no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy adversely to the contention of the appellant. That section provides for the charging of 'two or more different offenses of the same class of crimes or offenses, under separate counts.' That section, as amended in 1927, then provides that, 'A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' This language clearly means that each count in an indictment or information, which charges a separate and distinct offense must stand upon its own merit, and that a verdict of either con-

3. Veh.Code § 502. "(a) It is unlawful for any person who is under the in-

fluence of intoxicating liquor to drive a vehicle upon any highway. * * *

viction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein. * * * There are no authorities to the contrary in other jurisdictions where a statute exists similar to the California law above quoted."'" 20 Cal.2d at pages 251-252, 125 P.2d at page 29. The last paragraph reads: "Therefore the two crimes of involuntary manslaughter and negligent homicide are not identical.' Furthermore and in any event, 'under section 954 of the Penal Code as amended, the acquittal on count 1 does not necessarily result in an acquittal on count 3. *People v. Kirsch*, 204 Cal. 599, 269 P. 447.'" 20 Cal.2d at page 254, 125 P.2d at page 29.⁴

Certain later cases which follow *Amick* and apply § 954 stress the fact that the offenses alleged in the separate counts are not identical and indicate that § 954 would not apply if identity of the constituent elements were found to be present. Such cases include *People v. Hight*, 94 Cal.App. 2d 100, 107, 210 P.2d 270; *People v. Carner*, 117 Cal.App.2d 362, 364, 255 P.2d 835; *People v. Hoyt*, 20 Cal.2d 306, 317, 125 P.2d 29; *People v. Severino*, supra, 122 Cal.App. 2d 172, 184, 164 P.2d 656. As will appear later, we do not deem that to be the test under § 954. But it is worthy of mention in that connection that the court held in *Amick*, supra, that negligent homicide (Veh. Code § 500) and manslaughter (Pen. Code, § 192) are not identical offenses. At page 253, of 20 Cal.2d, at page 28 of 125 P.2d it is said: "Manslaughter, like murder, can be committed with any instrumentality or means known to the ingenuity of man, whereas, negligent homicide can only be committed as specified in section 500 of the Vehicle Code and by means of an automobile." *People v. Trantham*, 24 Cal.App.2d 177, 74 P.2d 851, holds that neg-

ligent homicide (Veh. Code, § 500) and violation of § 501 of the same code (driving a motor vehicle while under the influence of intoxicating liquor and causing bodily injury to another) are not identical offenses. At page 181 of 24 Cal.App.2d, at page 853 of 74 P.2d: "In order to support the conviction under the second count it is necessary that it be established that defendant was operating his car while under the influence of intoxicating liquor. No such proof is required to support a conviction of negligent homicide. Therefore, there is here 'a fact necessary in one offense and absent in another that determines' that the offenses are separate." A similar holding is found in *People v. Picaroni*, 131 Cal.App.2d 612, 618, 281 P.2d 45.

[2] The essentials of the offenses charged at bar cannot be deemed exact duplicates. Penal Code, § 192, subdivision 3, like Vehicle Code, § 501, requires the driving of a motor vehicle. There the coincidence of constituent elements stops. Under § 192 there must be an unlawful act not amounting to a felony (e.g., any misdemeanor) or commission of a lawful act which might produce death in an unlawful manner; this may be with or without gross negligence, and indeed without any negligence at all. Section 501 requires that the driver be under the influence of intoxicating liquor (a specific misdemeanor) and that, in addition thereto, he do some other act forbidden by law (e.g., wilful misconduct), or be guilty of negligence. Under § 501 bodily injury must be caused, but under § 192 the proscribed conduct must be the proximate cause of death, not mere personal injury. A single operation of an automobile may take on one or more of these characteristics. If perchance it happens to fit both statutes it does not become a single offense, although it cannot be pun-

4. Other applications of the rule of the *Amick* case are found in *People v. Chessman*, supra, 38 Cal.2d 166, 193, 238 P.2d 1001; *Rodriguez v. Superior Court*, 27 Cal.2d 500, 502, 165 P.2d 1; *People v. Carothers*, 77 Cal.App.2d 252, 254, 175 P.2d 30; *People v. Arbaugh*, 82 Cal.App. 2d 971, 991, 187 P.2d 866; *People v.*

Simpson, 87 Cal.App.2d 359, 362, 196 P.2d 933; *People v. McNamara*, 103 Cal. App.2d 729, 736, 230 P.2d 411; *People v. Grant*, 105 Cal.App.2d 347, 352, 233 P.2d 660; *People v. Whitehurst*, 112 Cal.App. 2d 140, 145, 245 P.2d 509; *People v. Shaw*, 115 Cal.App.2d 597, 602, 252 P. 2d 670.

ished more than once. "While verdicts are inconsistent as a matter of law when one verdict is a finding which, if true, of necessity makes the other verdict impossible, the rule has no application to a case in which but one crime has been committed but the offense is charged in two or more counts under the authority of section 954 of the Penal Code which provides that 'accusatory pleading may charge * * * different statements of the same offense * * * under separate counts * * * a verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' Where an offense is thus pleaded in the alternative a verdict of acquittal under one count is merely a finding that all of the elements of the corpus delicti of the offense therein charged have not been proved but is not a finding that any particular one of the elements of the offense has not been proved and such verdict is not a finding as to any of the elements of the corpus delicti of the offense, charged in another count, of which the jury, by verdict, has found the defendant guilty." Fricke on California Criminal Procedure, Fourth Edition, p. 346.

[3] Reading the instant verdicts together they seem to say that the jury found defendant to have been driving while under the influence of intoxicating liquor (an unlawful act not amounting to a felony) which, without the intervention of gross negligence, proximately caused the death of a human being. There is no inconsistency in this.

[4] As above indicated, this question of identity of offenses charged in the same information or indictment is no longer determinative of the propriety of the verdicts; though actually inconsistent, § 954 sustains them. *People v. Greer*, 30 Cal.2d 589, 599, 184 P.2d 512, 518: "Accordingly, section 954, provides that verdicts may be sustained, even if they are inconsistent in fact.

People v. Codina, 30 Cal.2d 356, 360, 181 P.2d 881; *People v. Amick*, 20 Cal.2d 247, 252, 125 P.2d 25; *People v. Dreyer*, 71 Cal. App.2d 181, 193, 162 P.2d 468." *People v. Wallace*, 78 Cal.App.2d 726, 742, 178 P.2d 771, 781: "Even if the verdicts here involved were inconsistent a reversal would not be required. The Supreme Court in *Rodriguez v. Superior Court*, 27 Cal.2d 500, 165 P.2d 1, has recently reviewed the authorities dealing with the effect of inconsistent verdicts, and particularly with the cases interpreting § 954 of the Penal Code, and has held that inconsistent verdicts of acquittal on one count and conviction on another do not compel a holding that the judgment of conviction is a nullity." *People v. McCree*, 128 Cal.App.2d 196, 203, 275 P.2d 95, 100: "And the following cases hold that said provision of the Penal Code dictates that an acquittal of one or more counts is not to be deemed an acquittal of any other count, even if such verdicts are inconsistent."

It is to be remembered that this case presents only a problem in procedure. Any apparent injustice growing out of the quoted rule is obviated by application after verdict of Penal Code, § 654: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one * * *." As to proper treatment of inconsistent verdicts, see *People v. Knowles*, 35 Cal.2d 175, 187, 217 P.2d 1; *In re Chapman*, 43 Cal.2d 385, 390, 273 P.2d 817; *People v. Kehoe*, 33 Cal. 2d 711, 715-716, 204 P.2d 321; *People v. Smith*, 36 Cal.2d 444, 448, 224 P.2d 719.

Judgment and order denying new trial affirmed.

FOX, Acting P. J., and RICHARDS, J. pro tem., concur.

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Todd A. CONOVER et al., Defendants,
Frank William White, Appellant.*

Cr. 5945.

District Court of Appeal, Second District,
Division 2, California.

Nov. 29, 1957.

Rehearing Denied Dec. 23, 1957.

Hearing Granted Jan. 23, 1958.

Prosecution for possession of heroin. From adverse judgment of the Superior Court, Los Angeles County, Joseph M. Maltby, J., and from an order denying defendant's motion for a new trial, the defendant appealed. The District Court of Appeal, Fox, Acting P. J., held that acts of codefendants in furtherance of agreement to purchase heroin for defendant, who had left \$5 with one of codefendants, were attributable to defendant and admissible in evidence against him.

Judgment and order affirmed.

1. Conspiracy ⚡23

Gist of criminal conspiracy is corrupt agreement by two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of objects of conspiracy.

2. Conspiracy ⚡47

A conspiracy may be established by circumstantial evidence.

3. Conspiracy ⚡41

Upon existence of conspiracy being shown, acts of each coconspirator in furtherance of conspiracy are attributable to all others, even though they were not personally present when such acts were committed.

4. Criminal Law ⚡427(5)

A conspiracy need not be established beyond a reasonable doubt before evidence of acts of coconspirators in furtherance of conspiracy are admissible, a prima facie showing of conspiracy being all that is required.

* Opinion vacated 325 P.2d 985.

5. Criminal Law ⚡427(1)

In a criminal case, it is not necessary that a conspiracy be alleged in order that proof thereof may be made.

6. Criminal Law ⚡427(5)

In prosecution for possession of heroin, which was found in apartment shared by defendant and a codefendant, testimony by arresting officer concerning statements made by defendant to effect that he had left money with codefendant for purpose of purchasing capsule of heroin, that capsule found in apartment was his, and that he had a narcotic outfit for administering narcotics, constituted a prima facie showing of agreement between defendant and codefendants to violate statutes prohibiting purchase and sale of narcotics. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, §§ 182, 184; West's Ann.Code Civ.Proc. § 1870, subds. 6, 7.

7. Criminal Law ⚡423(1)

In prosecution for possession of heroin found in apartment shared by defendant and a codefendant, who had purchased capsule of heroin with money given to him by defendant, acts of codefendant and seller of heroin in furtherance of agreement to purchase heroin for defendant were attributable to him and admissible in evidence against him. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, §§ 182, 184; West's Ann.Code Civ.Proc. § 1870, subds. 6, 7.

8. Poisons ⚡4

Where defendant had given codefendant \$5 with which to buy capsule of heroin, which was found by arresting officers in apartment shared by defendant and codefendant, possession of capsule by codefendant was possession by defendant, and codefendant's knowledge that it was a narcotic was attributable to defendant.

9. Poisons ⚡9

Evidence was sufficient to sustain conviction for possession of heroin. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, §§ 182, 184; West's Ann.Code Civ.Proc. § 1870, subds. 6, 7.

10. Criminal Law ⇨783(1)

In prosecution for possession of heroin wherein testimony of arresting officer as to conversations with codefendant out of defendant's presence, was admitted without objection, instruction by court, sua sponte, at conclusion of State's case in chief that such testimony was not to be considered as evidence against defendant, was adequate. West's Ann. Health & Safety Code, § 11500.

11. Criminal Law ⇨1038(2)

A contention that court should have charged jury that certain evidence was admissible only for a particular purpose comes too late when raised for first time on appeal.

12. Criminal Law ⇨720(3)**Witnesses** ⇨380(2)

In prosecution for possession of heroin, wherein arresting officer testified without objection as to conversations with codefendant out of defendant's presence, such evidence was admissible to impeach testimony given by codefendants by showing that they made prior inconsistent statements, and to that extent it was proper for deputy district attorney to refer to such evidence in his argument.

13. Criminal Law ⇨1037(2), 1129(1)

Unless harmful results of misconduct of district attorney cannot be obviated by appropriate instructions, error cannot be predicated in Court of Appeal on such alleged misconduct in absence of assignment of such misconduct as error and request to trial court to instruct jury to disregard it.

Freedman & Herscher, Horace N. Freedman, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Acting Presiding Justice.

Appellant White was convicted of the possession of heroin in violation of section 11500, Health and Safety Code. He appeals from the judgment and from the order denying his motion for a new trial.

At approximately 9:00 p. m. on October 26, 1956, Officers Berry and McMahan, of the Long Beach Police Department, observed defendant Hanick near his residence in that city. Officer Berry had arrested Hanick previously and knew him to be a user of narcotics.

The officers followed Hanick's automobile to an apartment building on the corner of Sixth and Linden Streets in Long Beach. Hanick went into the apartment building where he remained for some 15 minutes. Upon coming out of the building, it appeared to the officers from Hanick's demeanor that he had had a "fix." On being interrogated by the officers, Hanick admitted that he had a narcotic in his possession and handed Officer Berry an aspirin box that contained seven capsules of heroin. Hanick was then arrested.

Hanick told the officers that he had just left the apartment shared by appellant and one Conover; that he and Conover had fixed a capsule of heroin in the apartment, using appellant's outfit; and that he (Hanick) had left a capsule of heroin in the apartment with Conover for appellant.

The officers waited until Conover came out of the apartment house. From Conover's actions and appearance the officers concluded he was under the influence of narcotics and arrested him. The officers returned Conover to the apartment shared by him and appellant and informed Conover of the statements previously made by Hanick regarding the capsule of heroin left for appellant and the use by Hanick and Conover of appellant's outfit. Conover directed the officers' attention to a potted plant beside the bed in the living room and stated, "That is where he keeps the outfit." Upon examination the officers found the equipment ordinarily used by addicts in administering narcotics. The officers then inquired of Conover relative to the capsule assertedly left by Hanick for appellant. Conover pointed out a watch box on a dresser in the bedroom in which there were four check stubs, a belt buckle, and a capsule later determined to be heroin.

Conover stated to the officers that the capsule had been left with him for appellant and that he, Conover, had purchased it from Hanick for \$5.

Appellant, who had been working, returned from work at approximately 2:15 a. m. on October 27th. The officers arrested him in the hallway of the apartment house. Appellant was informed at that time of the statements made by Hanick and Conover relative to appellant's ownership of the outfit, and the capsule of heroin that had been left for appellant. Appellant told the officers that he did have a narcotic outfit and that it was in his room and indicated where it was probably located. "At that time," according to Officer McMahan, "Mr. White admitted that the capsule was his."

In a later conversation at the city jail, the officer testified that "He [White] stated that the outfit was his; that he had had it for some time and that he and Conover had used it jointly, but that it was his outfit. He stated that he had never seen the capsule of heroin that was in the room, but that he had left money with Mr. Conover for the purchase of a capsule of heroin from Mr. Hanick." The officer further testified, "We asked him [White] where the capsule would be and he said it would probably be in the watch box on the dresser." Appellant stated that he had been an addict or had used heroin off and on since 1932. Upon examination of appellant's right forearm, the officers found what they termed a "snake," fixe or six inches in length. This snake was the result of numerous injections by a hypodermic needle along one of the main veins. At one end of the snake was a badly ulcerated spot that appeared to be infected.

When Officer Berry took appellant to the municipal court for arraignment, appellant told the officer that he was guilty of possession of narcotics and that he intended to so plead. Later, at the preliminary hearing, appellant again told Officer Berry that he wished to plead guilty and receive hospitalization.

At the trial appellant, and his codefendants Conover and Hanick who had pled guilty, denied everything that implicated appellant.

In rebuttal, Officer Berry testified that when Hanick was arrested he told the officers that he had left a capsule in the apartment for appellant; also, that Conover told him and Officer McMahan that the capsule found in the apartment was appellant's and that he (Conover) had bought it for him, paying \$5 for it.

In seeking a reversal appellant argues that the evidence is insufficient to establish (1) that he "possessed the narcotic," and (2) that he had "knowledge of the presence of the narcotic." Appellant also argues that he was denied a fair trial.

[1-5] "The gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the conspiracy." *People v. Sica*, 112 Cal. App.2d 574, 580-581, 247 P.2d 72, 76; *People v. Frankfort*, 114 Cal.App.2d 680, 688, 251 P.2d 401; *People v. Brownstein*, 109 Cal.App.2d 891, 892, 241 P.2d 1056; *People v. Pierce*, 110 Cal.App.2d 598, 610, 243 P.2d 585; Penal Code, §§ 182, 184. A conspiracy may, of course, be established by circumstantial evidence. *People v. Frankfort*, supra. Upon the existence of the conspiracy being shown, the acts of each coconspirator in furtherance of the conspiracy are attributable to all the others even though they were not personally present when such acts were committed. *People v. Robinson*, 43 Cal.2d 132, 137, 271 P.2d 865; *People v. Ash*, 88 Cal.App.2d 819, 828, 199 P.2d 711; Code Civ.Proc. § 1870, subs. 6, 7. The conspiracy need not be established beyond a reasonable doubt before such evidence is admissible; a prima facie showing of the conspiracy is all that is required. *People v. Steccone*, 36 Cal.2d 234, 238, 223 P.2d 17; *People v. Robinson*, supra; *People v. Frankfort*, supra, 114 Cal.App.2d at page 699, 251 P.2d 401. In a criminal case it is not necessary that

a conspiracy be alleged in order that proof thereof may be made. *People v. Duran*, 57 Cal.App.2d 363, 371, 134 P.2d 305; *People v. Rivas*, 92 Cal.App.2d 663, 668, 207 P.2d 1062; *People v. Gregory*, 12 Cal.App.2d 7, 15, 54 P.2d 770.

[6-9] Applying these principles, it is apparent that the testimony of Officer McMahan (received without objection) relative to the statements made to him and to Officer Berry by appellant, constituted a prima facie showing of an agreement between appellant and Conover and Hanick to violate the statutes prohibiting the purchase, sale and possession of narcotics. This agreement, coupled with the act of appellant in giving Conover \$5 with which to buy a capsule of heroin, constituted a prima facie showing of a criminal conspiracy. The acts of Conover and Hanick in furtherance of the agreement were therefore attributed to appellant and admissible in evidence against him. *People v. Sica*, supra, 112 Cal.App.2d at page 584, 247 P.2d 72; *People v. Frankfort*, supra, 114 Cal. App.2d at page 689, 251 P.2d 401. On this basis the possession of the capsule of heroin by Conover which he bought from Hanick pursuant to the agreement between himself (Conover) and appellant was the possession of appellant, and Conover's knowledge that it was a narcotic was attributable to his coconspirator, the appellant, and was in legal contemplation the knowledge of the latter. It is thus clear that the evidence is sufficient to support the judgment of conviction.

[10] Appellant's contention that he did not have a fair trial is based on the theory that the testimony of the officers as to conversations with Conover and Hanick out of his presence was hearsay and inadmissible. Appellant, however, did not object to any of this testimony either on direct or on rebuttal. But the court, *sua sponte*, at the conclusion of the People's case in chief told the jury that although this testimony "was admitted for a legal purpose"

it "is not to be considered by you as evidence against the defendant [appellant] in this case." We see no reason why this admonition was not adequate.

[11] But, says appellant, "[a]fter the defense had closed its case the prosecutor put Officer Berry back on the stand and had him repeat all of the prohibited hearsay testimony." At this stage of the case the officer's testimony was admissible to impeach that given by Conover and Hanick by showing that they had made prior inconsistent statements. Appellant now insists that the court should have advised the jury that this evidence was admitted only for the purpose of impeachment. The answer to this proposition is that appellant made no such request or even suggestion to the trial court. It is too late to raise this point for the first time on appeal.

[12, 13] Appellant also contends that the prosecutor was guilty of misconduct in referring to this evidence in his argument to the jury. As noted above, the evidence was admissible for purposes of impeachment and to that extent it was proper for the deputy district attorney to refer to it in his argument. If he went beyond the bounds of propriety appellant should have assigned any such statement as misconduct and requested an appropriate instruction to the jury with respect thereto. He took neither of these steps. He is therefore in no position to complain now. The applicable principle on this question is succinctly stated in *People v. Hampton*, 47 Cal. 2d 239, 240, 302 P.2d 300, 301: "The rule is established that unless the harmful results of misconduct of the district attorney cannot be obviated by appropriate instructions of the trial court, error cannot be predicated in this court on such alleged misconduct in the absence of (a) assignment of such misconduct as error; and (b) a request to the trial court to instruct the jury to disregard it. [Citations.]" This is obviously not a case where an appropriate instruction would not have obviated any

harmful results of the asserted misconduct. There is no support for appellant's contention that he did not have a fair trial.

The judgment and order are affirmed.

ASHBURN, J., and RICHARDS, J. pro tem., concur.



155 Cal.App.2d 568

Mariano GARCIA, Plaintiff and Appellant,
v.

SAN GABRIEL READY MIXT, a California Corporation, and Albert C. Strinz, Defendants and Respondents.

Civ. 22393.

District Court of Appeal, Second District,
Division 1, California.

Nov. 27, 1957.

Rehearing Denied Dec. 19, 1957.

Hearing Denied Jan. 23, 1958.

Action for injuries sustained by plaintiff when his hand was injured by a defective chute on a backing concrete mix truck. Judgment for the defendants in the Superior Court of Los Angeles County, Vernon W. Hunt, J., the plaintiff appealed. The District Court of Appeal, Drapeau, J. pro tem., held that plaintiff was improperly denied the right of argument as to the alleged negligence which was a part of the second cause of action, that both issues should have been submitted to the jury and that instructions were properly given.

Judgment reversed.

1. Trial ⇨29(1)

Where trial judge granted a motion for a directed verdict as to the second cause of action, and alleged negligence therein was also a part of the first cause of action, action of trial judge in granting defendant's motion for a directed verdict, in stating that there would be no further reference to the second cause of action and that the argument would relate solely to the first cause of action was an abuse of discretion as denying the plaintiff a fair and impartial trial.

2. Automobiles ⇨245(2)

In action for injuries when plaintiff was injured by a backing cement mix truck on which a homemade chute had been constructed, whether the chute was improperly constructed so that it would catch the hand that held it, if it was shot backward by colliding with some stationary object should have been submitted to the jury.

3. Trial ⇨165, 178

When a trial judge is called upon to rule on a motion for nonsuit or a directed verdict, the judge must take utmost care not to invade the province of the jury as to questions of fact.

4. Trial ⇨171

The trial court's power to direct a verdict is the same as its power to grant a nonsuit.

5. Appeal and Error ⇨997(3)

On appeal from a judgment on directed verdict, the evidence is not to be weighed on review.

6. Trial ⇨139(1)

A verdict may be directed only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support any verdict in favor of plaintiff.

7. Automobiles ⇨246(30)

In action for injuries sustained by plaintiff laying concrete foundations when injured by a backing ready mix concrete truck, instructions on assumption of risk, should tell the jury that a person must know what risk he assumes.

8. Trial ⇨127

In action for injuries sustained by plaintiff when injured by the chute of a concrete mix truck, paragraph in contract between the driver of the truck and the ready mix corporation, with reference to the insurance, was properly kept from the jury.

9. Automobiles ⇨246(57)

In action for injuries sustained by plaintiff laying a concrete foundation, when his hand was injured by defective chute of a concrete mix truck, instruction relative to unavoidable accident was properly given under the evidence.

10. Automobiles ⇨246(15)

In action for injuries sustained from a concrete mix truck, instruction as to the liability of corporate owner of the truck should have been given, subject to the usual qualification that it was a question of fact for the jury.

11. Corporations ⇨423

Where plaintiff was injured by defective chute on a concrete ready mix truck, the jury could hold the corporate owner of the truck equally liable with the driver thereof for the injuries of the plaintiff.

David Hoffman, Los Angeles, for appellant.

Schell, Dalamer & Loring, Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Plaintiff, Mariano Garcia, was laying concrete foundations under an old house that had been jacked up a few feet.

Defendant, Albert C. Strinz, owned a truck that had been leased, together with himself as driver, to defendant San Gabriel Ready Mixt, a corporation.

Upon the truck was a large barrel-shaped tank, to hold concrete mix for delivery to customers of the corporation. The tank turned round and round, to keep the cement, water, and other ingredients of the mix, in motion.

Mr. Strinz brought his truck to the house where Mr. Garcia was working. Mr. Garcia showed Mr. Strinz where he wanted some of the cement poured, on the west side of the building. The pouring was done by means of a chute attached to the rear end of the truck. Mr. Garcia held the chute and Mr. Strinz operated the truck.

After this pouring was finished, Mr. Strinz took his truck into the street, and

backed it into a driveway on the east side of the building. When he got near to the place where this cement was to be poured, he got out of the cab of his truck and looked around, and told Mr. Garcia to hold the chute until it reached the place where the cement was to go. Neither man understood much that was said by the other, for Mr. Garcia didn't speak much English.

The chute was of metal, and was designed to convey cement mix from the tank to foundation forms. The chute was in two parts, one fastened to the rear of the truck; the other was an extension that slipped inside the first, along a flange that held it so that it would go forward or backward. One of the witnesses described it as telescoping.

The extension piece was not of a standard type or design used by original equipment manufacturers. At the time Mr. Strinz purchased the truck, the extension piece was broken and was in the corporation's yard. Mr. Strinz put a new "ear" or flange on it, and a handle, fitted it as it was used by Mr. Garcia, and fastened it to his truck. The dangerous feature of the chute was that the extension piece would naturally come back against one's thumb if he were holding the handle and if the truck backed into an immovable object.

Then Mr. Strinz got into his cab, backed his truck farther up the driveway, with Mr. Garcia holding the handle of the chute, with the extension thrust out.

Unfortunately Mr. Strinz miscalculated distances, and backed his truck into the side of the house.

This caused the extension piece to violently slide backward. It caught Mr. Garcia's thumb between the handle and the extension, and caused injuries that required amputation of his thumb.

Mr. Garcia brought this action for personal injuries.

The complaint pleads two causes of action. These will be described later on in this opinion.

The trial judge granted a motion for a directed verdict as to the second cause of

action, and the jury found against Mr. Garcia as to the first cause of action.

Mr. Garcia appeals from the judgment against him.

It therefore becomes necessary to examine the two causes of action; to determine whether or not it was prejudicial error to direct counsel in his argument to the jury not to mention anything connected with the second cause of action.

The first cause of action is for negligence in driving the truck.

The second cause of action is for negligent fabrication, installation, and maintenance of the extension piece on the chute, and that the chute was defectively and carelessly made.

When the trial judge granted the motion for a directed verdict he said:

"* * * there will be no further reference to the second cause of action in the proceedings hereafter, that is to say, during the arguments to the jury, or in my instructions, so the instructions and the argument will relate solely to the first cause of action.

"Now the case will go to the jury on the first cause of action as to both defendants."

The judgment must be reversed for two reasons.

[1] First, it is to be presumed that counsel for plaintiff obeyed the judge's direction. Therefore plaintiff was denied the right of argument as to the alleged negligence which was part of the second cause of action, and which was also part of the first cause of action. This was an abuse of discretion which denied appellant a fair and impartial trial.

[2] Secondly, the issues raised by the two causes of action involved facts that should have been submitted to the jury as to both of them.

The motion was granted upon the ground that "no evidence has been introduced of any improper construction or fabrication, or any right of the plaintiff against either of the defendants upon that theory."

The facts as narrated are amply sufficient to require the issues in the second

cause of action to be submitted to a jury. Whether or not the home-made chute was improperly constructed, so that it would catch the hand that held it if it was shot backward by colliding with some stationary object was for the jury to decide.

[3] When a trial judge is called upon to rule upon a motion for a non-suit or a directed verdict, he deals with one of the most tricky situations in the administration of our law. While in some few cases such motions are properly made and granted (*Farber v. Olkon*, 40 Cal.2d 503, 254 P.2d 520), the judge must take utmost care not to invade the province of a jury as to questions of fact. For that is the sole function of a jury in this state, and it is never the function of a judge in a jury trial.

[4] The court's power to direct a verdict is the same as its power to grant a non-suit. *Gish v. Los Angeles Ry. Corp.*, 13 Cal.2d 570, 572, 90 P.2d 792.

[5] The evidence is not to be weighed on review. *Dieterle v. Yellow Cab Co.*, 34 Cal.App.2d 97, 101, 93 P.2d 171.

[6] And a verdict may be directed only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support any verdict in favor of plaintiff. *Sokolow v. City of Hope*, 41 Cal.2d 668, 670, 262 P.2d 841.

Tried by these time-honored rules, it was clearly error for the trial judge to direct a verdict in this case.

As these issues will have to be tried again, some questions raised on the first trial invite attention.

[7] 1. However many instructions on assumption of the risk may be given, and however they may be worded, one essential is that the jury be told that a person must know what risk he assumes.

Mr. Garcia is a Mexican who doesn't understand the English language, at least not very well. Any trial lawyer who has had to deal with this situation knows how difficult it is to get to a jury through an in-

terpreter the real facts about which such a witness is testifying. The barrier of language is a real one.

The crucial questions in this respect were whether or not Mr. Garcia really knew the danger of holding the chute with the handle, and whether or not he understood what Mr. Strinz told him to do—if he was warned of the danger involved.

[8] 2. The paragraph in the contract between Mr. Strinz and the ready mix corporation, with its reference to insurance, was properly kept from the jury.

[9] 3. The instruction relative to unavoidable accident was not improperly given. *Parker v. Womack*, 37 Cal.2d 116, 230 P.2d 823.

[10, 11] 4. The instruction as to the liability of defendant San Gabriel Ready Mixt should have been given, subject to the usual qualification that it was a question of fact for the jury. In the facts in this case, a jury can hold that this corporation is equally liable with the driver of the truck.

The judgment is reversed.

WHITE, P. J., and FOURT, J., concur.



155 Cal.App.2d 596

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Zack Kenneth VAUGHN and Clifford
Edwards, Defendants and
Appellants.**

Cr. 5901.

District Court of Appeal, Second District,
Division 1, California.

Nov. 27, 1957.

Prosecutions on two counts of armed robbery first degree. The Superior Court, Los Angeles County, LeRoy Dawson, J.,

entered judgment of conviction and denied motions for new trial and defendants appealed. The District Court of Appeal, Drapeau, J. pro tem., held that trial court did not err in receiving confessions of defendants in evidence, on theory that tape recording of what was said during such confessions was the best evidence, in view of fact testimony of one hearing a confession is always the best evidence of it.

Judgments and orders denying defendants' motions for new trial affirmed.

1. Arrest $\Leftrightarrow$ 63(4), 71

Where officers had reasonable cause to believe that a felony had been committed by certain men in an automobile due to a witness' observation of their possession of guns, their arrest of such men and subsequent search, even without a warrant, was not illegal. West's Ann.Pen.Code, § 836, subd. 5.

2. Criminal Law $\Leftrightarrow$ 1144(1)

Where there was no evidence that arresting officers did not have warrants for arrest of certain defendants in a criminal prosecution, or a search warrant, it would be presumed on appeal that arrest and search was lawful. West's Ann.Code Civ. Proc. § 1963, subs. 1, 15, 33.

3. Criminal Law $\Leftrightarrow$ 419(3)

In prosecution for armed robbery, it was not error to admit testimony of deputy sheriff as to what a certain witness had told him in regard to his observation of defendants exchanging guns, even though hearsay, in view of fact it was not used to show truth of matter asserted, and did not connect defendants in any way with crimes of which they were charged, but was introduced to show that deputy sheriff had reasonable cause to believe a felony had been committed by men observed by such witness.

4. Criminal Law $\Leftrightarrow$ 1036(1)

Where no objection was made to admission of confessions in criminal prosecutions, question of whether such admissions were properly received in evidence was beyond attack on appeal, and confessions

could be considered in support of judgment of conviction.

5. Criminal Law Ⓒ400(9)

In prosecutions for first degree armed robbery, trial court did not err in receiving confessions of defendants in evidence on theory that tape recording of what was said during such confessions was the best evidence, in view of fact testimony of one hearing a confession is always the best evidence of it.

6. Criminal Law Ⓒ519(8)

A voluntary confession is admissible in evidence against the one who makes it, even though made during an illegal detention.

7. Criminal Law Ⓒ939(1)

In prosecution for armed robbery, trial judge did not abuse his discretion in denying motion for new trial on ground of newly discovered evidence consisting of an affidavit that another had committed crimes in question, in view of fact defendant made no showing that he did not know the existence of such evidence at time of trial, or that he used diligence to discover the same, or that he could not by exercise of reasonable diligence have discovered it at time of trial.

Eugene V. McPherson, Joseph A. Armstrong, Gladys Towles Root, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Miles J. Rubin, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

Zack Kenneth Vaughn and Clifford Edwards were convicted of two counts of armed robbery first degree, and sentenced to the penitentiary for the term prescribed by law. Each man has appealed from the judgment against him, and from the order denying his motion for a new trial.

On August 21, 1956, Pete's Liquor Store in Maywood was held up. The clerk on duty testified on the preliminary examination that at about 3 o'clock in the afternoon two men came into the store, walking fast. One of them had a gun, and held it on the

clerk. He recognized this man as defendant Vaughn. Another man who was in the store identified Vaughn as being there at the time. None of the men in the store could identify the other defendant, Edwards.

After the first two men came into the store, a third man came in. He covered the outer door, and he too had a gun in his hand.

Mr. Vaughn took about \$75 from the cash register, about \$300 from the clerk, and \$22 from a customer who came in while the holdup was going on. Mr. Vaughn also took a Citizens National Bank change bag, containing \$6 in nickels, and a roll of half dollars.

In the evening of the same day a man by the name of Zielinski told a deputy sheriff of Los Angeles County about an unusual incident that took place just outside the window of his motel apartment. Mr. Zielinski was manager of the motel. The window of his quarters faced on the street. He said that his attention was called to an automobile that made a U-turn, and parked directly in front of his window. The men in the car got out, and were arguing about a gun. One of them put his hands up on top of the car, while another one removed a gun from his waistband and put another back. It appeared to Mr. Zielinski that he had witnessed a forcible exchange of guns. The men then got back into their car and drove away.

Mr. Zielinski also told the deputy that there were four men in the car; that it was a yellow, cream-colored Cadillac with red wheels and no hub caps; and that the first three letters on the license plate were GCY.

The deputy and his partner started looking for this car. They found it parked near a liquor store. No one was in it. But in a few minutes four men walked out of the liquor store and came to the car.

The officers arrested these men. Among them were Mr. Vaughn and Mr. Edwards. This liquor store had not been held up.

But the officers found two loaded guns in the car, the money bag that had been

taken from Pete's Liquor Store, with silver coins in it, and ammunition in the trunk compartment.

Thereafter, Vaughn and Edwards each admitted taking part in the robberies at Pete's Liquor Store. Mr. Edwards said that he was the man at the door with a gun in his hand.

Defendants waived a jury in the superior court, and stipulated that the judge could consider the evidence at the preliminary examination. Then they both testified, and denied any part in the robberies at Pete's Liquor Store, with circumstantial details as to where they went and what they did on the afternoon of the day of the crime.

Defendants argue on appeal:

1. That the arrest and search were illegal.

2. That hearsay evidence was improperly admitted.

3. That the evidence of the confessions was improperly admitted, and the best evidence was not given on the question of voluntariness of the confessions.

4. That Mr. Edwards' motion for a new trial should have been granted.

These matters will be discussed in the order in which they have been stated.

1. Was the arrest and search illegal?

[1] The officers had reasonable cause to believe that a felony had been committed by the men in the car that stopped outside Mr. Zielinski's window. Penal Code, section 836, subd. 5.

[2] There is no evidence that the arresting officers did not have warrants for the arrest of the men in the car, or a search warrant. It is therefore presumed on appeal that the arrest was lawful. Code Civ. Proc., section 1963, subs. 1, 15, 33; *People v. Farrara*, 46 Cal.2d 265, 268-269, 294 P.2d 21.

[3] 2. It was not error to admit testimony of the deputy sheriff as to what Mr. Zielinski had told him. While it was, of course, hearsay, it was to show that he had reasonable cause to believe a felony had been committed by the four men in the Cadillac. And it did not connect either de-

fendant in any way with the crimes of which they were charged.

[4] 3. The confessions of both defendants were properly received in evidence. No objection was made to either confession, and therefore that evidence is beyond attack on appeal, and may be considered in support of the judgment. *People v. Simmons*, 28 Cal.2d 699, 723, 172 P.2d 18.

[5] It is argued that there were tape recordings of what was said during these confessions, and that the tapes were the best evidence. The testimony of one who hears a confession is always the best evidence of it. Tape recordings could have been used to refresh recollection, just as one may testify to a confession, using a reporter's transcript of what was said to refresh his recollection.

Defendants also argue in this connection that they were illegally detained when the confessions were made, and for that reason the confessions were not admissible in evidence against them.

[6] A voluntary confession is admissible in evidence against the one who makes it, even though made during an illegal detention. *Rogers v. Superior Court*, 46 Cal.2d 3, 10, 291 P.2d 929.

Moreover, the record here does not support the suggestion that these defendants were illegally detained.

[7] 4. Finally, it was not error to deny defendant Edwards' motion for a new trial.

This was made upon the ground of newly discovered evidence. It is said to be supported by an affidavit of one Jack Beck, who is confined in the Missouri state penitentiary, and who averred that he and others committed these crimes, and that Mr. Edwards was not involved in them. This affidavit is not to be found in the record.

The trial judge did not abuse his discretion in denying the motion. Mr. Edwards made no showing that he did not know of the existence of such evidence at the time of the trial, or that he used diligence to discover the same, or that he could not by the exercise of reasonable diligence have discovered it. See *People v. Beard*, 46 Cal.

2d 278, 281-282, 294 P.2d 29; People v. Ansite, 110 Cal.App.2d 38, 39, 241 P.2d 1036.

The judgments are, and each of them is, and the orders denying defendants' motions for a new trial are, and each of them is, affirmed.

WHITE, P. J., and FOURT, J., concur.



155 Cal.App.2d 601

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Kinnon WILKS, Defendant and Appellant.
Cr. 5968.

District Court of Appeal, Second District,
Division 1, California.
Nov. 27, 1957.

Defendant was convicted of receiving stolen property. The Superior Court, Los Angeles County, Walter H. Odemar, J., rendered judgment, and defendant appealed from judgment and from order denying motion for new trial. The District Court of Appeal, Drapeau, J. pro tem., held that evidence sustained conviction, and that statement of trial judge, during examination of 14 year old brother of defendant, that boy was either all mixed up or lying as fast as he could run, did not require reversal on ground that trial judge had formed or expressed an opinion before case was submitted.

Affirmed.

1. Receiving Stolen Goods ⚡8(3)

Evidence sustained conviction of receiving stolen property. West's Ann.Pen.Code, § 496.

2. Criminal Law ⚡260(11)

In prosecution for receiving stolen property tried to court without a jury, trial court's resolving against defendant the con-

flicting evidence was final so far as reviewing court was concerned.

3. Criminal Law ⚡260(11)

In prosecution for receiving stolen property, tried to court without jury, statement of trial judge, in connection with examination of 14 year old brother of defendant, that boy was either all mixed up or was lying as fast as he could run, did not require reversal on basis that judge had formed or expressed an opinion before case was submitted. West's Ann.Pen.Code, § 496.

4. Witnesses ⚡246(2)

Judge has not only right, but it is his duty, to take part in examination of witnesses, if he feels he can help elicit the truth.

5. Criminal Law ⚡1035(3)

Where no objection was made to any of judge's questions or remarks in prosecution for receiving stolen property, right, if any, to object on appeal was waived. West's Ann.Pen.Code, § 496.

Gladys Towles Root, Eugene V. McPherson, Joseph A. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

Kinnon Wilks, defendant in this case, was charged with receiving stolen property (Penal Code, section 496), with grand theft, and with a prior conviction of a felony, for which he served time in the penitentiary.

In a trial in the superior court, without a jury, he was convicted by the judge of receiving stolen property, and acquitted of grand theft. The judge found that he had suffered a prior conviction of a felony and imprisonment therefor. The judge sentenced defendant to seven months in the county jail.

Defendant appeals from the judgment, and from "a denial of a new trial." The record does not show, however, that a mo-

tion for a new trial was made, or was considered by the trial court.

Turning now to the facts in the case.

Aaron A. Berger, a plastering contractor, owned a plaster mixer that disappeared from one of his jobs.

On the day before the mixer disappeared defendant drove up to Mr. Berger's job, and told him he had a plaster mixer he would sell him for \$150; that the mixer had been hot but wasn't any more; and that he had obtained it by taking it from a man in San Pedro who owed him wages.

The next day defendant told Mr. Richard Dill, an employee of Central Rentals, that he had a plaster mixer for sale. Central Rentals owned a lot renting utility trailers for moving baggage and household goods; also trailers with equipment for industrial purposes, such as the mixer here in question.

Mr. Dill told defendant that he had no authority to buy a mixer, but that if he would come back the next day, Mr. Grady, the owner of the lot, might be interested.

The next day defendant appeared at the trailer lot, towing Mr. Berger's mixer, with his (defendant's) automobile. He unhooked the mixer from his car, tore off the metal serial number on the mixer, and left the mixer on the trailer lot. This aroused the suspicions of the men on the lot, and they called the police.

The next day defendant saw Mr. Grady at the trailer lot. He told Mr. Grady he would sell him the mixer for \$125 (Mr. Grady testified that it was worth from \$450 to \$500). Defendant also told Mr. Grady that he didn't own the mixer; "a man owes me money, and he doesn't know I have it." About that time the police arrived and arrested defendant.

Mr. Berger identified the mixer as his, from a scratch with a nail that he had made on it under the hood.

It is argued on appeal that the evidence is insufficient to support the judge's decision; and that the judge formed and expressed an opinion before the case was submitted to him for decision.

There is no merit to either argument.

[1] The evidence supports the conviction. The mixer was stolen. The inference can be drawn from the evidence that defendant knew it was stolen, and that he knowingly concealed and withheld it from its lawful owner. Penal Code, section 496; *People v. Holland*, 82 Cal.App.2d 310, 186 P.2d 58.

[2] Defendant denied ever having possession of the mixer, or ever having talked to Mr. Grady, or Mr. Dill, or Mr. Berger about it. He and his witnesses attempted to show that the only reason he was at the trailer lot was because he had rented a trailer there, and had been hauling household goods for a friend of his. But the judge resolved against him the conflict in the evidence, and, so far as this court is concerned, that is the end of it. *People v. Seerman*, 43 Cal.App.2d 506, 509-510, 111 P.2d 457.

Very little need be said about the argument that the trial judge formed or expressed an opinion before the case was submitted.

We have examined the record, and cannot draw that conclusion from it at all.

During the trial someone in the court room was making signs to a 14-year-old boy, brother of the defendant, who was on the witness stand. The judge saw this, stopped it in no uncertain terms, and directed the offender to leave the court room.

[3] The judge questioned the boy at length, testing his testimony for veracity. Finally the judge said:

"The Court: Don't have this boy commit any more perjury than he committed just a second ago.

"He said his brother was going somewhere else. Now he said he didn't know he was going any place.

"This little boy is either all mixed up or is lying as fast as he can run."

It goes without saying that if such a comment had been made before a jury, the case would have had to be reversed. But in the circumstances of this case we are not disposed to condemn the remarks, when

the judge was so obviously trying to ascertain the truth of defendant's defense. It is pertinent to add here that the judge sent for witnesses who testified on the preliminary examination, and required them to identify defendant in the superior court. Their testimony on the preliminary had been admitted in evidence by stipulation.

[4, 5] Defendant bases his contention that the judge formed or expressed an opinion on the case from what he said to the offender in the court room and to the boy on the witness stand. As has been said many times by our courts, the judge has not only the right, but it is his duty, to take part in the examination of witnesses, if he feels he can help elicit the truth. Moreover, no objection was made to any of the judge's questions or remarks. In such circumstances, the right, if any, to object on appeal is waived. *People v. Hill*, 116 Cal.App.2d 212, 218, 255 P.2d 54.

The appeal from the purported order denying a new trial is dismissed.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



155 Cal.App.2d 534

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph Calvin WHISENHUNT, Defendant
and Appellant.

Cr. 2798.

District Court of Appeal, Third District,
California.

Nov. 26, 1957.

Defendant was convicted in the Superior Court, Lassen County, Ben V. Curler, J., for issuing checks with intent to defraud, and he appealed. The District Court of Appeal, Schottky, J., held

that instruction given was not subject to claimed infirmity of permitting jury to find defendant guilty of offense charged even though they also found as a fact that he had informed payees that he had insufficient funds on deposit to cover his checks.

Affirmed.

1. False Pretenses §49(3)

Evidence would sustain conviction for issuing checks with intent to defraud. West's Ann.Pen.Code, § 476a.

2. False Pretenses §52

In prosecution for issuing checks with intent to defraud, instruction given was not subject to claimed infirmity of permitting jury to find defendant guilty of offense charged even though they also found as a fact that he had informed payees that he had insufficient funds on deposit to cover his checks. West's Ann.Pen.Code, § 476a.

Hardin Barry, Susanville, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

An information was filed against the above named defendant who was charged with a violation of Section 476a of the Penal Code (issuing checks without sufficient funds), it being charged that on or about April 20 and 21, 1957, appellant "did, with intent to cheat and defraud Doyle Motor Co. and the B & B Cocktail Lounge, all of Susanville, California, wilfully, unlawfully, fraudulently and feloniously make, draw, utter and deliver to said establishments, checks * * *, two negotiated on the 20th of April, 1957, to the B & B Cocktail Lounge, for \$10.00 each, one dated April 21, 1957, to the B & B Cocktail Lounge, for \$20.00, and one dated April 20, 1957, to Doyle Motor Co., for \$49.00; all of said checks drawn upon Golden State Bank * * *; knowing at the time * * * that he had not suf-

ficient funds in or credit with said Bank to meet the said checks and drafts in full upon their said presentation for payment."

Two of the counts were abandoned at the trial and the jury found the defendant guilty on the remaining two counts relating to the \$49 check payable to Doyle Motor Co. and a \$10 check payable to the B & B Cocktail Lounge dated April 20, 1957. The court denied probation and judgment was pronounced sentencing appellant to the county jail for four months on each count, to run concurrently.

Defendant has appealed from the judgment and makes the following assignments of error:

"1. The evidence is legally insufficient to support the charge against defendant of issuing checks with intent to defraud.

"2. Error in instructing the jury."

Before discussing these contentions we shall give a brief summary of the evidence, bearing in mind the familiar rule that all conflicts must be resolved in support of the judgment.

On Saturday, April 20, 1957, the appellant purchased an automobile from the Doyle Motor Co. by negotiating with one Orval Dieter. The down payment on the car consisted of \$100 in cash and a check for \$49. The appellant showed Dieter a bank deposit book which indicated that the appellant's bank account had a balance of \$221. Dieter took the check and they engaged in a general conversation for approximately five minutes and then appellant asked Dieter to hold the check until the following Wednesday. Contrary to the testimony of appellant, Dieter testified that the reason given by the appellant for his request that the check be held for several days was that he did not want his wife to know that he had written a check for the purchase of the automobile and that nothing was said to indicate that appellant did not have sufficient funds in the bank to cover the check. Mr. Dieter informed the appellant that he would hold the check and attached a piece of paper to it, indicat-

ing that the check should be held until Wednesday. This check was picked up by the Chief of Police of Susanville on the following Monday, April 22, 1957. It was subsequently presented to the bank and duly protested for non-payment due to insufficiency of funds.

At the time of the issuing of this check, the appellant's deposit book actually showed a balance of \$21, although he admitted having issued a check for approximately \$21 which would close out the account. He also admitted that he inserted the figure "2" in front of the \$21 which made it appear that he had a balance of \$221 because he expected to realize \$200 on the sale of a trailer and he planned to deposit this money the next week, and he wanted to keep himself straight, not to overdraw what would be in there the next week.

On or about the same day that appellant issued the check for \$49, he cashed three checks in the B & B Cocktail Lounge. One of these checks, for \$10, was cashed by a Mr. Zunino, a partner in the business. Mr. Zunino testified that appellant stated that he needed the money in connection with the purchase of an automobile and he gave no indication to Mr. Zunino that he had insufficient funds in the bank to cover the check, nor did Mr. Zunino remember any request to hold the check for any period of time. This check, together with an additional check for \$10 and one for \$20 were later picked up by the Chief of Police.

In order to establish a *modus operandi* the prosecution introduced evidence that appellant cashed other checks on or about April 20, 1957. In all of these instances the evidence shows that the appellant did not inform the payee that there were insufficient funds to cover the check on the day it was issued or that he intended to make a deposit prior to the time that the checks would be presented to the bank.

The appellant testified at the trial that at the time he cashed these checks he had the intention of making a deposit of approximately \$200 prior to the time that the checks in the ordinary course of busi-

ness would be presented to the bank for payment. His testimony was to the effect that he expected to sell a trailer coach and that a purchaser had already agreed to pay him the sum of \$200.

In support of his contention that the evidence is insufficient to support the judgment, appellant argues that the evidence establishes that there was a lack of intent to defraud because when he issued the two checks in question he intended to make a deposit in his account sufficient to cover the amount of the checks prior to the time that the checks could be presented to the bank during the ordinary course of business and also at the time he presented the two checks he informed the payees that there were insufficient funds at the time and asked them to hold the checks for several days in order to permit him to make the necessary deposit. Appellant relies upon the cases of *People v. Griffith*, 120 Cal.App.2d 873, 262 P.2d 355, and *People v. Wilkins*, 67 Cal.App. 758, 228 P.367, in which it was held that where the evidence establishes that the drawer informed the payee that there were insufficient funds to cover the check, such fact precludes a finding of guilt upon a charge of violating Penal Code section 476a.

Respondent does not take issue with these decisions but points out that in the instant case there is sufficient evidence upon which the jury could conclude and obviously did conclude that the statements of the appellant at the time he passed the checks in question were different from those which he related at the trial. The testimony of Mr. Orval Dieter is directly contrary to that of appellant with respect to the conversations which occurred at the time the \$49 check was given to him. Mr. Dieter testified that the appellant showed him a deposit book which indicated an account balance of \$221, thus indicating to Mr. Dieter that the appellant had at that time sufficient funds in the bank to cover the amount of the check. The appellant did not inform Mr. Dieter that there were insufficient funds in the bank and he did not request Mr. Dieter to hold the check for

the purpose of enabling the appellant to make a deposit. On the contrary, according to Mr. Dieter's testimony, the appellant requested that the check not be deposited for several days for the reason that the appellant did not want his wife to know that he had written a check for the purchase of an automobile.

The appellant in his testimony stated that he had altered the figures on the deposit book by adding the figure "2" in front of the \$21. He also admitted that even this amount of \$21 was incorrect for the reason that he had issued a check for approximately \$20, thus closing out the account or reducing it to less than \$1.

The essential elements of the offense of a violation of Penal Code section 476a consist of the drawing or issuing of a check or draft with knowledge that at the time of such drawing the drawer has insufficient funds in or credit with the bank to meet payment upon presentation and such check is drawn or issued with the intent to defraud the payee or other person.

[1] The earnest and vigorous argument of appellant is but an argument as to the weight of conflicting evidence. Appellant's argument is based upon his own testimony and, as has been so often stated, it is not the function of an appellate court to weigh conflicting evidence. That was the function of the jury and it is evident that the jury reached the conclusion that appellant wrote the checks in question and passed them to the payee knowing that he did not have sufficient funds on deposit in the bank to cover the checks, and without informing the payees of that fact and without requesting that the checks be held for a few days for that reason. The evidence was sufficient to warrant an inference that appellant intended to defraud the payees.

As stated in *People v. Yrigoyen*, 45 Cal. 2d 46, at page 49, 286 P.2d 1, at page 2:

"The evidence is sufficient to show that there were not enough funds in the account when the check in question was issued or presented and that no credit arrangement was made for its payment.

It can be inferred that defendant knew the depleted condition of the account, and, under the circumstances, the record supports the implied finding that he issued the check with intent to defraud Mendiboure. *People v. Wallin*, 34 Cal. 2d 777, 780, 215 P.2d 1; *People v. Rose*, 9 Cal.App.2d 174, 175-176, 48 P.2d 1009; see *People v. Boyce*, 87 Cal.App. 2d 828, 829-830, 197 P.2d 842."

Appellant next contends that the court erred in two instructions to the jury. The first of the challenged instructions merely told the jury that they were the sole and exclusive judges of all questions of fact and of the credibility of witnesses and the weight of the evidence. This was obviously a correct and proper instruction.

The second instruction attacked by appellant reads as follows:

"You are instructed that Section 476a of the Penal Code provides any person who willfully with intent to defraud, makes, draws, utters or delivers any check, draft, or order upon any bank for the payment of money, knowing at the time of such making, drawing, uttering, or delivering, that the maker has not sufficient funds in, or credit with said bank or depository for the payment of such check, draft, or order in full upon its presentation, although no express representation is made with reference thereto, is guilty of the offense charged in the information.

"Where such check, draft or order is protested, on the ground of insufficiency of funds, or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depository, or person, or firm, or corporation."

Appellant argues that the court erred in giving this instruction, thereby permitting the jury to find the defendant guilty

upon facts which established, according to the appellant's version, that he had informed the payees that there were insufficient funds to cover the checks and requested that the checks be held for several days in order to permit him to make a deposit. The appellant bases his argument upon the case of *People v. Burnett*, 39 Cal.2d 556, 247 P.2d 828. There is no similarity between the facts in the cited case and the facts in the present case. In the *Burnett* case the error committed by the trial court arose in the following manner. The jury, after the case had been submitted to them and during their deliberation, returned to the court room for the purpose of asking the court a question. The following transpired, as set forth in 39 Cal.2d at page 559, 247 P.2d at page 830:

"* * * The court directed them to deliberate further, but before the jury retired again one of the jurors asked, 'Is intent to defraud, if you give a check with not sufficient funds and at the time that you deliver the check you informed the person to whom you issued that check that there is not sufficient funds? If he demands it, you say, "Well, I give you the check, but there is not sufficient funds in the bank to cover that check," is that to be construed as intention to defraud?' The court replied, 'That is a question for the jury to determine after considering all of the facts and circumstances of the case.'"

[2] This statement by the trial court in the *Burnett* case instructed the jury that even though they should find as a fact that the drawer of the check had informed the payee that there were insufficient funds to cover the check, the jury could nevertheless find him guilty of a violation of Penal Code section 476a. This, of course, was clearly erroneous. There was no such instruction given to the jury in the present case. The instructions referred to by the appellant did not inform the jury that they could find the appellant guilty of the offense charged even though they also found as a

fact that he had informed the payees that there were insufficient funds to cover the checks.

There was a conflict in the evidence in the instant case upon the question of whether or not the appellant did in fact inform the payees that there were insufficient funds to cover the checks. The jury was properly instructed that it was their duty to weigh this evidence and to determine which version was correct. The jury was not instructed as contended by the appellant that they could find the appellant guilty even though they also found his version of the facts to be true.

We are therefore of the opinion that there was no error in giving the instructions complained of. In fact, a reading of all of the instructions given to the jury convinces us that the jury was fully, fairly and correctly instructed and that the instructions are free from error.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



155 Cal.App.2d 665

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Norman MITCHELL, Defendant and
Appellant.

Cr. 5958.

District Court of Appeal, Second District,
Division 3, California.

Dec. 2, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., under one count of an indictment, and he appealed from the judgment of conviction and an order denying him a new trial. The District Court of Appeal,

Cal.Rep. 317-318 P.2d-35

Shinn, P. J., held that each count which charges a separate and distinct offense must stand upon its own merits, and disposition of one count has no effect upon verdict with respect to other counts contained in accusatory pleading; and held that hence a verdict of acquittal on one count is not deemed to be an acquittal on any other count.

Affirmed.

1. Assault and Battery ☞92

Evidence sustained conviction of defendant for inflicting upon his wife a corporal injury resulting in a traumatic condition. West's Ann.Pen.Code, § 273d.

2. Criminal Law ☞878(3)

Each count which charges a separate and distinct offense must stand upon its own merits, and disposition of one count has no effect upon verdict with respect to other counts contained in accusatory pleading; and hence a verdict of acquittal on one count is not deemed to be an acquittal of any other count.

Norman Mitchell, appellant, in pro. per.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

By information Norman Mitchell was charged in Count I with a violation of section 273d of the Penal Code in inflicting upon Bertha Mae Mitchell a corporal injury on August 23, 1956, which resulted in a traumatic condition, and in Count II with committing a like offense on October 10, 1956. Mitchell was represented at the trial by a Deputy Public Defender. Trial was to a jury which found him not guilty on Count I but found him guilty on Count II. Defendant's motion for a new trial was denied. Probation was likewise denied and defendant was sentenced to state prison for the term prescribed by law. He appeals from the judgment and an order denying him a new trial.

The conviction was based upon evidence of the following facts. Defendant and Bertha Mae Mitchell were husband and wife and on October 10, 1956, they were residing in a three-room apartment on West 47th Street in the City of Los Angeles. At approximately 9 p.m. that evening, Officer G. L. Bryan of the Los Angeles Police Department received a call to go to the Mitchell residence. Upon arriving in the vicinity he saw Mrs. Mitchell running down 47th Street; she was dressed only in a torn slip which was covered with blood spots and she was bleeding from the nose and mouth. Defendant was chasing her. The officer stopped Mitchell and interrogated him. The officer testified that defendant told him he suspected his wife of infidelity with a house guest, that he knocked her down and "stomped" on her, tried to kill her, and that he would certainly kill her after he was released from jail. The officer went to the apartment with defendant and observed what appeared to be fresh blood stains on the floor and walls in all three rooms.

The complaining witness was taken to the receiving hospital where she was examined by Dr. Lawrence Owens, who treated her for a broken jaw, contusions around the face and head, and a laceration over one of her eyebrows. Dr. Owens referred Mrs. Mitchell to the county hospital for further treatment; she remained there for two weeks. A photograph of the complaining witness, taken at the receiving hospital, was introduced in evidence; the photograph disclosed the injuries we have already mentioned.

Mrs. Mitchell testified that around 8:30 p.m. on October 10th she was in bed. Her husband had been drinking. He called her into the bathroom, confronted her with a white boy who was a house guest of the Mitchells, and accused her of "being with the kid." Mrs. Mitchell denied any impropriety. Defendant then seized his wife, struck her on the side of the jaw with his fist, and gave her a bad beating about the face and head. Mrs. Mitchell ran from the apartment and telephoned the police from

a nearby liquor store. In the course of cross-examination which anticipated the defense that was forthcoming, she denied having had intercourse with the guest, denied attacking her husband with a screwdriver, denied hitting her head against the bedstead and denied stumbling into a washing machine on her way out of the apartment. She admitted having stabbed Mitchell in the kidneys in December 1955 and pointing a shotgun at him in June 1956, but she testified that those incidents occurred upon occasions when he was beating her.

Defendant, testifying in his own behalf, stated that he did not strike his wife. While he was lying in bed he discovered his wife and the house guest together on the floor at the foot of the bed. The boy ran outside. Mrs. Mitchell shouted "I'll explain it," reached into a chest of drawers and pulled out a screwdriver. She made a pass at defendant with the screwdriver but he succeeded in disarming her. They began to tussle and Mrs. Mitchell tried to crawl head first underneath the bed. While doing so, she struck her face on the front of the iron bedstead. She rushed out of the apartment and ran into the washing machine. Mitchell denied telling the officer that he had "stomped" on his wife although he admitted saying that she had been unfaithful to him. He testified that the spots in the apartment which the officer stated to be fresh blood stains were spots of red paint and dark floor wax that had been there prior to October 10th. Mitchell was a house painter by trade.

Defendant has filed a brief in propria persona. It is adequate as a presentation of all the points that could be advanced in his behalf. We have made a careful examination of the record and have discovered no insufficiency of the evidence and no error at the trial. There is no merit whatever in the appeal.

Mitchell argues the following points in his brief: (1) The evidence was insufficient to support the verdict; (2) Since the two counts of the information alleged identical offenses committed on different dates, the

fact that the jury found defendant guilty of Count I and not guilty of Count II requires a reversal of the judgment.

[1] The argument that there was insufficient evidence to support the verdict as to the second count cannot be maintained. Section 273d of the Penal Code reads in pertinent part as follows: "Any husband who wilfully inflicts upon his wife corporal injury resulting in a traumatic condition, but not constituting a felonious assault or attempted murder, * * *, is nevertheless guilty of a felony, * * *." The implied findings necessary to sustain a conviction of that offense are that defendant and the complaining witness were husband and wife, that he wilfully inflicted corporal injury upon her, and that the corporal injury thus inflicted resulted in a traumatic condition. *People v. Burns*, 88 Cal.App.2d 867, 200 P.2d 134. There was ample evidence to support such implied findings. The weight to be given to the testimony of the People's witnesses and to defendant's denials of wrongdoing was a matter for the determination of the jury. Mere conflicts in the evidence such as we have related present no question of law. All the elements of the offense charged were established.

[2] There is likewise no merit in the contention that the judgment cannot be sustained because the jury returned inconsistent verdicts on the two counts of the information. Each count in an accusatory pleading which charges a separate and distinct offense must stand upon its own merits, and the disposition of one count has no effect upon the verdict with respect to other counts contained in the pleading; hence a verdict of acquittal of one or more counts is not deemed to be an acquittal of any other count. *People v. Carner*, 117 Cal.App.2d 362, 364, 255 P.2d 835; *People v. Nye*, 38 Cal.2d 34, 39, 237 P.2d 1. Furthermore, defendant denied striking Mrs. Mitchell on August 23rd and there was evidence of the records of the receiving hospital which supported his testimony that she fractured her jaw in an automobile accident on that date.

The wire braces on her jaw were removed several days prior to October 10th. There is no inconsistency between the conclusions of the jury that defendant did not inflict corporal injury upon his wife on August 23rd and that he did do so on October 10th.

The prosecutor made a vigorous attempt to prove the commission of the crime charged in Count I and we find nothing in the record to substantiate defendant's contention that he was accused of that offense solely in order to prejudice the jury against him.

The judgment and the order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



155 Cal.App.2d 554

**Nathan M. DICKER, Plaintiff and
Respondent,**

v.

**Alexander BISNO, Individually and doing
business as Bisno & Bisno, Snader Tele-
scriptions Sales, Inc., a corporation, Com-
bined Television Pictures, Inc., a corpora-
tion, Defendants and Appellants.**

Civ. 22140.

District Court of Appeal, Second District,
Division 1, California.

Nov. 27, 1957.

Action to recover for legal services wherein defendant filed a counterclaim. Judgment for the plaintiff in the Superior Court, of Los Angeles County, Orlando H. Rhodes, J., and the defendants appealed. The District Court of Appeal, Fourth, J., held that permitting filing of a supplemental bill of particulars was not improper; that the defendants were not entitled to raise for the first time on appeal an objection that there had been a misjoinder of causes of action of parties; that the partly

several and partly joint judgment was properly rendered; and that the statute of limitations could not be raised for the first time on appeal.

Judgment affirmed.

1. Judgment ⚭252(1)

In a contested case, the plaintiff may secure relief greater than that prayed for. West's Ann.Code Civ.Proc. § 580.

2. Pleading ⚭328

In action to recover for legal services, permitting filing of a bill of particulars in which a larger balance than that contained in the prayer of the complaint was indicated was not error where the bill was simply an amplification of the complaint and merely gave the defendants reasonable notice of items constituting the plaintiff's claim.

3. Appeal and Error ⚭1039(10)

Permitting the filing of a bill of particulars in which a larger balance was claimed was not prejudicial, where the judgment was less than the amount prayed for in the complaint and less than the amount set forth in either the first or supplemental bill of particulars. West's Ann.Code Civ.Proc. § 580.

4. Appeal and Error ⚭187(2), 193(2)

Where there was no contention by defendants that the court did not have jurisdiction and no objection that the complaint did not state a cause of action and no demurrer and neither the answer nor amended answer set forth any objections as to misjoinder of parties or causes of actions, such objections could not be raised for the first time on appeal. West's Ann.Code Civ.Proc. §§ 430, subds. 4, 5, 433, 434.

5. Judgment ⚭240

In action to recover for legal services, where neither defendant was liable for the obligation of the other except in so far as it was a joint obligation and each was adjudged to pay his or their respective shares of the liability for the services rendered, rendering a partly several or

partly joint judgment against the several defendants was not improper. West's Ann.Code Civ.Proc. §§ 379a, 580.

6. Trial ⚭382

A trial court must weigh the evidence and testimony and give to it value and credit which the court thinks it should receive under the circumstances.

7. Trial ⚭29(2)

In action to recover for legal services, statement by the trial court that he intended to give no value to the arbitrators statement of what he intended to do but was concerned only with what he did was not improper.

8. Limitation of Actions ⚭182(5)

The defense of the statute of limitations is a personal privilege which must be affirmatively invoked by appropriate proceedings in the lower court, otherwise it is waived.

9. Limitation of Actions ⚭182(2)

Where defense of the statute of limitations did not clearly appear on the face of the complaint, plea of limitations if it was to avail should have been made by answer.

10. Appeal and Error ⚭173(10)

Defendants were not entitled to avail themselves of the defense of the statute of limitations where it was not raised by demurrer or by any other proceedings prior to the appeal.

11. Attorney and Client ⚭166(1)

In action to recover for legal services, evidence did not sustain counterclaim of indebtedness of the plaintiff to the defendant for money had and received.

Maurice Rose, Beverly Hills, for appellants.

Nathan M. Dicker and Milton Linder, Beverly Hills, for respondent.

FOURT, Justice.

This is an appeal from a judgment in favor of the plaintiff and against the defendants Alexander Bisno and Combined

Television Pictures, Inc. (formerly known as Snader Telescriptions Sales, Inc.), for services rendered; and from a judgment in favor of the plaintiff and counter-defendant and against the defendant and counter-claimant Alexander Bisno upon a counter-claim.

The plaintiff Dicker is an attorney-at-law. For many years he represented Alexander Bisno in connection with Bisno's real estate transactions. Dicker was on a monthly retainer basis and was paid added amounts when extraordinary services were required. The retainer agreement was separate and apart from the services referred to in the present complaint and is not connected therewith. Alexander Bisno owned all of the stock of Snader Telescriptions Sales, Inc., which corporation changed its name to Combined Television Pictures, Inc., named as one of the appellants herein. In the fall of 1952, while appellants were engaged extensively in the television film production and distributing business they became involved in legal difficulties. Dicker rendered services to the appellants as an attorney in such matters. He received \$2,500 on account from Snader Telescriptions Sales, Inc. The balance of the fees were to be paid to the plaintiff when all of the legal services had been completed. Plaintiff continued to represent the defendants in their television business activities until June 26, 1953, expending about 1,077 hours in connection therewith. The parties were unable to agree upon the reasonable value of the services rendered by the plaintiff to the defendants and on April 20, 1955, the plaintiff filed his complaint for legal services rendered "in the television film production and distributing business, and including in such services proceedings before an arbitrator." He alleged that the value of such services was \$15,000, with a credit of \$2,500 paid on account. One cause of action was stated against all defendants. The appellants answered the complaint by denying generally the allegations of the same, and alleging affirmatively that \$7,500 had been paid by Alexander Bisno as full payment for any services of the plaintiff, and further alleged

that the plaintiff was to look to the arbitration proceedings for further fees if any were due. By way of counter-claim, Alexander Bisno alleged that the plaintiff was indebted to him in the sum of \$5,000 for money had and received. Thereafter an amended answer was filed wherein appellants changed the amount allegedly paid to the plaintiff from \$7,500 to \$2,500. The amount of the counter-claim was increased from \$5,000 to \$7,500. Two more amended answers were filed, neither, however, alleging any new affirmative defenses.

After a demand by the defendants for a bill of particulars, the plaintiff, on July 29, 1955, filed a document titled "Bill of Particulars," which set forth the services rendered to Alexander Bisno and Combined Television Pictures, Inc., in connection with the television matters. This document referred to certain arbitration proceedings and certain actions brought against Bisno in the state and federal courts. Further, it set forth that the services were rendered between October 20, 1952, and about July 15, 1953, and that such services were reasonably worth the sum of \$15,000, upon which \$2,500 had been paid on November 20, 1952. On September 26, 1955, plaintiff filed a supplemental bill of particulars in which he set forth all of the matters in which services were rendered for appellants. In this supplement the number of hours for each particular case and matter (and there were many) was set forth. It indicated that Dicker had spent 1,277 hours working for the defendants, of which 200 hours were on matters not connected with the television business. The reasonable value of the services was claimed to be \$25 per hour, making a total of \$26,925 on account of the television activities, with a credit of \$2,500 paid by Snader Telescriptions Sales, Inc., leaving a balance due Dicker of \$24,425.

The court found that the plaintiff had rendered legal services to Alexander Bisno at his special request and that the reasonable value of those services was \$1,600, and concluded that interest thereon in the amount of \$264 was also due; fur-

ther, that the plaintiff had rendered legal services to Snader Telescriptions Sales, Inc., later known as Combined Television Pictures, Inc., at its request, and the reasonable value of the services so rendered was \$5,350, of which \$2,500 had been paid on account thereof, and concluded that interest on the balance, in the amount of \$473, was also due. Also, it was found that the plaintiff had rendered legal services to Alexander Bisno and Snader Telescriptions Sales, Inc., now known as Combined Television Pictures, Inc., jointly, at their request and that the reasonable value of such services was \$3,200, and concluded that interest thereon in the amount of \$530 was also due. In other words, the court found that the services of the plaintiff to the defendants jointly and severally were of the value of \$10,150, of which \$2,500 had been paid by Snader Telescriptions Sales, Inc., and that there remained due and owing to the plaintiff the sum of \$7,650, plus interest upon the various amounts from the dates the said amounts were found to be due and owing. The court gave judgment to the plaintiff and ordered the liability split as follows: Alexander Bisno—\$1,864; Combined Television Pictures, Inc.—\$3,323; Alexander Bisno and Combined Television Pictures, Inc., jointly—\$3,731.

Simply stated, the issues are (1) was it reversible error to file a supplemental bill of particulars in which a larger balance than that contained in the prayer of the complaint was indicated; (2) can the appellants for the first time on appeal raise an objection that there has been a misjoinder of causes of action or parties when such is not apparent on the face of the complaint; (3) is there any reason why a partly several and partly joint judgment should not be rendered against several defendants sued jointly in one cause of action where the question of misjoinder has not been raised in the trial court; (4) was it reversible error for the court to comment upon what it intended with reference to certain statements of the arbitrator; (5) may the statute of limitations be raised for the first time on appeal?

We are of the opinion that the answer in each instance is — No.

Code of Civil Procedure, section 580 provides that where an answer is filed the court may grant to the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. The complaint in the present case was based upon the performance of legal services to the defendants in the television business. The plaintiff testified at length concerning the services rendered to appellants, either jointly or severally, in their television activities. There were no objections to such testimony upon the ground that it was outside the scope of the issues raised by the complaint. Plaintiff also testified, without objection, as to the value of the services rendered, which testimony was to the effect that the value of the services exceeded the amounts set forth in the prayer in the complaint.

[1] In a contested case the plaintiff may secure relief greater than that prayed for. *Martin v. Pacific Southwest Royalties*, 41 Cal.App.2d 161, 172, 106 P.2d 443; *Johnson v. Polhemus*, 99 Cal. 240, 244, 33 P. 908; *Potter-Huffman Land & Livestock Co. v. Witcher*, 48 Cal.App. 93, 96, 191 P. 725; *Von Schrader v. Milton*, 96 Cal.App. 192, 198, 273 P. 1074; *Nathan v. Dierssen*, 164 Cal. 607, 611, 130 P. 12.

[2] The bill of particulars was simply an amplification of the complaint (*Kurokawa v. Saroyan*, 95 Cal.App. 772, 775, 273 P. 613; *Gage v. Billing*, 12 Cal.App. 688, 108 P. 664), and it merely gave the defendants reasonable notice of the items constituting the plaintiff's claim, to the end that they could be prepared for trial. *McCarthy v. Mt. Tecarte Land & Water Co.*, 110 Cal. 687, 692, 43 P. 391.

[3] In any event, in this case the judgment was less than the amount prayed for in the complaint, and less than the amount set forth in either the first or the supplemental bill of particulars. The question, therefore, is an academic one in this instance, and no substantial rights of either

party are affected either way. *Keefer v. Keefer*, 31 Cal.App.2d 335, 87 P.2d 856.

[4] As to the misjoinder of causes of action, or misjoinder of the parties, it is apparent that such does not exist upon the face of the complaint. Section 430, Code of Civil Procedure, states when a defendant may demur to a complaint. Subdivisions (4) and (5) thereof read as follows: "4. That there is a defect or misjoinder of parties plaintiff or defendant; 5. That several causes of action have been improperly united, or not separately stated." Section 433, Code of Civil Procedure, provides that when any of the matters enumerated in section 430 do not appear upon the face of the complaint, the objection may be taken by answer, and section 434 of the same Code sets forth that if no objection is taken either by demurrer or answer, the defendant must be deemed to have waived the objection, excepting only the objection as to jurisdiction of the court and the objection that the complaint does not state a cause of action. There was no contention by the appellants that the court did not have jurisdiction and there was no objection upon the ground that the complaint did not state a cause of action. There was no demurrer. Neither the answer nor any of the amended answers set forth any objections as to misjoinder of parties or misjoinder of causes of action. The objection cannot be raised, as it was in this case, for the first time on appeal. *Diel v. Baxter*, 58 Cal.App.2d 383, 136 P.2d 789; *Frazure v. Fitzpatrick*, 21 Cal.2d 851, 136 P.2d 566; *Perry v. Futch*, 119 Cal.App.2d 556, 259 P.2d 971.

The appellants had an opportunity, had they been so minded, to request of the court that they be permitted to amend their answer to set forth the proper objection if the supplemental bill of particulars disclosed a misjoinder of parties or a misjoinder of causes of action; but they did not see fit to avail themselves of such opportunity. They cannot now be heard to complain.

[5] As to the matter of whether a partly several, partly joint judgment may be rendered against several defendants sued joint-

ly in one cause of action, where the question of misjoinder has not been raised, it is to be remembered in this instance that the plaintiff's complaint set forth that the services were rendered to the defendants and no objection was raised as to the form of the pleading. The proof was to the effect that all of the services rendered by the plaintiff were to the defendants in their television activities, as alleged in the complaint. We have already alluded to the provisions of section 580 of the Code of Civil Procedure as applying here. Further, it is set forth in section 379a, Code of Civil Procedure, that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

In the case before us, neither appellant was held liable for the obligation of the other, except insofar as it was a joint obligation. Each was adjudged to pay his or their respective share of the liability for the services rendered. The reasons for the provisions in the last mentioned code sections are fairly apparent, namely, to give greater freedom and flexibility in practice and to place responsibility for a wrong without the necessity of a multiplicity of suits. *Busset v. California Builders Co.*, 123 Cal.App. 657, 12 P.2d 36.

The next contention is in essence, that the court refused to give consideration to certain tape recordings. The plaintiff, in rebuttal to what was set forth in the tape recordings introduced by appellants, was attempting to introduce a letter into evidence. The appellants objected to the letter as hearsay and the objection was sustained. In sustaining the objection the court said: "I will state now, unless something further occurs in this trial, that I intend to give no value to the arbitrator's statement of what he intended to do, or was doing. I am concerned with what he did, not as his intentions may have been expressed from time to time."

[6, 7] The appellants had, at that time, presented all of their evidence and respond-

ent had completed his case but for a small amount of rebuttal, and he himself was on the witness stand. The court was properly more concerned with what the arbitrator did, than in what he said he intended to do. It is the duty of the trial court to weigh the evidence and testimony and to give to it the value and credit which the court thinks it should receive under the circumstances.

[8-10] Lastly, the appellants contend that some of the services rendered by the plaintiff were completed more than two years before the filing of the complaint. As heretofore indicated, the defense of the statute of limitations was not raised by demurrer or by any other proceeding prior to this appeal. The defense of the statute of limitations is a personal privilege which must be affirmatively invoked by appropriate proceedings in the lower court, otherwise it is waived. *Hall v. Chamberlain*, 31 Cal.2d 673, 679, 192 P.2d 759; *Bliss v. Sneath*, 119 Cal. 526, 528, 51 P. 848; *Sheeter v. Lifur*, 113 Cal.App.2d 729, 739, 249 P.2d 336. The defense of the statute of limitations in this case did not clearly appear on the face of the complaint and therefore the plea, if it was to be of any avail, should have been made by answer. *Vassere v. Joerger*, 10 Cal.2d 689, 693, 76 P.2d 656; *Pleasant v. Samuels*, 114 Cal. 34, 45 P. 998. Even if such were not the law, in the case at hand there was ample evidence of activity upon the part of the plaintiff to toll the statute of limitations.

[11] As to the counter-claim against the plaintiff, the trial court summed up the matter when, at the conclusion of the case it said:

"The Court has listened carefully to the evidence and is prepared to indicate one finding in connection with the counter-claim, to wit, that it has not been established by a preponderance of the evidence. The Court feels that this is the imagined figment of some defendant's imagination."

We find no prejudicial error in the record.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.

155 Cal.App.2d 639

A. W. APPEL, Plaintiff and Respondent,

v.

Caroline E. HUBBARD, Burton F. Hubbard, Adolph Stockly, Mary F. Stockly, Richard Bradford Harrison, Lee Burgeson, Trustee, et al., Defendants and Appellants.

Civ. 5725.

District Court of Appeal, Fourth District, California.

Nov. 27, 1957.

Action to recover indemnity for amount paid by plaintiff to satisfy claim under a defaulted bail bond. From orders of the Superior Court of San Bernardino County denying motions for change of venue, the defendants appealed. The District Court of Appeal, Griffin, J., held that where plaintiff was forced to satisfy amount paid by surety on bail bond and he sued his co-obligors for indemnity and some defendants signed a deed of trust on their realty located in Los Angeles county and other defendants gave a deed of trust on their real property located in San Bernardino county to secure the obligations, suit to enforce indemnity was properly maintained in San Bernardino county.

Orders affirmed.

1. Mortgages ⇨218.4

Under the statute declaring that there can be but one form of action for the recovery of any debt, or enforcement of any right secured by mortgage, there could be but one action for the recovery of a debt secured by trust deeds which was a suit to foreclose the trust deeds. *West's Ann Code Civ.Proc. § 726.*

2. Venue ⇨5(1)

Where parties become jointly and severally liable for a debt in one instrument which is secured by separate mortgages executed by different obligors, even though the realty involved is located in two counties and the realty or any part of it is situated in one county, an action on the original obligation is properly brought in the county where the realty is situated. *West's Ann.Code*

Civ.Proc. §§ 392-395, 726; West's Ann. Const. art. 6, § 5.

3. Venue $\Leftrightarrow$ 5(1)

Where plaintiff was forced to satisfy amount paid by surety on bail bond and he sued his co-obligors for indemnity and some defendants signed a deed of trust on their realty located in Los Angeles county and other defendants gave a deed of trust on their real property located in San Bernardino county to secure the obligations, suit to enforce indemnity was properly maintained in San Bernardino county notwithstanding the latter defendants were not residents of San Bernardino county. West's Ann.Code Civ.Proc. §§ 392-395, 726; West's Ann. Const. art. 6, § 5.

Wolver & Wolver, Los Angeles, for appellants.

Chapman & Sprague, San Bernardino, for respondent.

GRIFFIN, Justice.

One Harrison was arrested and was required to post bail in the sum of \$5,000 by the Superior Court of Los Angeles County. It is alleged in plaintiff's complaint that a surety bond was there posted by Continental Casualty Company on behalf of defendant Harrison, upon the request of defendants and appellants herein, namely, Richard Bradford Harrison, Caroline E. Hubbard, Burton F. Hubbard, Adolph Stockly and Mary F. Stockly, in consideration of their promise in writing to indemnify and to save harmless the surety from any liability. After defendant Harrison was released on bail he failed to appear at the time required and the bail was forfeited. The amount was paid by the surety company.

The agreement, as pleaded and which was signed by defendants on June 4, 1956, in Los Angeles County, provides in part that in case of declaration of forfeiture, they would pay to the surety company the penal amount. In signing, defendants, the Stocklys and the Hubbards, gave their address as Pomona, California, and in connection

therewith rendered financial statements. The Hubbards signed a deed of trust in said amount on their real property located in Pomona, Los Angeles County, and the Stocklys gave one on their real property located in Fontana, San Bernardino County, to secure the payment to the beneficiary for any liability suffered by it. Plaintiff A. W. Appel, as beneficiary under the deed of trust and as attorney in fact for the surety company, gave notice to them of the forfeiture of the bond and payment of the amount by the surety company, and declared the default. It is then alleged that demand was made for payment of said \$5,000 under the original agreement above mentioned; that the Los Angeles property had been sold to the State for taxes; that no other proceedings had been had, at law or otherwise, for the recovery of said money; that plaintiff brought this action to enforce the provisions of the bail bond agreement; that defendants refused to indemnify plaintiff according to the agreement for the loss suffered by the company; and that said agreement has been assigned by the surety company to plaintiff Appel. The prayer is to recover from defendants \$5,000 on said indemnity agreement plus attorneys' fees and costs, and that said sum be declared a lien on said real property; that each defendant be foreclosed of all equity of redemption or other interest in said real property or any part thereof; that the real property be sold and the proceeds be applied to the payment of said amount; that the court direct the manner of sale; and that plaintiff have judgment and execution against defendants for any deficiency.

The motions for change of venue to Los Angeles County were predicated upon the ground that the county in which the action was commenced was not the proper county because the named defendants, at the time, were not residents of San Bernardino County, but were residents of Los Angeles County. Affidavits indicating this fact were filed therewith. In conjunction therewith there was also filed demurrers to the complaint which questioned the jurisdiction of the court and attacking the allegations of

the complaint in general. Motions to strike portions of the complaint in reference to the deeds of trust and the property which secured them were filed. The motions to strike and to change venue were denied. The appeal is from the orders denying the motions to change venue. The record is predicated upon the clerk's transcript.

It is plaintiff's claim, in support of the orders: (1) That there can be but one cause of action for the recovery of any debt secured by a mortgage on real property and that is by foreclosure of the security, and where the debt is secured by two or more separate and distinct mortgages, all must be foreclosed in the one cause of action, citing such authority as section 726 of the Code of Civil Procedure; *Brown v. Jensen*, 41 Cal. 2d 193, 195, 259 P.2d 425; *Stockton Savings & Loan Soc. v. Harrold*, 127 Cal. 612, 616, 60 P. 165; *Stark v. Coker*, 20 Cal.2d 839, 845, 129 P.2d 390; and *McArthur v. Magee*, 114 Cal. 126, 45 P. 1068. (2) That where separate mortgages or trust deeds covering properties in two or more counties are given to secure one debt, or obligation, the creditor must include all properties on which there is a lien to secure the debt in one action or he waives the lien as to the property not included, and such action may be commenced in any county in which any of the properties so included is situated. (3) That an action to foreclose a lien on real property is local in nature and must be commenced in the county in which the real property or some part thereof, which is the subject of the action, is situated, citing such authority as Section 392 of the Code of Civil Procedure; Article 6, Section 5, California Constitution; *Murphy v. Superior Court*, 138 Cal. 69, 71, 70 P. 1070; and *Kent v. Williams*, 146 Cal. 23, 10, 79 P. 527.

Defendants claim (1) That the two deeds of trust here involved cannot be construed as one and the same instrument but rather, in law, are separate and distinct, and that where a joint debt is secured by each of the debtors thereto by separate and distinct deeds of trust upon the real property of each such debtor, such real property being situated in different counties, a plaintiff

cannot properly seek to foreclose such deeds of trust by the instigation of one cause of action, citing such authority as 59 C.J.S. Mortgages § 158, p. 209; *McDonald v. Second National Bank of Nashua*, 106 Iowa 517, 76 N.W. 1011; *Tacoma Savings Bank & Trust Co. v. Safety Investment Company*, 123 Wash. 481, 212 P. 726; *Merced Security Savings Bank v. Casaccia*, 103 Cal. 641, 37 P. 648; *McArthur v. Magee*, 114 Cal. 126, 45 P. 1068; and Sec. 392, Code Civ.Proc. (2) That the right to foreclose in one action separate mortgages or trust deeds covering properties in two or more counties given by the same parties does not entitle foreclosure in one action upon separate mortgages or trust deeds covering properties in two or more counties when each is given by separate parties. (3) That the relief herein sought is essentially for breach of contract rather than for the foreclosure of deeds of trust; that plaintiff cannot join in one action a cause of action for breach of contract and the foreclosure of two separate deeds of trust securing the same where neither the real property involved in one such deed of trust, the residences of all of the defendants, and the place of making, execution, and performance of such contract are not within the county wherein such action was commenced, citing 34 Cal.Jur.2d pp. 182-183, sec. 502; Article 6, sec. 5 California Constitution; Sec. 392, Code Civ.Proc. (4) That where real property or the title thereto is not the exclusive subject of such action, then in such event the subject of said action is not "local" but rather is deemed to be "transitory", citing *Turlock Theatre Co. v. Laws*, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786; *Neet v. Holmes*, 19 Cal.2d 605, 122 P.2d 557; and *O'Gorman v. Wachter*, 71 Cal.App. 266, 235 P. 57. (5) That where a plaintiff unites in one complaint matters which form the subject of a personal action with matters which form the subject of a local action then in such event said cause of action is not controlled by the provisions of the Code of Civil Procedure section 392, citing *White v. Adler*, 5 Cal.Unrep.Cas. 215, 218, 42 P. 1070.

(6) That if the judgment sought to be obtained can be satisfied in money, then in such event the cause of action is transitory and not local, citing *Hardy v. White*, 130 Cal.App.2d 550, 279 P.2d 126. And (7) That where a complaint contains both local and transitory causes of action, a defendant may have the entire action transferred to the county of his or her residence, citing *Turlock Theatre Co. v. Laws*, supra.

At the outset, it must be conceded, had it not been for the allegation that the real property involved in the one trust deed attempted to be foreclosed was located in San Bernardino County, the order retaining jurisdiction in that county would be unauthorized under the undisputed facts. Secs. 392-395, Code Civ.Proc.; *O'Gorman v. Wachter*, supra; *Turlock Theatre Co. v. Laws*, supra; Art. 6, sec. 5, California Constitution.

Defendants concede that there is adequate authority to the effect that "a right exists to maintain a single suit to foreclose separate mortgages, the same having been executed by and between the *same parties*, securing the same debt or portion thereof, upon real property in different counties." Citing 110 A.L.R. 1477. However they do claim there is some authority to the contrary, citing *McDonald v. Nashua Second National Bank*, supra; *Tacoma Savings Bank & Trust Co. v. Safety Investment Co.*, supra. Their main claim in the instant action is that the deeds of trust were not executed by the *same parties* and do not come within this rule. It appears that the California courts have held in accordance with the concession. *Kent v. Williams*, supra; *Murphy v. Superior Court*, supra.

[1] Section 726 of the Code of Civil Procedure provides: "There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by

mortgage upon real or personal property, * * * In such action the court may, by its judgment, direct the sale of the encumbered property * * *." In interpreting that section, the courts have consistently held that there can be but one action for the recovery of a debt secured by trust deeds, which is to foreclose the trust deeds. *Brown v. Jensen*, 41 Cal.2d 193, 195, 259 P.2d 425; *Kent v. Williams*, supra. In *Stockton Savings & Loan Soc. v. Harrold*, 127 Cal. 612, at page 616, 60 P. 165, 167, it is said:

"By the law of this state, one who proceeds for the recovery of a debt secured by mortgage is required to exhaust the security *in one action* for the foreclosure of the mortgage * * (Italics ours) and it has been held, pursuant to the policy declared by the statute, that, when the same debt is secured by two distinct mortgages, the foreclosure of but one of these has the effect to waive and nullify the lien of the other."

[2,3] It therefore appears to us that where the parties became jointly and severally liable for a debt, *in one instrument*, and said debt is secured by separate mortgages or trust deeds, executed by different obligors, even though the real property involved is located in two separate counties, and where the real property or any part of it is situated in one county, an action on the original obligation setting up these facts and the nature of the security sought to be foreclosed is properly brought in the county where the real property which is the subject of the action, or some part thereof, is situated.

Orders affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

155 Cal.App.2d 561

In the Matter of the ESTATE of Mike M. NERSISIAN, Deceased.

Karapet NERSISIAN, David Nersisian and Napoleon Nersisian, Petitioners and Appellants,

v.

Leo KOLIGAN, Contestant and Respondent,

K. A. Sarafian, Armenian General Benevolent Union, a corporation, and Irene Meketarian, Respondents.

David NERSISIAN, Karapet Nersisian and Napoleon Nersisian, Petitioners,

v.

The SUPERIOR COURT In and For the COUNTY OF LOS ANGELES, State of California, Respondent.
Civ. 22300, 22234.

District Court of Appeal, Second District,
Division 1, California.
Nov. 27, 1957.

Hearing Denied Jan. 23, 1958.

Proceeding in the matter of a decedent's estate. From an order of the Superior Court of Los Angeles County, Clyde C. Triplett, J., denying a motion to vacate and set aside decree of partial distribution, an appeal was taken. Appellants also petitioned for writ of certiorari. The District Court of Appeal, Drapeau, J. protem., held that no reciprocity exists between residents of Soviet Union and residents of State of California, and that citizens of Soviet Union would not be entitled to take under will of California resident.

Appeal dismissed and petition denied.

1. Wills ⚡271

Whatever defect there might have been in service of notices of petition to probate will was cured by appearance of testator's heirs, whose attorney filed with court instrument consenting to jurisdiction. West's Ann.Code Civ.Proc. § 473; West's Ann.Prob.Code, § 328.

2. Aliens ⚡7, 14

No reciprocity exists between residents of Soviet Union and residents of State of California; and citizens of Soviet Union

would not be entitled to take under will of California resident. West's Ann.Prob.Code, §§ 259, 259.1.

3. Aliens ⚡9, 14

If a nonresident alien cannot allege and prove reciprocity, he may not inherit under California laws. West's Ann.Prob.Code, §§ 259, 259.1.

4. Executors and Administrators ⚡314(6, 12)

Persons not entitled to inherit can take no part in litigation in estates of decedents in California, and have no standing to complain of any order made with respect thereto. West's Ann.Prob.Code, §§ 259, 259.1.

5. Judgment ⚡475

Probate proceeding cannot be impeached for lack of jurisdiction unless the record on its face affirmatively shows that probate court was without jurisdiction.

6. Executors and Administrators ⚡314(12)

Order denying motion to vacate decree of partial distribution of testator's estate is not appealable. West's Ann.Prob.Code, § 1240.

7. Constitutional Law ⚡55

District court of appeal has no power to add additional orders to those made appealable by Probate Code section. West's Ann.Prob.Code, § 1240.

8. Certiorari ⚡7

Where nonresident heirs had opportunity to perfect lawful appeal, and in fact did appeal from order of partial distribution, but abandoned such appeal, certiorari would not lie. West's Ann.Prob.Code, § 1240; West's Ann.Code Civ.Proc. § 1068.

Margolis, McTernan & Branton, Los Angeles, for appellants.

Joseph Scott, Charles Murstein, Los Angeles, James C. Janjigian, Fresno, for respondents (Executors of Estate of Mike Nersisian, and Armenian General Benevolent Union).

DRAPEAU, Justice pro tem.

Mike M. Nersisian was born in Armenia, now one of the soviet states. He came to America and accumulated property worth approximately \$175,000. He died in 1952, a resident of Los Angeles county, California, leaving a last will and testament.

The will directed that his estate go to Armenian General Benevolent Union, as trustee, with directions as follows:

1. To distribute \$10,000 to his sister, Margaret Agopian, of Muslugi, Armenia, U. S. S. R., or if she predeceased him to her two sons, share alike.

2. To distribute to his nephew, Bobken Nersisian, of Kellaki, Armenia, U. S. S. R., \$500.

3. To use \$10,000 to establish a general hospital to bear his name at the city of Kirikh, Armenia, U. S. S. R., the city of his birth.

4. To distribute the remainder of his estate to his brothers Garabed Nersisian and David Nersisian and to his nephew, Napoleon Nersisian, share alike.

It is stated in the will that the brothers reside at Tiflis, Armenia, and the nephew at Vagarshabad, near Erivan, Armenia, U. S. S. R.

The will further provides that in the event it is not legally possible to transmit the property to the soviet heirs, "I do hereby direct that all of my estate shall be distributed to the said Armenian General Benevolent Union, a corporation, for use by it within the scope of its charitable and benevolent corporate purposes."

The will was admitted to probate in 1953. The order admitting the will to probate states that defaults of all of the legatees named as residing in the soviet union were entered.

In 1954, the executors filed their second annual account and petition for partial distribution. In the decree of partial distribution that followed it is stated that at the time of the making of the will and at all times since, all of the legatees were and are aliens; and that "they and each of them

now reside, and have at all times during the lifetime of each of them, prior to, and at the life of making said will, and ever since the making of said will by deceased on July 29, 1950, and thereafter, have each resided within the Socialist Soviet Republic of Armenia only, none of them ever having left Armenia nor ceased to reside there.
* * *

The decree then finds that no reciprocity exists between residents of the soviet union or the republic of Armenia and the state of California; that the soviet heirs thus are not qualified to take under the will; and that the Armenian General Benevolent Union should receive the bulk of the estate in accordance with the prayer of the petition for partial distribution.

Garabed, David, and Napoleon Nersisian, legatees and heirs named in the will, appeal from the order of the probate court denying their motion to vacate and set aside the decree of partial distribution.

Grounds of appeal are:

1. The probate court was without jurisdiction to make the decree of partial distribution, because valid notice of the proceedings leading up to the entry of that decree had not been given as required by law.

2. Since the defect in the jurisdiction of the probate court appears on the face of the judgment roll, it was error for the court to deny appellants' motion to vacate its prior decree.

3. The probate court having acted without jurisdiction and having refused to recognize this, appellants are entitled to relief either by appeal or by writ of certiorari.

The facts supporting these grounds of appeal may be epitomized as follows:

The will stated that testator's brothers lived in Tiflis, Armenia.

Copies of the petition for probate of the will were mailed to the brothers at that address, in an attempt to comply with section 328 of the Probate Code. Pertinent parts of that section provide that if heirs are not personally served copies of the notice of hearing of a petition to admit a will

to probate, the notice must be mailed "postage prepaid, from a post office within this State, addressed to them at their respective places of residence, if known to the petitioner * * *."

Tiflis is the capital city of another soviet state, the republic of Georgia. Search of maps and other sources of geographical information shows that there is no "Tiflis" in the Russian republic of Armenia.

All of the parties to this appeal have argued from the leading case of *Farmers etc. Nat. Bank v. Superior Court*, 25 Cal.2d 842, at page 846, 155 P.2d 823, at page 825, in which our Supreme Court says: "* * * an order admitting a will to probate which includes the names of known heirs who have not been notified of the hearing is void upon its face, and the probate court, at least up to the time of closing the estate, has power to set it aside."

And (25 Cal.2d at page 845, 155 P.2d at page 825), "Courts should be particularly alert to require compliance with statutory provisions relating to constructive notice, for a departure therefrom constitutes a denial of due process."

But in that case the Supreme Court holds that this jurisdictional defect can be cured by the general appearance of heirs through their attorneys.

So we come to what we think is the controlling question in this case: Did the two brothers appear in this case, by their attorneys?

Garabed's appearances are as follows:

August 24, 1954, filed request for special notice.

October 6, 1954, filed notice of appeal from an order settling second annual account, and for preliminary distribution.

December 10, 1954, filed application to vacate decree, settling second annual account and for preliminary distribution, made under section 473 of the Code of Civil Procedure.

January 13, 1955, application to vacate said decree; and the later notice of appeal from order denying same.

David's appearances are as follows:

November 3, 1954, filed notice of appeal from the order settling second annual account and for preliminary distribution.

January 13, 1955, filed affidavit in support of Garabed's application to vacate decree settling second annual account and for preliminary distribution.

While there might be some debate as to the sufficiency of these appearances, especially as to David, there is a document in the file which we think settles the argument as to whether or not there was sufficient appearance to cure the defect in the service of notice of the petition to probate the will.

This is from page 9 of the augmented record on appeal, and it is as follows:

"(Title of Court and Cause)

"Abandonment of appeal by appellants

"To the Clerk of the above entitled Court:

"You are hereby notified that the appeal from the judgment of the Superior Court of the State of California in and for the County of Los Angeles, in the above entitled cause, for which notices of appeal have heretofore been filed with said Clerk of the Superior Court, are hereby abandoned by appellants Karapet Nersisian, also known as Garabed Nersisian, Margaret Agapian, Tavid Nersisian, Napoleon Nersisian, and the City of Kirikh, Armenia, U. S. S. R., and appellants consent that the jurisdiction of said Superior Court in said cause shall be restored.

"Dated: January 12, 1955." (Emphasis added.)

This document was signed by the attorneys for "Krapet Nersisian aka Garabed Nersisian, Margaret Agapian, Tavid Nersisian, Napoleon Nersisian, City of Kirikh, Armenia, U. S. S. R."

It is to be noticed that this notice of abandonment of appeal spells the brother David's name "Tavid." But it is clear enough from the record here that David Nersisian was meant by his attorneys.

[1] Therefore it would seem that whatever defect there may have been in the service of the notices of the petition to probate the will was cured by the appearance of all of the Armenian heirs and legatees.

[2] This brings us to respondent executors' contention that appellants are non-resident aliens; that no reciprocal rights of inheritance exist among residents of the United States of America and residents of the soviet union (see, Probate Code, § 259); and that therefore appellants have no right to participate in this estate and no standing in it.

This contention we think is sound in law.

[3] If a non-resident alien cannot allege and prove reciprocity he may not inherit under our laws. Probate Code, §§ 259, 259.1; In re Estate of Knutzen, 31 Cal.2d 573, 578, 191 P.2d 747; In re Estate of Bevilacqua, 31 Cal.2d 580, 191 P.2d 752; In re Estate of Karban, 118 Cal.App.2d 240, 257 P.2d 649; In re Estate of Giordano, 85 Cal. App.2d 588, 193 P.2d 771.

The policy of our law as so expressed finds good practical reasons to support it. Consider the following remarks of the judge of the probate court who heard and denied the motion:

"The Court: You might have the law on it, but as a matter of fact how are you going to prove that any distribution to be made here to a Russian subject under Russia would be distributed to him and not taken by the Russian Government?"

And again, "The Court: * * * That matter has been gone into a number of times, not only by myself sitting in this Court but by other judges of this Court, and the evidence has been abundant that they would only receive—I think in one instance they had received about five per cent of that which was distributed and the Russian government would take the rest of it in duties and what not."

[4] It follows therefore that persons not entitled to inherit can take no part in litigation in estates of decedents in this state,

and they have no standing to complain of any order made with respect thereto. It has been said by our Supreme Court that persons having no interest in an estate in probate cannot question the manner of its distribution. In re Estate of Spreckels, 165 Cal. 597, 604, 133 P. 289.

The fact that attorneys for appellants first discovered on November 2, 1956, that the notices were mailed to Tiflis, Armenia, rather than to Tiflis, Georgia, does not change the views of this court hereunder expressed.

Appellants have also petitioned for a writ of certiorari to review this case, probably as a matter of precaution mostly.

We have stated the facts in this controversy at considerable length to throw light upon the reasoning of our conclusions about to be stated.

[5] First. We approached the case as an impeachment of the entire proceeding for lack of jurisdiction. But this approach is untenable because the record on its face must affirmatively show that the probate court was without jurisdiction to make its order. Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 5 Cal.2d 35, 41, 53 P.2d 127; Cf., In re Dahnke's Estate & Guardianship, 64 Cal.App. 555, 560, 222 P. 381.

[6] Second. The order appealed from denying the motion to vacate the decree of partial distribution is not appealable. Such an order is not mentioned in section 1240 of the Probate Code; and in Re Estate of Rouse, 149 Cal.App.2d 674, 309 P.2d 34, it is so expressly held.

[7] The argument of counsel for the Armenian heirs that we should hold the order appealable to do substantial justice does not commend itself to us. We do not have the power to add additional orders to the Probate Code section.

[8] Third. Nor do we think that certiorari lies in the facts of this case. The Armenian heirs had an opportunity to perfect a lawful appeal. In fact they did appeal from the order of partial distribution,

but they abandoned it. When there is a right of appeal certiorari does not lie. Code Civ.Proc. § 1068.

Therefore this court has no other alternative but to make the following orders:

The appeal is dismissed.

The petition for a writ of review is denied.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



155 Cal.App.2d 474

Melvin STAFFORD, Plaintiff and Appellant,

v.

RIVERSIDE COUNTY, City of Palm Springs, et al., Defendants and Respondents.

Civ. 5583.

District Court of Appeal, Fourth District, California.

Nov. 22, 1957.

Action by taxpayer for refund of certain realty taxes paid under protest. The Superior Court, Riverside County, Hilton H. McCabe, J., sustained a demurrer to the complaint without leave to amend and entered judgment for defendants, and taxpayer appealed. The District Court of Appeal, Griffin, J., held that complaint by taxpayer for refund of realty taxes paid under protest, alleging that assessment of such taxes as escape taxes was void, and sufficiently setting forth reasons for claimed invalidity, as to one installment, and amendable to set forth sufficient reasons as to another installment, sufficiently alleged a cause of action for refund predicated on void assessments.

Reversed with directions.

1. Taxation Ⓒ451

Generally, a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before administrative body empowered initially to correct the error, although an exception exists where an attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction.

2. Taxation Ⓒ543(2)

Where alleged escape assessments were added to assessment role outside regular assessment period and without notice to taxpayer, board of equalization had no jurisdiction over the subject matter for such year and taxpayer was not required to make timely appeal to it for relief, for such year, as a prerequisite to maintenance of an action for refund of money paid under protest in payment of such assessments which allegedly were void. West's Ann.Rev. & Tax.Code, §§ 5137, 5139.

3. Taxation Ⓒ543(6)

Complaint by taxpayer for refund of realty taxes paid under protest, alleging that assessment of such taxes as escape taxes was void, and sufficiently setting forth reasons for claimed invalidity, as to one installment, and amendable to set forth sufficient reasons as to another installment, sufficiently alleged a cause of action for refund predicated on void assessment. West's Ann.Rev. & Tax.Code, §§ 5096 (a-c), 5136 et seq., 5137, 5139.

4. Counties Ⓒ222

Municipal Corporations Ⓒ1034

Common count method of pleading is available against the county or a city where other counts incorporated in a complaint sufficiently show full details of transaction and nature of claim.

Leonard A. Bock, Palm Springs, for appellant.

Ray T. Sullivan, Jr., County Counsel, Leo A. Deegan, Asst. County Counsel, and Gerald F. Schulte, Deputy County Counsel, Riverside, for respondents.

GRIFFIN, Justice.

In a second amended complaint plaintiff alleges he owned two lots in Palm Springs Village Tract. Apparently, prior to March, 1947, there was a hotel building on these lots and plaintiff added improvements thereto. It was alleged that the nature of these improvements, for the years 1947, 1948 and 1949, were well known to the county assessor and tax collector and were open and apparent to anyone; that prior to the completion of the original building plaintiff was regularly assessed for said real property and improvements thereon and paid approximately \$250 per year taxes; that after completion the taxes and assessments were doubled; that about March 5, 1955, there were further added to said assessment rolls, without notice to plaintiff, "alleged escape assessments" for the regular tax years of 1949, 1950, 1951, 1952, 1953, and 1954, at the rate of \$368.44 per year, totaling \$2210.64; that thereafter, on December 9, 1955, plaintiff, who claimed said alleged escape assessments were void, paid the first installment of \$1888.39 to the defendant tax collector, claiming that \$1508.27 (being the portion designated as escape assessment) was paid under protest. (Exhibit A is a copy of said protest attached to the complaint.) It is then alleged said escape assessment on said land and improvements and the required payment thereof was void and illegal for the reasons set forth in the protest and that said property did not in fact escape any prior assessment; that plaintiff paid the second installment of \$1407.93 before the due date, and \$1105.32 was paid under protest. Also, the same allegations are made in the claim to the board of supervisors and board of equalization. He then alleges that on January 5, 1956, he filed with the board of supervisors a verified petition (Exhibit B attached to the complaint) asking it to order the appropriate authorities to refund said sum and that all further assessments levied under the guise of escape property tax be canceled as being void. This is in accordance with the claim made in Exhibit B. Said petition was denied on February 20, 1956, without ob-

jection as to its form. He then alleges that all the property described was, at all times, known to defendants and was duly assessed on the rolls of the county as required by law; that the increased assessment, under the guise of escape assessment, was arbitrary, void, and without any basis in law, and that in fact no property of plaintiff escaped assessment. The allegation is then made that on May 17, 1956, plaintiff filed a verified petition for refund with the board of equalization (identical to Exhibit B); that said board referred said matter to the tax collector and no action was taken by it, and that the tax collector does not intend to do so; that a notice to plaintiff from said board stated that said board did not handle said matters; that on July 2nd, 1956, plaintiff filed his verified claim for refund with the board of supervisors, sitting as a board of equalization (Exhibit C) and it was denied upon the ground it lacked jurisdiction to consider said petition. As a second cause of action, after repeating these general allegations, plaintiff alleges in a common count that defendants became indebted to plaintiff in the sum of \$2210.64 for money had and received, plus \$1105.32 paid on April 10, 1956. A demurrer to this complaint was sustained without leave to amend and a judgment for defendants followed.

The main question is whether plaintiff has or can state a cause of action under section 5096 et seq. or section 5136 et seq. of the Revenue and Taxation Code. It is the argument of defendants that the complaint does not allege specific reasons and follow those reasons set forth in the protest or demand for refund, and that timely application to the board of equalization for the relief sought in his complaint was not made, citing section 5139 of the Revenue and Taxation Code; *De Fremery v. Austin*, 53 Cal. 380; and *Albro v. Kettelle*, 42 R.I. 270, 107 A. 198.

[1] It is a general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body em-

powered initially to correct the error. *Security-First National Bank v. County of Los Angeles*, 35 Cal.2d 319, 217 P.2d 946. An exception is therein noted such as where the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction. See also *Parrott & Co. v. City and County of San Francisco*, 131 Cal.App.2d 332, 280 P.2d 881. The function of the board of equalization is to equalize the assessment of property on the local roll. Sec. 1603 Revenue & Taxation Code; *Parrott & Co. v. City and County of San Francisco*, supra.

The next questions presented are whether the claimed escape assessments were invalid and void and come within an exception, and whether the law first required a timely request for redress before the board of equalization, and whether it had jurisdiction and power to act. *Parr-Richmond Industrial Corp. v. Boyd*, 43 Cal.2d 157, 272 P.2d 16. Section 531 of the Revenue and Taxation Code provides that "If any property belonging on the local roll has escaped assessment, the assessor shall assess the property on discovery at its value on the lien date for the year for which it escaped assessment * * *" Section 533 of the same code provides that "Property escaping assessment shall be entered on the roll prepared or being prepared in the assessment year when it is so discovered and, if this is not the roll for the assessment year in which it escaped assessment, the entry shall be followed with 'Escaped assessment for year 19—.'"

Plaintiff's brief discloses no California cases defining "escaped property" or "property escaping assessment" as applied to improvements on real property. There is considerable authority from other jurisdictions bearing on this question. In *Davidson v. Franklin Avenue Inv. Co.*, 129 Minn. 87, 151 N.W. 537, plaintiff acquired property in 1912, which had on it a four-story concrete building. The land was assessed, but not the building, from 1907 to 1911. The auditor, in 1912, discovered this fact and reassessed the property as "omitted property" under a similar statute to that here involved. Plaintiff paid the tax and

demanding repayment from the defendant, from whom he purchased the property. The question was whether the auditor had power to reassess as omitted property, real estate which had been assessed and the taxes paid. The Supreme Court of Minnesota there held that the statute under consideration did not authorize a reassessment where the real estate was assessed and the taxes were paid for the years in question. To the same effect are *Application of National Tube Co.*, Ohio B.T.A., 98 N.E.2d 78; and *E. K. Wood Lumber Co. v. Whatcom County*, 5 Wash.2d 63, 104 P.2d 752. In the latter case the court held that the procedure of county officers in attempting to re-assess land for prior years, so as to include the value of growing timber thereon, which had been inadvertently omitted in prior assessments, was unwarranted and was no defense in an action to recover excess taxes paid. To the same effect are *Hammond Lumber Co. v. Cowlitz County*, 84 Wash. 462, 147 P. 19, 20; *Marshall Wells Co. v. Foster County*, 59 N.D. 599, 231 N.W. 542, 545; *State v. Mortgage-Bond Co. of New York*, 224 Ala. 406, 140 So. 365, 366; *Delta Land & Timber Co. v. Police Jury*, 169 La. 537, 125 So. 585, 586; and *State v. R. C. Jones & Co.*, 169 Okl. 38, 35 P.2d 908, 910. *People ex rel. McDonough v. Birtman Electric Co.*, 359 Ill. 143, 194 N.E. 282; and *People v. Sears*, 344 Ill. 189, 176 N.E. 273, are distinguishable. In *De Luz Homes, Inc., v. County of San Diego*, 45 Cal.2d 546, 290 P.2d 544, involving assessment of possessory estates of lessees of government property, the trial court found in favor of the taxpayer and held that the assessment had not been made during the regular assessment period, that it was not properly an "escape assessment", and accordingly it was void. The Supreme Court reviewed the order of the trial court in respect to the method of computing the value of the leasehold estates and remanded the case for further proceedings before the county board of equalization.

[2,3] From the authorities cited it would appear that it is only where there has been no assessment at all that the provisions for escape assessments apply. There were

sufficient allegations of the illegality and invalidity of the assessment in dispute, particularly as to the claimed fact that the escaped assessments for the years 1949 to 1954, inclusive, were added to the assessment rolls outside the regular assessment period and without notice to plaintiff. The board of equalization properly determined it had no jurisdiction over the subject matter for these years. The requirement that plaintiff first make timely appeal to it for relief, for those years, was unnecessary. *Mahoney v. City of San Diego*, 198 Cal. 388, 404, 245 P. 189. Accordingly, in this respect, the timing and sufficiency of the notice to said board of equalization becomes unimportant. Apparently the first notice plaintiff had of such illegal assessment was at the time of the receipt of the tax statement. The tax was paid under a verified protest in respect to the years concerned and it sufficiently apprised the tax collector that he was endeavoring to illegally collect said taxes under a wrong theory of the law (escape property tax). A similar request for refund was directed to the board of supervisors under section 5096 of the Revenue and Taxation Code. The reason for the claimed invalidity was sufficiently set forth and was generally in accord with the allegations and prayer of the complaint. It was sufficient to satisfy the requirements of sections 5137 and 5139 of the Revenue and Taxation Code, particularly as to the first installment paid.

It is not clear from the complaint what grounds were set forth in the protest as to the second installment of taxes paid. The complaint may well be amended to make these allegations more certain. *Simms v. County of Los Angeles*, 35 Cal.2d 303, 217 P.2d 936. Section 5136 et seq. of the Revenue and Taxation Code provide generally that within six months after the payment of taxes, under protest, an action may be brought against a county or a city in the Superior Court to recover the taxes thus paid or in the alternative under section 5096 of the Revenue and Taxation Code, and on an order of the board of supervisors, any taxes paid before or after delinquency shall be refunded if they were "(a) Paid

more than once. (b) Erroneously or illegally collected. (c) Paid on an assessment in excess of the cash value of the property by reason of the assessor's clerical error."

We conclude that the amended complaint sufficiently alleges a cause of action subject to such defenses as may be properly pleaded. *Brill v. County of Los Angeles*, 16 Cal. 2d 726, 108 P.2d 443.

[4] Defendants' argument that the common count method of pleading is not available against a county or a city (citing *Union Bank & Trust Co. of Los Angeles v. Los Angeles County*, 2 Cal.App.2d 600, 38 P.2d 442) is not tenable where other counts incorporated therein sufficiently show the full details of the transaction and the nature of the claim. *Union Bank & Trust Co. of Los Angeles v. Los Angeles County*, supra.

Order sustaining demurrer without leave to amend and judgment of dismissal reversed. Defendants allowed a reasonable time in which to answer.

BARNARD, P. J., and MUSSELL, J., concur.



155 Cal.App.2d 604

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Thomas JAMES, Defendant and Appellant.
Cr. 5793.**

District Court of Appeal, Second District,
Division 3, California.

Nov. 27, 1957.

Defendant was convicted of petty theft with a prior felony conviction. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgment of conviction and an order denying a new trial, and the defendant appealed. The District

Court of Appeal, Shinn, P. J., held that where defendant was convicted in Pennsylvania of the felony of receiving stolen property and was ordered to be imprisoned in county jail for period of not less than 11 months or more than 23 months, and after serving about 13 months he was released on parole for remainder of maximum term of imprisonment, defendant served a term in a "penal institution" on prior felony conviction within meaning of California Penal Code and was properly subject to increased punishment in California on conviction for petty theft.

Judgment and order affirmed.

1. Witnesses ⇨255(9)

In prosecution for petty theft with prior felony conviction, no error was committed by prosecution in showing witness his previous testimony at preliminary hearing and his signed statement in an effort to refresh his memory. West's Ann.Pen.Code, § 667; West's Ann.Code Civ.Proc. § 2047.

2. Witnesses ⇨255(3)

Witness may refresh his recollection respecting a fact by anything written by himself or under his direction at time fact was fresh in his memory and he knew fact was correctly stated in writing, and it is a proper procedure, when a witness fails to testify to matters previously within his recollection or gives evidence in apparent variance with that previously given. West's Ann.Code Civ.Proc. § 2047.

3. Witnesses ⇨255(3, 9)

Memory of witness may be refreshed by his written memoranda made soon after the event as well as by a transcript of his previous testimony. West's Ann.Code Civ. Proc. § 2047.

4. Criminal Law ⇨742(1)

Though lapses of memory of witness as to crucial facts and admission that he was intoxicated at time when he was with defendant would have warranted jurors in viewing his statements with caution in prosecution for petty theft with prior

felony conviction, effect to be given his testimony was a matter for determination of jury. West's Ann.Pen.Code, § 667; West's Ann.Code Civ.Proc. § 2047.

5. Larceny ⇨65

Evidence sustained conviction for petty theft with prior felony convictions. West's Ann.Pen.Code, §§ 484, 667.

6. Larceny ⇨1

"Theft" is the felonious taking of property which is not one's own. West's Ann. Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "Theft".

7. Larceny ⇨1

In prosecution for petty theft, prosecution must prove an unlawful taking and asportation of property of some intrinsic value with intent to deprive the owner thereof. West's Ann.Pen.Code, §§ 484, 667.

8. Criminal Law ⇨1159(2, 4)

Resolution of inconsistencies in testimony of witnesses and weight to be given their testimony is a matter for the jury, not for a reviewing court.

9. Criminal Law ⇨1202(1)

In order to subject defendant to increased punishment on conviction for petty theft because of prior felony conviction, it was not necessary for the prosecution to allege and prove that defendant had been imprisoned for the full term of his sentence for the felony, and service of a portion of the term was sufficient. West's Ann. Pen.Code, § 667.

10. Criminal Law ⇨1202(1)

Where defendant was convicted in Pennsylvania of the felony of receiving stolen property and was ordered to be imprisoned in county jail for period of not less than 11 months or more than 23 months, and after serving about 13 months he was released on parole for remainder of maximum term of imprisonment, defendant served a term in a "penal institution" on prior felony conviction within meaning of California Penal Code and was properly subject to increased punishment in Cali-

fornia on conviction for petty theft. West's Ann.Pen.Code, §§ 496, subd. 1, 644, 667, 668; 18 P.S.Pa., §§ 891, 4817.

See publication Words and Phrases, for other judicial constructions and definitions of "Penal Institution".

Thomas James, in pro. per., for appellant.
Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Thomas James was accused by information of a violation of section 667 of the Penal Code (petty theft with a prior felony conviction) in that he took \$35 in money and a bottle of whiskey of the value of \$5.50, the property of William Aulwes, having previously suffered a conviction of receiving stolen goods, a felony, in Pennsylvania, and having served a term of imprisonment in the state prison therefor. Defendant pleaded not guilty and denied the prior conviction. Trial was to a jury which found him guilty of petty theft with prior conviction of felony. Defendant's motion for a new trial was denied. Probation was likewise denied and James was sentenced to imprisonment in the county jail for the term of one year. He appeals from the judgment and the order denying him a new trial.

The conviction was based upon evidence of the following facts. William Aulwes testified that his son, Bud Aulwes, was the proprietor of the Tower Cafe, a barroom located at 6211 South Normandie in the City of Los Angeles. Mr. Aulwes was tending the bar on April 11, 1956, while his son was away from the premises. Defendant entered the cafe at approximately 1 p. m. in the company of a man named Sepulveda who left immediately thereafter. Defendant sat down at the bar, ordered several drinks, and then asked Mr. Aulwes if he could see Bud. Aulwes replied that Bud was out, but would be back in a few minutes.

A delivery of two small packages of liquor was made at the bar. Mr. Aulwes went

to the cash register, which was located behind the middle of the bar, and asked the deliveryman if he would take some checks. The cash register contained a few customers' checks, a number of bills of various denominations, some loose change, a \$10 roll of quarters and seven \$5 rolls of dimes. The coins were rolled in brown paper. The bar had an opening with a counter and the counter was hanging up so that a person in front of the bar could walk through the opening and gain access to the cash register.

Mr. Aulwes gave two checks to the deliveryman and then went back to talk to defendant who was the only customer on the premises. He left the cash register open. Defendant asked him where Bud was and Aulwes answered that he knew where to locate his son. Defendant told Aulwes that he would buy him a drink if he would telephone Bud. After some coaxing Aulwes agreed. Defendant then went to the telephone booth, which was located behind an archway at the rear of the cafe, and placed a call. After returning to his stool at the bar, he asked Mr. Aulwes whether he was going to telephone Bud. Aulwes went to the booth, called Hank's Place and ascertained that his son had just departed. He could not see the cash register from the telephone booth because of the archway. As he came out of the booth he saw defendant walking from the counter toward the door. There was no one else in the establishment.

Bud Aulwes entered the cafe in the company of several other men. Defendant asked him if he would take a bet but he refused. Bud testified that defendant was at the bar talking to his father when he arrived, although he also stated that defendant was standing in the middle of the floor drinking beer when he first saw him. Defendant left the premises immediately after speaking to Bud. A few minutes later, both Bud and his father noticed that a fifth bottle of Haig & Haig whiskey, which had been about half full, was missing from the back shelf near the cash register; it had been on the shelf before defendant came in. The elder Mr. Aulwes looked in the cash

register and discovered that four \$5 rolls of dimes and a \$10 roll of quarters were also missing.

Lawrence Johnson testified that defendant and Sepulveda had whiled away the morning in his apartment drinking wine. Defendant asked Johnson if he knew a place where he could make a bet. Johnson recommended the Tower Cafe and offered to write a note to Bud Aulwes for defendant but he did not do so. Defendant and Sepulveda left the apartment at 11:30 a. m. Shortly before 1 p. m., Johnson received a telephone call from defendant. Defendant asked him to come to the Tower Cafe and make a fast \$80, but Johnson refused. Defendant also said something about paying a \$17 debt which Johnson owed to Bud Aulwes. Sepulveda returned to Johnson's apartment and defendant came in a few minutes later. James put four or five quarters and twelve or fifteen dimes on a coffee table and told Johnson that he had gone behind a bar and taken the coins out of a drawer. The three men then went to the 62 Club where they had several beers.

Mrs. Aasen, the proprietor of the 62 Club, testified that defendant paid for the drinks with coins, which were probably dimes, and also exchanged \$3 in dimes for dollar bills. Bud Aulwes arrived a few minutes later, saw defendant in the company of Johnson and Sepulveda, and telephoned the police.

Officer Peterson of the Los Angeles Police Department was the investigating officer in the case. He testified that he had a conversation with defendant on the afternoon of April 12th at the police station. He asked defendant whether he had taken money from the cash register at the Tower Cafe and defendant said that he had not taken any. The officer asked James where he obtained the coins he exchanged at the 62 Club and defendant replied that he won the money gambling. Peterson also stated that on April 23rd he found a roll of dimes wrapped in brown paper in a vacant lot next to the Tower Cafe. Johnson had told him the roll was there. The paper used to wrap the coins was described by William

Aulwes as being similar to the paper used to wrap the dimes he had in the cash register.

The People introduced in evidence a certified copy of a judgment of the Court of Oyer and Terminer for Bucks County, Pennsylvania, and certified copies of records of the Bureau of Identification of the Eastern State Penitentiary, Philadelphia, Pennsylvania. These documents, together with copies of defendant's fingerprints, established that defendant was sentenced on May 23, 1944 to a term of 18 months to 4 years in the state penitentiary following a plea of guilty to the charge of receiving stolen property, that he was imprisoned from May 23, 1944 until May 22, 1945, and that he was discharged by court order.

Defendant, testifying in his own behalf, denied taking either the money or the bottle of whiskey and denied telling Johnson that he had taken coins from the cash register. He admitted telephoning Johnson from the cafe, but stated that he asked Johnson to come down and play a game of pool with him while he waited for Bud Aulwes. Johnson refused to come because he owed Bud \$17. Defendant stated that he told Johnson not to worry because he had a fast \$18 to pick up. He intended to place a \$5 bet on a horse running in the second race at Santa Anita that afternoon and according to the morning odds a winning ticket would pay \$18. When Bud Aulwes returned to the cafe he asked him whether he would take a bet and Bud accepted the bet. He changed the dimes into dollar bills at the 62 Club because he wanted to use the bills to pay a doctor he was planning to see that afternoon for a physical examination in connection with a new job; the examination cost \$2.50. He had the dimes with him when he left home that morning. On cross-examination he admitted the prior felony conviction.

Defendant has filed a brief in *propria persona*. It is adequate as a presentation of all the points that could be urged in his behalf. We have made a thorough examination of the record and have discovered

no insufficiency of the evidence and no error at the trial.

Defendant argues the following points in his brief: (1) The court erred in permitting the district attorney to refresh Johnson's recollection; (2) There was insufficient evidence to prove that he was guilty of petty theft; (3) There was insufficient evidence to establish that he served a term in a penal institution upon his prior felony conviction, as required by section 667 of the Penal Code.

There is no merit to the argument that the court erred in permitting Johnson's recollection to be refreshed by reading his testimony at the preliminary hearing and his signed statement, as urged under the first point. When asked at what time defendant telephoned him on April 11th, Johnson replied that he could not recall. The deputy showed him the transcript of his testimony at the preliminary hearing and asked him whether it refreshed his memory; Johnson replied in the affirmative and resumed his testimony. When asked whether defendant said anything when he placed the coins on the table, Johnson answered that he could not remember. In response to the deputy's questions, he stated that he did not know whether his memory was better at the time of the preliminary hearing than it was at the time of trial, that his memory was no better on April 12th than it was at the time of trial, and that he could not swear that he was telling the truth at the preliminary hearing because he was under the influence of liquor when he had the conversations with defendant. After a reading of his testimony at the preliminary hearing failed to refresh his memory, the deputy showed him a statement he had signed on April 12th, the day following the occurrences he had related in his testimony. Upon being asked whether the signed statement refreshed his recollection, Johnson replied that it did. The witness was permitted to read the transcript and statement over the objections of defendant's attorney.

[1-4] No error was committed in showing Johnson his previous testimony and his

signed statement in an effort to refresh his memory. A witness may refresh his recollection respecting a fact by anything written by himself or under his direction at a time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. Code Civ.Proc. § 2047. It is a proper procedure when a witness fails to testify to matters previously within his recollection or gives evidence in apparent variance with that previously given. *People v. Durrant*, 116 Cal. 179, 214, 48 P. 75. The witness' memory may be refreshed by his written memoranda made soon after the event as well as by a transcript of his previous testimony. *People v. Cotta*, 49 Cal. 166. While Johnson's lapses of memory as to crucial facts and the admission that he was intoxicated on April 11th would have warranted the jurors in viewing his statements with caution, the effect to be given to his testimony was a matter for the determination of the jury. *People v. Parchen*, 37 Cal.App.2d 215, 221, 98 P.2d 1045.

[5] The second point to be considered is that there was insufficient evidence to show that defendant was guilty of petty theft. The argument cannot be maintained.

[6-8] Theft is characterized as the felonious taking of property which is not one's own. Pen.Code § 484; *People v. Moorhead*, 104 Cal.App.2d 688, 694, 232 P.2d 268. In a prosecution for petty theft, the People must prove an unlawful taking and asportation of property of some intrinsic value with the intent to deprive the owner thereof. *People v. Williams*, 73 Cal.App.2d 154, 157, 166 P.2d 63. Although there was no evidence to connect defendant with the disappearance of the bottle of whiskey other than the fact that he had the opportunity to remove it from behind the bar, there was substantial evidence to justify a finding that he stole \$30 in coins from the cash register of the Tower Cafe. From the fact that the counter and cash register were left open, the jury could properly infer that defendant had the opportunity to take the money. It was a reasonable conclusion

from defendant's conversations with Aulwes and Johnson, as related by them, his admissions to Johnson and the fact that he had a quantity of dimes and quarters in his possession shortly after leaving the cafe, that he enticed Aulwes into making a telephone call so that he could gain access to the cash register while the bar was untended, and that he took the coins from the register while Aulwes was in the telephone booth and could not see him. Defendant calls attention to several minor discrepancies in the evidence against him, for example, that Aulwes and his son differed as to the precise time when he left the cafe. However, the resolution of inconsistencies in the testimony of witnesses and the weight to be given to their testimony is a matter for the jury, not for a reviewing court. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. White*, 35 Cal.App.2d 61, 68-69, 94 P.2d 617, and cases cited. In our opinion, there was ample evidence to support the jury's verdict.

The final point to be considered is that the evidence was insufficient to show that defendant served a term in a penal institution upon his prior felony conviction as required by section 667 of the Penal Code. The statute provides as follows: "Every person who, having been convicted of any felony either in this State or elsewhere, and having served a term therefor in any penal institution, commits petty theft after such conviction, is punishable therefor by imprisonment in the county jail not exceeding one year or in the State prison not exceeding five years."

As we have already said, defendant was convicted in Pennsylvania in 1944 of the crime of receiving stolen property and was sentenced to the state penitentiary for a term of 18 months to 4 years. Under Pennsylvania law receiving stolen property is a felony. Title 18 Purdon's Pa.Stats. § 4817; Act of June 24, 1939, P.L. 872, § 817; as amended by the Act of May 21, 1943, P.L. 306, § 1. The punishment prescribed under that statute is imprisonment for a term "not

exceeding five (5) years" or a fine not exceeding \$1,000 or both such fine and imprisonment.

Defendant has lodged with this court letters from official sources transmitting a typewritten copy of docket entries made by the Pennsylvania Superior Court subsequent to his sentence on May 23, 1944. Although presented informally the authenticity of the documents is not open to question and they are received and considered as a part of the record. It appears that in 1945 defendant petitioned the Superior Court for a writ of habeas corpus, alleging as grounds for the issuance of the writ that he has been illegally committed to the state penitentiary. It further appears from our examination of the applicable Pennsylvania cases and statutes that the legal place of confinement for persons convicted of receiving stolen property is not the state penitentiary but the county jail. This is for the reason that the Pennsylvania courts have held that when a statute uses the word "imprisonment" alone, the word refers to "simple imprisonment," (*Commonwealth v. Reps*, 32 Del.Co.R., Pa., 590, 591), and that, in Pennsylvania, "all persons sentenced to simple imprisonment for any period of time shall be confined in the county jail where the conviction shall take place * * *." Title 19 Purdon's Pa.Stats. § 891; Act of March 31, 1860, P.L. 427, § 75; as amended by the Act of June 26, 1895, P.L. 374, § 1.

In ruling on defendant's petition the Pennsylvania court held that defendant was not entitled to be released from custody and remanded him for proper re-sentence. On May 22, 1945, it was ordered that he be imprisoned in the Bucks County prison for a period of not less than 18 months nor more than 3 years, the sentence to run and to be computed from the date of commitment, May 23, 1944. On June 7, 1945, the court amended its previous sentences and ordered defendant to be imprisoned in the county jail for a period of not less than 11 months nor more than 23 months, the

amended sentence to be computed from May 23, 1944. On July 2, 1945, defendant was released on parole for the remainder of the maximum term of imprisonment.

[9, 10] Defendant earnestly argues that he served two illegal prison terms in Pennsylvania upon the prior conviction and that the requirements of section 667 of the Penal Code have not been met. The argument cannot be maintained. A different question would be presented had defendant been sentenced as an habitual offender under section 644 of the Penal Code, which requires, before an adjudication of habitual criminality can be made, that the accused shall have served separate terms of imprisonment in a state prison or a federal penal institution upon two prior felony convictions. Section 667 merely requires service of a term of imprisonment "in any penal institution." It is unnecessary for the People to allege and prove that the accused was imprisoned for the full term of his sentence; service of a portion of the term is sufficient. *People v. Murray*, 42 Cal.App. 2d 209, 217, 108 P.2d 748. It cannot be doubted that a county jail is a penal institution within the meaning of section 667. In *re Wolfson*, 30 Cal.2d 20, 26, 180 P.2d 326. It appears from the documents presented by defendant that he served at least a part of his term in the county jail. He was properly re-sentenced to a term in the county jail upon proof that he had been erroneously sentenced to the state penitentiary. *Commonwealth v. Reys*, supra, 32 Del.Co. R., Pa., 590, 591, and cases cited. The offense of receiving stolen property is a felony under Pennsylvania law, and if it had been committed in this state, defendant could have been punished by imprisonment in the state prison. Pen.Code § 496, subd. 1. Therefore, we conclude that defendant served a term in a penal institution upon the prior felony conviction and that he was properly subject to increased punishment upon a conviction for petty theft following his imprisonment for the prior offense. Pen.Code § 668.

The court did not err in denying defendant a new trial.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



155 Cal.App.2d 513

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Frank AMBROSE, Defendant and
Appellant.

Cr. 5924.

District Court of Appeal, Second District,
Division 1, California.

Nov. 26, 1957.

Rehearing Denied Dec. 19, 1957.

Hearing Denied Jan. 23, 1958.

Defendant was convicted of burglary in the second degree with prior convictions and from a judgment of the Superior Court of Los Angeles County, LeRoy Dawson, J., and from an order denying a new trial, the defendant appealed. The District Court of Appeal, White, P. J., held that denying impeachment of police officer was proper; that act of the prosecutor in opposing use of the transcript of the first preliminary examination was not misconduct; that the arrest was proper; and that certain articles were not inadmissible as obtained by an unlawful search and seizure.

Judgment affirmed.

1. Witnesses ⇨388(2), 396(3)

While a witness may be impeached by evidence that at other times he has made statements inconsistent with his present statement, the statements allegedly made must be related to him and he must be asked whether he had made such statements, and if so, he must be allowed to explain them. West's Ann.Code Civ.Proc. § 2052.

2. Witnesses Ⓒ347

A witness may not be impeached by showing that he omitted a fact or stated it less fully at a prior proceeding, unless his attention was called to it at that time and he was then asked to testify concerning the very facts embraced in the questions propounded at trial. West's Ann. Code Civ.Proc. § 2052.

3. Witnesses Ⓒ388(5), 396(3)

In burglary prosecution, where defendant inquired of arresting officer on cross-examination whether he had testified at preliminary examination and at that time that he did not mention anything about the flight of the defendant at time of arrest, attempted impeachment of the officer was improper where the officer was not asked whether he had made the statement and if so given an opportunity to explain the statement. West's Ann.Code Civ.Proc. § 2052.

4. Criminal Law Ⓒ254

Where trial was had before the judge sitting without a jury, he is the trier of fact and it is for him to determine whether testimony was false or not.

5. Criminal Law Ⓒ706

In burglary prosecution tried before the court, where defendant inquired of officer whether he had written the police report concerning the defendant and the answer was in the affirmative, question whether officer's testimony at the trial was in fact false was improper.

6. Stipulations Ⓒ14(7)

In burglary prosecution where parties stipulated that transcript of both the first preliminary and second examination might be "used" for impeachment purposes on cross-examination of the People's witnesses but there was no stipulation that transcript might be introduced in evidence, prosecutor was not guilty of misconduct in opposing use of the transcript after it became apparent that obvious inconsistencies were shown thereby in the People's case, where there was no showing that the transcript of the examination would shed any light on the issues nor that persons

who testified at the hearing were not available.

7. Arrest Ⓒ63(4)

"Reasonable cause" to justify an arrest is not necessarily limited to evidence which would be admissible at the trial on the issue of guilt but the term means reasonable or probable cause and means such a state of facts as would lead a man of ordinary caution to believe and conscientiously entertain a strong suspicion that the person accused is guilty. West's Ann.Pen. Code, § 836, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

8. Arrest Ⓒ63(4)

The term "probable cause" as cause for arrest means having more evidence for than against; supported by evidence which inclines the mind to believe but leaves some room for doubt.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

9. Arrest Ⓒ63(4)

In determining what constitutes reasonableness as cause for arrest each case must be reviewed in the light of its own facts. West's Ann.Pen.Code, § 836, subd. 5.

10. Arrest Ⓒ63(4)

Officers were reasonably justified in arresting defendant so as to justify admission in evidence of a ring obtained from the defendant, where officers observed the defendant about 8 p. m., there had been frequent early evening burglaries and there were articles protruding from the pocket of the defendant, who gave a non-existing address when questioned, and defendant was placed in the police vehicle at which time he fled and was then overtaken and transported to the police station. West's Ann.Pen.Code, § 836, subd. 5.

11. Searches and Seizures Ⓒ1

A "search" implies a prying into hidden places for that which is concealed and that the object searched for has been hid-

den or intentionally put out of the way and a mere looking at that which is open to view, is not a "search".

See publication Words and Phrases, for other judicial constructions and definitions of "Search".

12. Criminal Law Ⓒ736(1)

The question of consent to an alleged illegal search is to be determined by the trier of facts.

13. Criminal Law Ⓒ395

Searches and Seizures Ⓒ7(27)

In burglary prosecution evidence justified conclusion that hotel manager where the defendant was staying believed that he possessed authority to give consent to the officers to enter the defendant's room and that the officers acted in good faith in believing that the manager possessed such authority so that objects found in the defendant's room were admissible.

14. Criminal Law Ⓒ1169(3)

In burglary prosecution where defendant admitted taking some of the articles set forth and admitted that he had burglarized various premises and took certain of the missing property admitting the stolen property in evidence was harmless. West's Ann.Pen.Code, § 459.

15. Criminal Law Ⓒ517(1)

Generally in deciding whether a confession is admissible test is whether under all existing circumstances it was freely and voluntarily made without any inducement being held out to the declarant.

16. Criminal Law Ⓒ414

In burglary prosecution evidence did not establish that statements of defendant were made as a result of an alleged unlawful search, and hence admission of statements was not error.

Samuel C. McMorris, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Herschel T. Elkins, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused in four counts of the crime of burglary. Prior convictions of attempted burglary and burglary, both felonies, committed in the State of New York, and for which defendant served terms of imprisonment, were alleged.

Defendant pleaded not guilty as to each count of the information and denied the prior convictions. Trial by jury was duly waived and it was stipulated that "the case for the People in chief be submitted to the court on the transcript of the evidence taken at the preliminary hearing * * *. Thereafter, * * * either side may present further evidence, including the express right of the defendant to cross-examine all officers not only on the basis of their testimony given or for the proceedings here but, counsel, we would stipulate he may use the transcript of the preliminary hearing not only in the case which has resulted in this case being before the Court but also that previous preliminary transcript." The prosecution reserved "all rights as to objections to testimony given in the transcript". Evidence in addition to that given at the preliminary examination was introduced. Defendant was adjudged guilty of burglary as charged in each count, which the court found to be burglary of the second degree. The prior convictions were found to be true. Defendant's motion for a new trial was denied, and he was sentenced to State Prison. From the judgment of conviction and from the order denying his motion for a new trial, defendant prosecutes this appeal.

Count I charged burglary of the residence of Shelton Riley and Arthur F. Walker, at 1228 W. 65th Place, Los Angeles, on May 19, 1956. A decanter, \$18, a gold watch (People's Exhibit 1), and 4 bow ties were stolen.

Count II alleged that on September 14, 1956 defendant burglarized the residence of Mrs. Irene Harrington, 2207 W. 73rd

Street, Los Angeles, resulting in the theft of a Bolsey camera (People's Exhibit 2), a case and a flashlight.

Count III accused defendant of burglarizing the residence of Mr. and Mrs. Garcia, 1358 W. 70th Street, Los Angeles, between the dates of September 20 and 22, 1956, in which 2 watches and some money from a piggy bank were stolen.

Count IV charged that on July 15, 1956 defendant burglariously entered the residence of Edith Nelson, 9606 LaSalle, Los Angeles, and stole therefrom a movie camera, an index box, a carton and a half of cigarettes, and a ring (which was onyx with a small diamond—People's Exhibit 4).

Concerning the factual background surrounding this prosecution the record reveals that about 8:05 p. m. on the evening of September 27, 1956, police Officer Neal, accompanied by Officer King, was driving a police automobile on 69th Street in the city of Los Angeles when Officer King saw defendant walking on the sidewalk. The latter's jacket pockets were "bulging and a flash-light and a pair of gloves sticking out of his right jacket pocket". Officer King pulled over to the curb and said, "Police officers." Defendant continued to walk. The two officers got out of the automobile and Officer King called out, "Police officers, stop." After Officer King had repeated this phrase about three times defendant halted. The officer asked him for identification. Defendant stated he had none. The officers inquired as to where defendant lived. In the police report (introduced as People's Exhibit 6), it is stated that the defendant gave 1569 W. 69th Street as his address. He stated that he worked in a garage and that he was going to visit a friend named Finnerty.

Officer King arrested the defendant and searched him, finding on his person a screw driver and two brown paper bags. The officers asked defendant to be seated in the rear of the police vehicle, at which time he fled. He was apprehended and taken to the police station. When they arrived

at the police station, Officer King observed that defendant was not wearing two rings which the officer had observed on him at the time of his arrest. The two rings (People's Exhibit 4), and a little gold ring, were found by the officer near the rear door of the police vehicle. Officer King asked defendant what he had done with the rings and the latter answered that he had thrown them out of the police car.

On October 2d, Officer Hausman, a Los Angeles Police Officer, and Officer McGinty went to the Olive Hotel at 750 South Olive. Room No. 5 in this hotel was registered to the defendant. The room was registered in only one name. The officers asked the hotel manager, Harry Hartsook, for authority to enter the room. Mr. Hartsook opened the door and let them in. After this first visit, Officer Hausman went to the jail, picked up defendant, and took him out to the hotel. This second visit to the hotel was a "matter of hours" after the first visit.

Officer Hausman, in the presence of defendant, opened the door. When they had entered the apartment, Officer Hausman and defendant had a conversation. The officer said, "Look, there is a lot of stuff here. Now, you tell us which is stolen and which is not, and we will put the stolen stuff in one pile and it will save us a lot of trouble." The defendant said, "All right." The officers then followed this procedure: One would pick up an object and say to the defendant, "Is this stolen?" To some of these queries, defendant would say, "Yes," and to others he would say, "No." Two watches (People's Exhibits 1 and 3) and a camera (People's Exhibit 2) were identified by the defendant as being stolen property.

The following day, October 3d, Officer Hausman and defendant drove to various addresses.

They went to 1228 West 65th Place. (Count I) In response to Officer Hausman's question as to whether he recalled that place, defendant said, "Yes, I went through

the back door. I got some liquor and some—and bow ties from that place.”

They drove to 2207 West 73rd Street. (Count II) In response to Officer Hausman's inquiry as to whether defendant remembered that house, the latter said, “I went in there through a window. I think I got a camera there.”

They proceeded to 1358 West 70th Street (Count III) and when asked if he recalled that location, defendant replied, “Yes, I went in the front window. I got some change and a watch that was shaped like a horseshoe.”

These statements of defendant were made freely and voluntarily and without any threats or promises of any sort.

At the 77th Street Jail, Officer Hausman asked defendant, “Where did you get the black ring that had the white setting in it, * * * that was found on your person at such time as you were arrested?” The defendant said he took it from a house, not “too far in the past” but he didn't recall which house it was.

Following a preliminary examination on October 10, 1956 defendant was discharged. A second complaint was obtained and after preliminary examination he was held to answer and the instant trial ensued.

As a witness in his own behalf defendant testified that he was walking on 69th Street at about 8 p. m. on September 27, 1956. He had a flashlight, gloves and a screw driver in a paper bag which he was carrying. He saw lights directed towards him and heard someone say something, but he paid no attention to the sound. An officer then arrested him and asked where he worked, what he was doing in the neighborhood and if he had any identification. He told the officer that he had no address, that he was a transient, and that a friend of his lived in the neighborhood. He was questioned again but refused to say anything more. Officer King then kicked him and he ran. That night he did have some rings on his fingers, but in the police car, he took them off and, at the request of police officers, handed them to the officers.

At a later date, he, in company with police officers, went to 750 South Olive. Upon arriving, an officer asked a clerk for the key to Room 5. The clerk said he could not give him the key but that he would summon the manager. The manager gave to the officer a pass key to the room. Room 5 was his room; he was registered under the name of Fontaine. Officer Hausman and Officers King and Neal walked with defendant to Room 5. Officer Hausman opened the door with the key and told him to enter. Defendant further testified that at no time did he give his consent for the officers to enter his room, nor did he authorize the hotel manager or anyone else to permit the officers or any other person to enter his room.

As his first ground for reversal appellant urges that the court erred in its rulings on the admission and exclusion of proffered evidence in that it,

“a. Sustained objections to impeachment questions;

“b. Sustained objections to the introduction of a transcript;

“c. Erred in admitting an exhibit.”

In this regard appellant asserts that Officer King testified that the former started to run when requested to go to the police station for investigation. On cross-examination appellant inquired of the officer as to whether he had testified at the first preliminary examination and on receiving an affirmative reply, appellant's counsel asked, “And at that time you did not mention anything about running, did you?” Objection was made on the ground of immateriality “unless there was a showing there was a question asked to which there was a negative response”. The objection was sustained. Then the following question was propounded:

“By Mr. Graves (appellant's counsel): Was the statement you made in the police report in fact true, officer?

“A: Yes.

“Q: Then your statement in court is in fact false?

“The Court: Now you are asking the officer to take over my job. I am

the one to determine the truth or falsity of any evidence."

[1-3] The rulings were correct. While a witness may be impeached by evidence that at other times he has made statements inconsistent with his present testimony (Code Civ.Proc. sec. 2052), the statements allegedly made must be related to him and he must be asked whether he made such statements, and if so, he must be allowed to explain them. A witness may not be impeached by showing that he omitted a fact or stated it less fully at a prior proceeding unless his attention was called to it at that time and he was then asked to testify concerning the very facts embraced in the questions propounded at the trial (*People v. Reimringer*, 116 Cal.App.2d 332, 342, 253 P.2d 756; *People v. Casanova*, 54 Cal.App. 439, 446, 447, 202 P. 45; *People v. Maddux*, 102 Cal.App. 169, 171-172, 282 P. 996). Appellant did not follow such procedure.

[4, 5] As to the question regarding the police report the record reflects that appellant's counsel read it and inquired of the police officer whether he had written it. The answer was in the affirmative. Subsequently, the officer was questioned as above set forth as to whether his testimony at the trial was, "in fact, false". Where, as here, the trial was had before the judge sitting without a jury, he is the trier of fact and it was for him to determine whether the testimony was false or not. *Thompson v. City of Long Beach*, 41 Cal.2d 235, 246; 259 P.2d 649; *Dillard v. McKnight*, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

Appellant next complains that the court erroneously admitted into evidence an exhibit as appellant's, although it was not offered by him. The record reveals that appellant offered as defendant's Exhibit "A" for identification a "case envelope" containing an account of statements made by him to the officer. Appellant now complains that it was improper for the prosecution to offer the envelope and contents in evidence as an exhibit for the People. Appellant's contention lacks substance here because the record shows that the court sustained appel-

lant's objection to the introduction into evidence of the foregoing "case envelope".

Appellant attempted to introduce into evidence a transcript of the first preliminary examination wherein the case was dismissed. An objection by the prosecutor that it was "incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and it is not proper impeachment", was sustained.

[6] Appellant argues that, "The parties having stipulated that the testimony as contained in the transcript of the first preliminary hearing, which resulted in dismissal of the information, might be used in cross-examination, it was misconduct on the part of the prosecuting attorney to oppose its use after it became apparent that obvious inconsistencies were shown thereby in the People's case." The record clearly shows that it was stipulated that the transcript of both the first preliminary examination as well as the second one might be "used" for impeachment purposes on cross-examination of the People's witnesses, but there was no stipulation that the transcript or either of them might be introduced into evidence. No showing is made that the transcript of the so-called first preliminary examination would shed any light on the issues before the court nor that the persons who testified at such preliminary hearing were not available. Since no proper foundation was laid for admission of the transcript, the ruling of the court was proper.

It is next urged by appellant that the court erred in overruling objections to the introduction of the exhibits allegedly obtained by unlawful search and seizure, in that it allowed in evidence:

"a. A ring obtained from the appellant's person after an unlawful arrest;

"b. Two watches and a camera obtained from the appellant's room as a result of an unlawful search."

Appellant argues that the ring mentioned in Count IV of the information was discovered as a result of the search of his person as an incident to his arrest. Conced-

ing that a search may be made incidentally to a valid arrest, appellant however challenges the legality of his arrest in the instant case.

[7] Section 836, subd. 5 of the Penal Code authorizes an arrest by a peace officer, at night, when there is reasonable cause to believe "that (a person) has committed a felony". As was said by this court in *People v. Jaurequi*, 142 Cal.App.2d 555, 559, 298 P.2d 896, 899, "It is settled that reasonable cause to justify an arrest is not necessarily limited to evidence which would be admissible at the trial on the issue of guilt (citing cases.) 'The term, reasonable or probable cause, has been defined: 'By 'reasonable or probable cause' is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.'" In *re McCarty*, 140 Cal.App. 473, 474, 35 P.2d 568.

[8] "The term, "probable," has been defined as meaning "having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." (Citing cases.)'".

[9] In determining what constitutes reasonableness each case must be reviewed in the light of its own facts (*Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374). As to the officers accosting appellant, it has been held that an officer may question people who are outdoors late at night (*People v. Simon*, 45 Cal.2d 645, 650, 290 P.2d 531). With the foregoing rules before us, we have no hesitancy in saying that the officers were reasonably justified in arresting appellant. At about 8 p. m. the officers observed him walking along 69th Street. There had been frequent early evening burglaries in this neighborhood. Protruding from appellant's jacket pocket was a flashlight and a pair of pigskin gloves. Leaving their vehicle, one of the officers called out three times, "Police officers, stop." before appellant com-

plied. The officer asked him for identification and he responded that he had none. Asked where he lived, appellant gave as his address 1569 W. 69th Street, Los Angeles (a non-existent address). Thereupon Officer King arrested appellant, searched him and found on his person a screw driver and two brown paper bags. Appellant was placed in the police vehicle at which time he fled, was overtaken and then transported to the police station. We entertain no doubt that knowing of recent burglaries in the neighborhood they were justified in concluding that a person carrying a flashlight and a pair of pigskin gloves was a suspicious person and they were entitled to question such person. Indeed, from the foregoing facts before the officers, coupled with the inferences reasonably to be drawn therefrom, there can be no doubt as to the reasonableness, but also as to the necessity for arrest (*Gisske v. Sanders*, 9 Cal.App. 13, 16, 17, 98 P. 43; *People v. West*, 144 Cal.App.2d 214, 219, 300 P.2d 729; *People v. Jaurequi*, supra, 142 Cal.App.2d at page 560, 298 P.2d 896).

[10,11] Furthermore, the ring here in question was not obtained by any "search". When they apprehended appellant, the officers observed he was wearing two rings. Upon arrival at the police station, Officer King noticed that appellant was not wearing the two rings. They were later found near the rear door of the police vehicle. Appellant stated he had thrown them out of the automobile and at the trial admitted he was wearing the ring mentioned in Count IV at the time of his arrest. Therefore, there was in fact no search or seizure as those terms are defined in the cases. As was said in *People v. West*, supra, 144 Cal.App.2d at pages 219-220, 300 P.2d at page 733, " * * * A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way. While it has been said that ordinarily searching is a function of sight, it is generally held that the mere looking

at that which is open to view is not a 'search'."

[12, 13] Appellant next contends that the watches and camera introduced into evidence as People's Exhibits 1, 2, and 3 (mentioned in Counts I, II and III of the information) were procured by an illegal search of his hotel room. The testimony concerning the officers' two visits to appellant's room has heretofore been narrated and need not now be repeated. Suffice it to say that appellant contends that the manager of the hotel was without authority to admit the officers to appellant's room either on the occasion when he was not with them or on the occasion when he accompanied them. That therefore, both the entry of the officers and their consequent search of the room was in violation of appellant's constitutional rights. In the instant case the officers went to the hotel where Room 5 was registered to appellant under the name of "Fontaine". The officers asked the hotel manager for authority to enter the room whereupon he opened the door and let them in. The question of consent is to be determined by the trier of fact (People v. Smith, 141 Cal.App.2d 399, 402, 296 P.2d 913; People v. Michael, 45 Cal.2d 751, 753-754, 290 P.2d 852; People v. Lujan, 141 Cal.App.2d 143, 147, 296 P.2d 93). Upon the authority of People v. Gorg, 45 Cal.2d 776, 783, 291 P.2d 469, and People v. Caritativo, 46 Cal.2d 68, 73, 292 P.2d 513 we are persuaded that appellant's contention must be rejected. In the cited cases it is held that where the officers have acted in good faith with the consent of a homeowner or landlord in conducting a search, and the latter believed they had joint control over the premises, and the right to enter them, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner or landlord's authority. See also People v. Silva, 140 Cal.App.2d 791, 794-795, 295 P.2d 942. In the case now engaging our attention, we therefore conclude that it was reasonable for the trier of facts to conclude that the hotel manager believed, as he testified at the trial, that he

possessed the authority to give consent to the officers to enter appellant's room and that it was equally reasonable for the court to hold that the officers acted in good faith and with the belief that the manager possessed the authority he asserted. Therefore, the objects found in appellant's room were admissible in evidence. People v. Burke, 47 Cal.2d 45, 49, 301 P.2d 241; People v. Hood, 149 Cal.App.2d 836, 309 P.2d 135.

[14] Furthermore, the ring, watches and camera were not required to be introduced into evidence. Penal Code, section 459 defines burglary as the entrance into a house or apartment with intent to commit larceny. In each count of the information, the corpus delicti of the crime was proved with the testimony of the occupants of the respective premises burglarized. Appellant admitted the taking of some of the articles set forth in the respective counts. Having proved the corpus delicti and having the admissions of appellant that he burglarized the various premises and took certain of this missing property, there was no need for the introduction of the stolen property as exhibits.

[15] Finally, appellant contends that certain admissions made by him were made as a result of an unlawful search and therefore, should not have been admitted in evidence. The generally accepted test adopted by state courts to decide whether a confession is admissible is whether under all existing circumstances it was freely and voluntarily made, without any inducement being held out to the declarant (Rogers v. Superior Court, 46 Cal.2d 3, 10, 291 P.2d 929.)

[16] In the case now under consideration, on the day following the search of appellant's hotel room, Officer Hausman drove appellant to the addresses involved in Counts I, II and III. At each of these premises appellant made admissions such as, "Yes, I went through the back door. I got some liquor and some—and bow ties from that place."; "I went in there through a window. I think I got a camera there.";

and "Yes, I went in the front window. I got some change and a watch that was shaped like a horseshoe."

It is now contended by appellant that he would not have made these statements had there been no search of his hotel room on the previous day. In support of his position appellant relies on the case of *People v. Dixon*, 46 Cal.2d 456, 458, 296 P.2d 557, 559. In that case, the police officers unlawfully searched the appellant's garage and found heroin. At the trial, the defendant testified that a Mrs. López forced her to keep the heroin. In her statement, she revealed that she knowingly possessed the heroin. The court held that the testimony "was impelled by the erroneous admission of the illegally obtained evidence and cannot be segregated from that evidence to sustain the judgment." A mere reading of the cited case at once suggests many distinguishing features and clearly shows that appellant was not confronted with such a dilemma as confronted the accused in the *Dixon* case. In the instant case appellant could have remained silent. He was not, as in the *Dixon* case, *supra*, obligated to make a statement. There is no contention that his statements were coerced, but on the contrary, there was positive testimony that they were free and voluntary. The prior search was but a factor to be considered as to the admissibility of the statements. Similar to so-called illegal detention cases, it is a factor in the consideration of whether the statement was voluntary (*Rogers v. Superior Court*, *supra*, 46 Cal.2d at page 10, 219 P.2d 929.)

There is a further and decisive reason why appellant's contention cannot be sustained, and that is our holding, as heretofore set forth, that it was reasonable for the trial court to rule that the search of appellant's room was lawful.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT, J., and DRAPEAU, J. pro tem., concur.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

Cal.Rep. 317-318 P.2d-37

155 Cal.App.2d 362

James W. DONLON, Plaintiff and Respondent,

v.

Evelyn DONLON, also known as Evelyn W. Donlon, also known as Evelyn Wray Donlon, et al., Defendants and Appellants,

Evelyn DONLON, also known as Evelyn W. Donlon, also known as Evelyn Wray Donlon, Cross-Complainant and Appellant,

v.

James W. DONLON et al., Cross-Defendants and Respondents.

Civ. 22189.

District Court of Appeal, Second District, Division 3, California.

Nov. 20, 1957.

Action to partition property held by divorced husband and wife as joint tenants, wherein wife sought money judgment against husband for half of down payment made on property. The Superior Court, Los Angeles County, Stanley Mosk, J., entered interlocutory judgment for husband, and wife appealed. The District Court of Appeal, Parker Wood, J., held that wife had burden of proving her allegations that down payment was made from her separate property and since down payment had been made by exchange of other joint tenancy property, wife had burden to prove that such property was her separate property but that costs should not have been allowed in the interlocutory judgment.

Interlocutory judgment modified, and as modified affirmed.

1. Husband and Wife ⇨14(3)

Where property was in names of husband and wife as joint tenants, it was presumed that property was owned by them as joint tenants, and it was not to be presumed that it was separate property of wife.

2. Husband and Wife ⇨262(2)

In action to partition property held by husband and wife as joint tenants, wherein wife sought money judgment

against husband for half of down payment paid on property, wife had burden of proving her allegation that down payment was paid from her separate property and since down payment had been made by exchange of other joint tenancy property, wife had burden to prove that such property was her separate property.

3. Husband and Wife ⇨265½

Where wife alleged in divorce action that all joint tenancy property was her separate property, but at close of trial amended complaint to allege that property purchased was owned by parties as joint tenants, and findings in divorce action were same as her allegations, husband was not estopped to deny, in action for partition of such property, that down payment was separate property of wife.

4. Husband and Wife ⇨49¾(6)

Even if down payment on parcel had been paid from wife's separate property, the fact that deed was taken in names of husband and wife as joint tenants raised inference that a gift was intended.

5. Joint Tenancy ⇨3

Where title to real property is taken in names of parties as joint tenants, the presumption of joint tenancy cannot be rebutted solely by evidence concerning source of funds used to purchase the property.

6. Husband and Wife ⇨49¾(7)

In action to partition property held by husband and wife as joint tenants, wherein wife contended that property transferred as down payment on joint tenancy property had been her separate property, question whether one-half of down payment had been gift to husband was for trial court.

7. Husband and Wife ⇨14(3)

In action to partition property held by divorced husband and wife as joint tenants, question whether parties had agreed that, in consideration of contributions made by each party for benefit of both parties, property would be owned in joint tenancy without characteristics of such an estate was for trial court.

8. Husband and Wife ⇨14(3)

Irrespective of source of down payment of property held by divorced husband and wife as joint tenants, whether gift by one party or unequal contributions by parties, in view of fact that it was conceded that property was owned by parties as joint tenants, rights of parties with respect to down payment on property were identical and coextensive and husband was not required to account to wife with respect to down payment.

9. Partition ⇨114(6)

In a partition action costs may not be allowed until final judgment is entered and have no proper place in the interlocutory decree.

James A. Starritt, Los Angeles, for appellant.

James J. McCarthy, Santa Monica, for respondent.

PARKER WOOD, Justice.

Plaintiff Mr. Donlon filed an action for partition of two parcels of real property. Defendant Mrs. Donlon filed a cross-complaint wherein she sought partition of the property and a money judgment for \$5,991.36 against plaintiff and a lien therefor upon the portion of the property awarded to plaintiff. Defendant Mrs. Donlon appeals from the judgment of partition (interlocutory) wherein it was ordered that the property be sold and the proceeds divided equally between plaintiff and defendant, after paying certain encumbrances, taxes, expenses, and fees, and after paying \$1,491.36 to Mrs. Donlon. The judgment also provided that \$66.55 costs should be paid to plaintiff.

The record title to the property is in the names of plaintiff and defendant as joint tenants. The parties were married in 1948. Mrs. Donlon obtained an interlocutory judgment of divorce in 1955. In the divorce action the court found that five parcels of real property, the record title of which was in the names of plain-

tiff and defendant as joint tenants, were the separate property of Mrs. Donlon. Those parcels did not include the two parcels involved here. Also, in the divorce action, the court found that Mr. and Mrs. Donlon "own as joint tenants" two other parcels of real property. These are the two parcels involved here.

In the present action, Mrs. Donlon alleged in her cross-complaint that she and Mr. Donlon are the owners in joint tenancy of the two parcels, that she paid \$9,000 from her separate funds on the purchase price of one of the parcels (referred to as parcel 2), and that she paid \$2,982.72 from her separate funds on an encumbrance on parcel 2 and for improvements, repairs and taxes on both parcels. In addition to seeking partition, she sought judgment against Mr. Donlon for \$5,991.36 (being one-half of the \$9,000 and one-half of the \$2,982.72), and she sought a lien for that amount upon the portion of the property awarded to plaintiff.

The court found that Mr. Donlon and Mrs. Donlon are the owners, as joint tenants, of the two parcels; the parcels cannot be partitioned in kind and must be sold; the \$9,000, paid on the purchase price of parcel 2, was not paid from separate funds of Mrs. Donlon but it was paid from the proceeds of a sale or exchange of joint tenancy property owned by Mr. and Mrs. Donlon as joint tenants; Mrs. Donlon expended \$2,982.72 for debts, taxes, and expenses on both parcels, as alleged in her cross-complaint, and she is entitled to \$1,491.36 (one-half of \$2,982.72) from Mr. Donlon's share of the proceeds of the sale.

[1,2] Appellant (Mrs. Donlon) contends that she should have been awarded an additional amount of \$4,500, being one-half of the down payment of \$9,000 (on parcel 2) which she asserts was paid from her separate property. It is conceded by appellant that both parcels here involved are owned in joint tenancy by the parties. As above shown, she alleged in her cross-complaint that she and Mr. Donlon are

the owners in joint tenancy of the two parcels here involved. Also, she states in her brief that it is admitted by the pleadings that both parcels are joint tenancy property. The court found that the two parcels are owned by Mr. and Mrs. Donlon as joint tenants. The court also found that the down payment of \$9,000 on parcel 2 was not paid from her separate funds, but it was paid from the proceeds or exchange of joint tenancy property owned by Mr. and Mrs. Donlon as joint tenants. The joint tenancy property which was exchanged in the purchase of parcel 2, as referred to in that finding, was known as the Grand Avenue property. The record title to the Grand Avenue property was in the names of Mr. and Mrs. Donlon as joint tenants. Parcel 2 was purchased by transferring the Grand Avenue property to the seller on the basis that the Grand Avenue property was of the value of \$9,000, and by assuming an existing trust deed obligation in the approximate amount of \$16,000. It thus appears that the down payment was not made from the separate property of Mrs. Donlon, unless the Grand Avenue property which was also in joint tenancy was in fact the separate property of Mrs. Donlon. Since the record title to the Grand Avenue property was in the names of Mr. and Mrs. Donlon as joint tenants, it is presumed that that property was *owned* by them as joint tenants. It is not to be presumed that it was the separate property of Mrs. Donlon. The burden of proof was upon Mrs. Donlon to prove her allegation that the down payment of \$9,000 on parcel 2 was paid from her separate property; and since the down payment was made by the exchange of the Grand Avenue property, the burden of proof was on her to prove that the Grand Avenue property was her separate property. The trial court in the present action did not determine that the Grand Avenue property was the separate property of Mrs. Donlon. The court, in the divorce action, did not determine that the Grand Avenue property was the separate property of Mrs.

Donlon. That property had been transferred as a part of the purchase price of parcel 2 before the decision in the divorce action and, of course, that property was not one of the five parcels which the court therein found were the separate property of Mrs. Donlon. It thus appears that it has not been judicially determined that the Grand Avenue property, which was of record in the names of Mr. and Mrs. Donlon as joint tenants, was the separate property of Mrs. Donlon. This court cannot conclude that that property, which represented the down payment, was her separate property.

Appellant Mrs. Donlon seems to argue that it was adjudicated in the divorce action that the \$9,000 down payment on parcel 2 was her separate property; and that by reason of the decision in the divorce action Mr. Donlon is estopped to deny that the \$9,000 down payment was Mrs. Donlon's separate property. As above stated, the Grand Avenue property had been transferred as a part of the purchase price of parcel 2 before the decision in the divorce action. In the original complaint in the divorce action Mrs. Donlon alleged that all the real property which was of record in the names of the parties as joint tenants was her separate property. (That complaint did not state the legal description of any of the property.) At the close of the trial in that action, Mrs. Donlon filed an "Amended Complaint to Conform to Proof," and she alleged therein that five parcels which were of record in the names of the parties as joint tenants were her separate property, and she alleged that the parties own two other parcels in joint tenancy. (The amended complaint stated the legal description of the parcels.) Parcel 2 was referred to in the amended complaint as one of the two other parcels which were owned in joint tenancy. The decision in the divorce action was that five parcels of real property were the separate property of Mrs. Donlon, even though the record title to those parcels was in the names of both parties as joint tenants. Those five parcels did not include the Grand Avenue property

or the two parcels involved here. A further part of the decision in the divorce action was that the parties own two other parcels of real property in joint tenancy. One of those two parcels is parcel 2. In view of Mrs. Donlon's allegations in her amended complaint asserting that five parcels which were of record in joint tenancy were her separate property, and asserting further that the two other parcels (including parcel 2) were owned by the parties in joint tenancy (without asserting that the two parcels were her separate property), it is clear that she did not allege in the divorce action that parcel 2 was her separate property. In view of the findings in the divorce action which were the same as her allegations, it is clear that the court did not find that parcel 2 was her separate property.

(About two days after the interlocutory judgment of divorce was entered, Mr. Donlon commenced the present action for partition of the two parcels which the court, in the divorce action, found were owned by Mr. and Mrs. Donlon as joint tenants. Mr. Donlon appealed from the portion of the interlocutory judgment of divorce wherein it was adjudged that the five parcels were the separate property of Mrs. Donlon. On that appeal the judgment was affirmed. *Donlon v. Donlon*, 140 Cal.App.2d 428, 295 P.2d 51.)

[3] It was not adjudicated in the divorce action that parcel 2 was the separate property of Mrs. Donlon. Mr. Donlon was not estopped to deny that the \$9,000 down payment on parcel 2 was the separate property of Mrs. Donlon.

In any event, regardless of whether there was joint or separate ownership of the Grand Avenue property, it was conceded, as above shown, that parcel 2 is owned by the parties as joint tenants. Mrs. Donlon does not claim that parcel 2 is her separate property, but she asserts in effect that the down payment of \$9,000 was her separate property and therefore in partitioning that parcel one-half of the \$9,000 should be paid to her from such portion of the proceeds as might be awarded to Mr. Donlon.

In other words, she asserts that he should account to her for one-half of the down payment.

[4-6] "[T]he taking of title in the name of the parties as joint tenants was tantamount to a valid and binding contract that the property should thereafter be held in joint tenancy with all the characteristics of such an estate." *Barba v. Barba*, 103 Cal.App.2d 395, 396, 229 P.2d 465, 466. "'A joint tenancy is one estate, and in it the rights of the spouses [joint tenants] are identical and coextensive.'" *Ibid.* "By virtue of the nature of the title by which the property is held by the parties, each is the owner of an undivided one-half interest therein in his separate right." *Ibid.* As above stated, it was not found that the down payment was paid from Mrs. Donlon's separate property, but it was found that it was paid from other joint tenancy property. Even if the down payment on parcel 2 had been paid from Mrs. Donlon's separate property, the fact that the deed was taken in joint tenancy raised an inference that a gift was intended. See *Fitzgerald v. Fitzgerald*, 114 Cal.App.2d 549, 551, 250 P.2d 328; *Borgerding v. Mumolo*, 153 Cal.App.2d 821, 315 P.2d 347. Where title to real property is taken in the names of the parties as joint tenants the presumption of joint tenancy cannot be rebutted solely by evidence concerning the source of the funds used to purchase the property. See *Borgerding v. Mumolo*, *supra*, 153 Cal.App.2d at page 824, 315 P.2d at page 349. In the present case Mrs. Donlon testified that she bought parcel 2 (a service station) for Mr. Donlon; she had looked at several service stations trying to find one that had other buildings which would produce enough rent to give Mr. Donlon free rent so that he could earn a livelihood for them; the property would offer him security, and she did not intend to sell the property. Under the evidence the court might have found that one-half of the down payment was a gift to Mr. Donlon.

[7] In the present case, Mrs. Donlon testified further that at the time of the marriage she owned cash and property of

the value of approximately \$68,000; after the marriage she told Mr. Donlon that she wanted to buy and sell real property and she would put the property in joint tenancy but it would be her property, and if she died the property would be his, and if she made money it would be her money but he would not be involved in any losses. She also testified that she told him that it was her gamble but she thought it would be safe because he had a secure position (employed as a service salesman by an automobile company), and she put it in joint tenancy because (otherwise) he would have to sign quitclaim deeds; when she suggested selling a house and getting other property he told her to go ahead; he agreed that if she made money it would be her money. She bought several parcels of property and took titles in joint tenancy. Some of the parcels were sold. Mr. and Mrs. Donlon testified to the effect that Mr. Donlon turned his salary checks over to Mrs. Donlon who placed them in a joint tenancy bank account; Mrs. Donlon also placed some of her money in that bank account; when Mr. Donlon was not employed by others he did repair and maintenance work on property held in joint tenancy. Under the evidence the court might have found that the parties agreed that, in consideration of contributions made by each party for the benefit of both parties, parcel 2 would be owned in joint tenancy with all the characteristics of such an estate.

[8] Irrespective of the source of the down payment (whether a gift by one party or unequal contributions by the parties), since it is conceded that parcel 2 is owned by the parties as joint tenants, the rights of the parties with respect to the down payment on the joint tenancy property are identical and coextensive and Mr. Donlon is not required to account to Mrs. Donlon with respect to the down payment.

Appellant cites *Mercola v. Chester*, 97 Cal.App.2d 140, 217 P.2d 32, *Higgins v. Eva*, 204 Cal. 231, 267 P. 1081 and *Ventre v. Tiscornia*, 23 Cal.App. 598, 138 P. 954, in support of her contention that she is entitled to one-half of the down payment of

\$9,000. In those cases the parties owned the property as *tenants in common* and not as joint tenants. Therefore those cases are not applicable here.

[9] Appellant contends further that costs should not have been allowed in the interlocutory judgment. This contention is sustained. In a partition action costs "may not be allowed until the final judgment is entered and have no proper place in the interlocutory decree." *Elbert, Ltd. v. Federated etc. Properties*, 120 Cal.App.2d 194, 209, 261 P.2d 743, 751.

The interlocutory judgment is modified by striking therefrom the portion awarding \$66.55 costs to plaintiff. The interlocutory judgment, as so modified, is affirmed.

Respondent to recover his costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.



155 Cal.App.2d 551

STATE of California, Subsequent Injuries Fund, Petitioner,
v.

INDUSTRIAL ACCIDENT COMMISSION,
Juan Santiago, United Textile Company,
and State Compensation Insurance Fund,
Respondents.

No. 17802.

District Court of Appeal, First District,
Division 1, California.
Nov. 27, 1957.

Hearing Denied Jan. 23, 1958.

Proceeding to review order of Industrial Accident Commission vacating prior order discharging Subsequent Injuries Fund from liability. The District Court of Appeal, Fred B. Wood, J., held that upon expiration of five-year period from date of injury to employee, commission lost jurisdiction to modify its award, even though

Subsequent Injuries Fund's petition was filed prior to expiration of period and Fund sought to wipe out all liability.

Affirmed.

1. Workmen's Compensation ⇨1779

Upon expiration of five-year period from date of injury to employee, Industrial Accident Commission lost jurisdiction to modify its award, even though Subsequent Injuries Fund's petition, seeking to wipe out all liability, was filed prior to expiration of period. West's Ann.Labor Code, §§ 5502, 5804, 5900, 5903.

2. Workmen's Compensation ⇨1030

Fact that employee may file claim against Subsequent Injuries Fund within five years after date of injury and have it heard and determined after expiration of that period, did not entitle Fund to the same privilege. West's Ann.Labor Code, §§ 4750-4755, 5410, 5803, 5804.

3. Workmen's Compensation ⇨1793

Even if employee, who had been awarded disability of 100%, had been guilty of malingering, such fraud would be intrinsic, not extrinsic, in nature and would not furnish basis for collateral attack upon award of Industrial Accident Commission which had become final after expiration of five years from date of employee's last injury. West's Ann.Labor Code, §§ 4750-4755, 5803, 5804.

Edmund G. Brown, Atty. Gen., of the State of California, Gerald F. Carreras, Deputy Atty. Gen., for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondent Industrial Accident Commission.

Garcia & Wong, San Francisco, for respondent Juan Santiago.

FRED B. WOOD, Justice.

June 26, 1951, an employee sustained an industrial injury which resulted in total loss of sight in his right eye. In view of a previous injury to his left eye, the Subsequent Injuries Fund was joined as a party.

October 6, 1952, the respondent commission made awards against the Subsequent Injuries Fund and the employer's insurance carrier predicated upon a disability of 19.5% on account of the last injury and a disability of 100% as a result of his last injury and his prior disability.

June 15, 1956, the Subsequent Injuries Fund petitioned the commission for redetermination of the amount of disability and for discharge from liability, alleging substantial improvement¹ in the condition of the employee's left eye, resulting in a combined total disability of but 44%. After a hearing, the commission, on March 1, 1957, granted the petition, predicated upon a finding that the combined total disability is only 38%.

April 12, 1957, upon reconsideration, the commission vacated its order of March 1, 1957, and affirmed and adopted its award of October 6, 1952, for lack of jurisdiction to modify an award after the lapse of five years from the date of the injury. On May 23, 1957, the fund's petition for reconsideration of the order of April 12 was denied.

[1] The fund's petition for modification was filed before but the order granting it was made after the expiration of five years from June 26, 1951, the date of the injury. Upon the expiration of that five-year period the commission lost jurisdiction to modify its award. Labor Code, § 5804. As a practical matter, in view of the ten-day notice of hearing requirement of section 5502 of the Labor Code, a petition filed on the eleventh day from the very end of

the five-year period (as was this petition) really gave the commission no time to modify while it still had jurisdiction to modify its award of 1952.

This question was fully considered and decided in *Sutton v. Industrial Acc. Com.*, 46 Cal.2d 791, 298 P.2d 857. There is no need for us to repeat or to elaborate upon the analysis which was therein so clearly and cogently made and expressed.² The fact that here the Subsequent Injuries Fund seeks a modification whereas in the *Sutton* case the employer's carrier sought a modification is not a differentiating factor between that case and this case. Section 5803 of the Labor Code deals with the "continuing jurisdiction" of the commission "over all its orders * * * made * * * under the provisions of this division." Payments from the Subsequent Injuries Fund are sanctioned by the "provisions of this division" (§§ 4750-4755). Section 5804 puts a limit on that continuing jurisdiction: "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury." Moreover, sections 4751, 4753, 4753.5, 4754 and 4755 use the word "compensation" when referring to payments from the Subsequent Injuries Fund.

Petitioner would distinguish the *Sutton* case upon the further ground that there the carrier was merely seeking to cut down the amount of its liability while here the fund seeks to wipe out any and all liability. We see no merit in this point.

[2] The fund argues that since the employee may file a claim against it within

1. Specifically, the fund averred: "Your petitioner has now ascertained that there has been a substantial improvement in the condition of the applicant since the issuance of the above-named Findings and Award; that the factors of permanent disability from which the applicant suffers are not presently as great as at time of the determination of said Findings and Award and Rating; and that it now appears that said Findings and Award and Rating were, in fact, prematurely made."

2. We note in passing that the recent decision in *Gonzales v. Industrial Acc.*

Com., — Cal.App.2d —, 316 P.2d 736, did not involve this precise question.

There, upon a petition to re-open, the commission made an award within but near the end of five years from the date of the injury. It granted a petition for reconsideration which was filed within the prescribed 20 days and within five years from the date of the injury.

The decision upon reconsideration was filed, as it happened, more than five years after the date of injury. The court held that sections 5900 and 5903 of the Labor Code (not section 5804) governed in such a case.

the five-year period and have it heard and determined after the expiration of that period, the fund should have the same privilege. This contention was considered and answered in the Sutton case, pointing up the difference between an employee's application filed pursuant to section 5410 and the jurisdiction of the commission over an award it has made, jurisdiction to modify or rescind the award.

[3] The fund seems to suggest that the employee committed fraud (malinger), from the consequences of which the fund should be relieved. The fund did not plead fraud in its belated petition to reopen the case, nor does the record demonstrate to us that fraud was proved before or found by the commission. Moreover, the kind of fraud the fund is talking about would be intrinsic, not extrinsic, in nature and even in a court of equity would not furnish a basis for a collateral attack upon a judgment that had become final.

The order under review is affirmed.

PETERS, P. J., and BRAY, J., concur.



155 Cal.App.2d 660

CHAFFIN CONSTRUCTION COMPANY, a corporation, Plaintiff and Respondent,

v.

MALEVILLE BROS., a copartnership, and John J. Maleville, Elwood F. Maleville and Edwin R. Maleville, individually and doing business as copartners under the name and style of Maleville Bros., a copartnership, Defendants and Appellants.

Civ. 17433.

District Court of Appeal, First District,
Division 1, California.

Dec. 2, 1957.

Action for breach of contract or, alternatively, to recover upon an account stated. The Superior Court, San Mateo County,

Murray Draper, J., denied a motion for change of venue, and defendants appealed. The District Court of Appeal, Bray, J., held that it had not been an abuse of discretion, upon affidavits presented, to deny defendants' motion for change of venue from San Mateo County to Sacramento County upon ground of promotion of convenience of witnesses and ends of justice.

Affirmed.

1. Appeal and Error ⇨965

Venue ⇨42

Determination of motion for change of venue is addressed to sound discretion of trial judge, and his determination will not be disturbed by an appellate tribunal except where it manifestly appears that there was a clear abuse of discretion on part of trial judge.

2. Venue ⇨51, 52(1)

It is not only necessary that convenience of witnesses be promoted but equally essential that ends of justice be promoted before court is justified in granting motion for change of venue.

3. Venue ⇨52(1)

Ordinarily, convenience of those witnesses who are parties to action is not to be considered in determining whether to grant motion for change of venue.

4. Venue ⇨52(2)

Ordinarily, convenience of witnesses who are employees of parties to action is not to be considered in determining whether to grant motion for change of venue.

5. Venue ⇨45

Convenience of one of attorneys for plaintiff was not to be considered in determining whether to grant motion for change of venue.

6. Venue ⇨68

On motion for change of venue, moving party must stand upon strength of his showing rather than upon weakness, if any, of opposition.

7. Venue ⇨70

In action for breach of contract or, alternatively, to recover upon an account

stated, it was not an abuse of discretion, upon affidavits presented, to deny defendants' motion for change of venue, from San Mateo county to Sacramento county, upon ground of promotion of convenience of witnesses and ends of justice.

8. Appeal and Error ☞1107

On appeal from order denying defendants' motion for change of venue, reviewing court would have to consider situation as presented to trial court, notwithstanding post-determination amendment extending to 150 miles distance from which attendance of witnesses could be compelled. West's Ann.Code Civ.Proc. § 1989.

Wilke & Sapunor, Sacramento, for appellants.

Royal E. Handlos, San Francisco, for respondent.

BRAY, Justice.

Defendants' appeal from an order denying their motion for change of venue from San Mateo County to Sacramento County upon grounds of promotion of the convenience of witnesses and the ends of justice raises as the sole question whether the trial court abused its discretion.

Record.

The complaint alleged a cause of action upon breach of contract and in the alternative upon an account stated. The contract was in writing, executed between one Chaffin and the defendant copartnership and assigned by Chaffin to plaintiff. It alleged that plaintiff's principal place of business is in Sacramento County and defendant Edwin Maleville (one of the copartners) resides in San Mateo County. Defendants' answer denied liability and alleged among other matters nonperformance by Chaffin and plaintiff and that Chaffin had assigned his rights in the contract and in the alleged causes of action to third persons.

Accompanying defendants' notice of motion for change of venue was the affidavit of Elwood F. Maleville. It included a

statement to the effect that to prove the stated defenses, one of which was failure to perform by Chaffin, Elwood F. Maleville and John J. Maleville, who were parties to the contract together with Edwin R. Maleville and Chaffin, would be necessary witnesses; that the two first mentioned were residents of Sacramento County; that Edwin could not testify to said matters as he was residing in San Mateo County at all times mentioned in the complaint and did not participate directly in the negotiations for the contract nor have the opportunity to observe Chaffin's performance of the contract which took place in Sacramento County; that other witnesses necessary to be called, all of whom resided in Sacramento County, were Ralph Jeffords, who would testify to Chaffin's manner of performance and manner of keeping books, records and accounts pertinent to said contract, and to Chaffin's commingling of joint venture funds with his own funds; Esther Peyton, who was familiar with Chaffin's manner of doing business, his records, books and accounts, she having been in sole charge thereof; Morris Martin, Chaffin's construction superintendent who would testify to Chaffin's performance of the contract; Ruth Karlovich, who would testify concerning the moneys expended in the performance of the work and Chaffin's manner and method of keeping and paying accounts and in performing the construction work required by the contract; that each of these persons was gainfully employed in Sacramento County; that they could appear and testify in that county with little inconvenience but to require them to absent themselves from their homes and families to go to San Mateo County would cause them great inconvenience and hardship, particularly as more than one appearance upon the witness stand would be required of them; that Ruth Karlovich conducts an accounting service in Sacramento County requiring her constant personal attention; that all the Malevilles are engaged in business enterprises in Sacramento County requiring their full time and attention; that Edwin, though

residing in San Mateo County, makes frequent trips to Sacramento in the course of business and would not be inconvenienced if required to attend the trial in Sacramento, where the contract was made and was to be and was performed.

The sole affidavit in opposition to the motion was that of Attorney Evans. It stated that prior to the filing of the suit he was present at a certain meeting in the office of defendants at Sacramento in which defendants admitted the exact amount of their indebtedness to plaintiff; that affiant's testimony was material to prove plaintiff's cause of action upon an account stated and that it would be extremely inconvenient for him to attend a trial in Sacramento as he lived in San Mateo County and maintained a law office there and in San Francisco.

Discretion of Trial Judge.

[1-5] The determination of a motion of this kind is addressed to the sound discretion of the trial judge. *Wrin v. Ohlandt*, 213 Cal. 158, 1 P.2d 991; *Plum v. Newhart*, 118 Cal.App. 73, 4 P.2d 805. His determination "will not be disturbed by an appellate tribunal except where it manifestly appears that there is a clear abuse of discretion on the part of the trial judge." *Willingham v. Pecora*, 44 Cal. App.2d 289, 293, 112 P.2d 328, 331. Moreover, "It is not only necessary that the convenience of witnesses be promoted but equally essential that the 'ends of justice' be promoted before the court is justified in granting the motion." (44 Cal.App.2d at page 295, 112 P.2d at page 332.) Of defendants' witnesses the three Malevilles are parties and therefore their convenience is not to be considered. *Willingham v. Pecora*, supra, 44 Cal.App.2d 289, 112 P.2d 328.¹ While defendants' affidavit mentioned Chaffin, plaintiff's assignor, as one of the witnesses whose convenience is to be considered, it fails to mention whether he

would testify for or against defendants. Presumably he will not testify for defendant as he is plaintiff's assignor whom defendants state in their affidavit is the real party in interest. Moreover, the affidavit fails to state whether he would or would not prefer attending a trial in Sacramento rather than in San Mateo County. From the affidavit it does not appear whether Esther Peyton and Ruth Karlovich are or were plaintiff's or defendants' employees or neither. If employees of either party their convenience is not to be considered. *Willingham v. Pecora*, supra, 44 Cal.App. 2d 289, 112 P.2d 328. The same is true of the convenience of Attorney Evans, if he was one of the attorneys for plaintiff. *Idem.*, 44 Cal.App.2d at page 289, 112 P.2d at page 328. The affidavit fails to show whether any of these witnesses as well as Morris Martin will testify for the defendants. It states merely that they "will be required to appear and testify in the trial of this action *either by plaintiff or defendants * * **" (Emphasis added.) The statements appearing in the affidavit that these witnesses know of Chaffin's manner of keeping accounts and of performing his contract are similar to the statements appearing in *Ennis-Brown Co. v. Long*, 7 Cal.App. 313, 94 P. 250, concerning which the court commented "*Non constat*, but that they would testify against defendants." 7 Cal.App. at page 316, 94 P. at page 251.

[6-8] Defendants in their briefs contend that the ends of justice would be served by a trial in Sacramento instead of in San Mateo County for three reasons: (1) The apartment house, the construction of which being in Sacramento County, would allow the court and the jury to view the premises for a better understanding of the case, since an issue of the manner of performance is presented. However, there

1. There are certain circumstances not present in this case, under which the convenience of the parties will be considered (see *Borba v. Toste*, 1942, 52 Cal.App. 2d 591, 126 P.2d 655; *Simonian v. Si-*

monian, 97 Cal.App.2d 68, 217 P.2d 157), as well as the convenience of employees (*Wood v. Silvers*, 35 Cal.App.2d 604, 96 P.2d 366, 97 P.2d 265).

is nothing in the affidavit which indicates that anything in the manner of performance pertaining to the issues would be visible at the apartment house. Seybert v. County of Imperial, 139 Cal.App.2d 221, 293 P.2d 135, cited by defendants, dealt with an accident at an inland body of water owned by the defendant. In addition to the fact that the eyewitnesses to the accident lived in the county where the accident occurred and from which it was sought to have the case transferred, the court stated that "a view of the place where the accident happened might well be essential to a proper understanding of the testimony of the witnesses." 139 Cal.App. at page 231, 293 P.2d at page 141. The affidavit discloses no such situation here. (2) The contract was made and to be performed in Sacramento County. This fact is not shown by the pleadings to be particularly material to the question here. (3) Because San Mateo County is more than 100 miles from Sacramento the witnesses could not be compelled to attend court there, and their depositions might have to be taken.² This fact might require a transfer of the case were it possible to determine from the pleadings what witnesses other than the defendants themselves defendants intend to call. Their affidavit does not state that they will call any. On a motion of this kind the moving party must stand upon the strength of his showing rather than upon the weakness, if any, of the opposition. Assuming, as contended by defendants, that plaintiff's witnesses will be only its officers and employees, nevertheless in view of the failure of defendants' affidavit to inform the trial court what witnesses they will call, what they will testify to (from the affidavits it is reasonable to conclude that most, if not all, of the witnesses were or are Chaffin's employees), we are unable to hold that the trial court abused its discretion in finding that the

convenience of witnesses and the ends of justice did not require a change of venue.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



155 Cal.App.2d 423

**Susan McClain, by her guardian ad litem,
Mildred McClain Johnson, Plaintiff and
Appellant,**

v.

CITY OF SOUTH PASADENA, Frank Clough, individually, and as City Manager; Don Dollison, individually, and as assistant City Manager; Joseph C. Partsch, individually, as Mayor, and as a member of the City Council of South Pasadena; Clarence Stanyer, Roy L. Anderson, Verne E. Robinson and Selmer I. Snortum, members of the City Council of South Pasadena; Robert Sellar, individually, and as Superintendent of the Department of Recreation of South Pasadena; Neil Cornell, individually, and as an employee of South Pasadena; Donald Skraba, individually, and as an employee of South Pasadena; Cathi McColgan, individually, and as an employee of South Pasadena, Defendants and Respondents.

Civ. 22181.

**District Court of Appeal, Second District,
Division 3, California.**

Nov. 22, 1957.

Rehearing Denied Dec. 20, 1957.

Hearing Denied Jan. 15, 1958.

Action by nine year old nonresident Negro girl against city and officers and employees thereof for damages and for an injunction on ground that she was unlawfully excluded from municipal plunge because of her race. From adverse judgment of the Superior Court, Los Angeles County, Wal-

2. Since the determination of the motion section 1989, Code of Civil Procedure, was amended extending the distance in which a witness can be compelled to at-

tend court to 150 miles. Stats.1957, ch. 1560, p. 2918. However, we must consider the situation as presented to the trial court.

ter R. Evans, J., the plaintiff appealed. The District Court of Appeal, Vallée, J., held that municipal regulation limiting use of municipal plunge to residents of city was reasonable and did not deny nonresident equal protection of the law under the federal constitution or deny her privileges and immunities under the state constitution.

Judgment affirmed.

1. Pleading Ⓒ345(1)

A plaintiff may recover judgment on a motion for judgment on the pleadings only if his complaint states facts sufficient to constitute a cause of action and the answer neither raises a material issue nor states a defense.

2. Pleading Ⓒ345(1)

Complaint, which alleged that city regulations prohibited entry into or use of plunge by all persons of Negro extraction and that plaintiff was excluded solely because she was a Negro, and answer, which denied such allegations and alleged that in addition to a ticket of admission a person must be resident of city in order to be admitted to plunge and that plaintiff was a nonresident, raised issues of fact, and motion for judgment on the pleadings was properly denied.

3. Pleading Ⓒ350(3)

In passing on a plaintiff's motion for judgment on pleadings, every allegation affirmatively pleaded in answer must be deemed true.

4. Civil Rights Ⓒ13

Injunction Ⓒ128

In action against city and officers and employees thereof for damages and for an injunction on ground that plaintiff was unlawfully excluded from municipal plunge because of her race, wherein defendant alleged that plaintiff was denied admission because of city regulation limiting use of plunge to city residents, evidence sustained finding that plaintiff was not denied admission to plunge on account of her race or color. West's Ann.Civ.Code, §§ 51-53.

5. Appeal and Error Ⓒ1012(1)

The prerogative of weighing the evidence is in the trier of fact.

6. Appeal and Error Ⓒ989

Reviewing court does not reweigh evidence on review, and when it is claimed evidence is insufficient to support findings, function of reviewing court ends when it finds substantial evidence which supports findings.

7. Civil Rights Ⓒ6

Statute making it unlawful for proprietor of any place of public amusement or entertainment to refuse admittance to any person over 21 years of age who presents a ticket of admission acquired by purchase, or who tenders price thereof for such ticket, and who demands admission to such place was not applicable to action by nine year old Negro girl against city and officers and employees thereof for damages for unlawfully excluding her from municipal plunge which city had by regulation limited to use of residents only. West's Ann.Civ. Code, § 53.

8. Statutes Ⓒ223.2(23)

Statute providing that all citizens under state jurisdiction are entitled to full and equal accommodations and privileges in places of public accommodation and amusement, subject only to conditions and limitations established by law, and applicable alike to all citizens and statute prescribing liability of person who denies such accommodations and privileges, except for reasons applicable alike to every race or color, must be read and construed together. West's Ann.Civ.Code, §§ 51, 52.

9. Civil Rights Ⓒ4

Under statute providing that all citizens under state jurisdiction are entitled to full and equal accommodations and privileges in places of public accommodation or amusement, subject only to conditions and limitations established by law, and applicable alike to all citizens, any unreasonable discrimination is forbidden, but if ground of exclusion is reasonable, it is valid. West's Ann.Civ.Code, §§ 51, 52.

10. Constitutional Law ⇨208(3), 211

Municipal Corporations ⇨721(1)

Municipal regulation limiting use of municipal plunge to residents of city was reasonable and did not deny nonresidents equal protection of law under federal constitution or deny them privileges and immunities under state constitution. West's Ann.Civ.Code, §§ 51, 52; West's Ann. Const. art. 1, § 21; U.S.C.A.Const. Amend. 14.

11. Constitutional Law ⇨208(1), 211

A classification does not violate equal protection clause of federal constitution or privileges and immunities provisions of state constitution, merely because it produces an inequality. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, § 21.

12. Constitutional Law ⇨208(1), 211

A discrimination or inequality produced by a classification must, in order to conflict with the equal protection clause of federal constitution and privileges or immunities provision of state constitution, be actually and palpably unreasonable and arbitrary. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, § 21.

13. Constitutional Law ⇨48

When a legislative classification is questioned, if any state of facts reasonably can be conceived that will sustain it, there is a presumption of existence of that state of facts, and burden of showing arbitrary action rests upon one who assails classification.

14. Municipal Corporations ⇨122(2)

When municipal regulation is within power of municipality, presumption is that it is reasonable unless on its face unreasonableness is apparent, and reasonable doubts regarding its validity, if any, will be resolved in its favor.

15. Constitutional Law ⇨208(3)

All differentiation by municipal regulation as to nonresidents is not constitutionally prohibited and void, and it is only when municipal regulation discriminates unreasonably that it violates constitutional re-

quirements. U.S.C.A.Const. Amend. 14; West's Ann.Const art. 1, § 21.

16. Municipal Corporations ⇨626

A regulation making different provision for people residing outside a municipality from those residing in it is valid if classification is based on reasonable distinction and such regulation is not unconstitutional because it results in some inequality.

17. Constitutional Law ⇨208(1), 211

A municipal regulation applying alike to all persons similarly situated, without distinction as to nationality, race, color, or creed, does not violate federal or state constitutions. West's Ann.Const. art. 1, § 21; U.S.C.A.Const. Amend. 14.

18. Municipal Corporations ⇨589

Any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

19. Constitutional Law ⇨48

A large discretion is vested in legislative branch of government with reference to exercise of police power, and every intendment is to be indulged in by courts in favor of validity of its exercise, and unless measure is clearly oppressive it will be deemed to be within purview of that power.

20. Municipal Corporations ⇨594(1)

If good grounds for a classification in a municipal regulation exist, such classification is not void because it does not embrace within it every other class which might be included.

21. Municipal Corporations ⇨595, 597, 598

If police power is exercised by a municipality for proper purposes of public and if there is no arbitrary and unreasonable health, safety, morals, and general welfare, able application in a particular case, an individual cannot complain of incidental injury.

22. Constitutional Law ⇨208(1)

A classification is reasonable if it has a substantial relation to a legitimate objective to be accomplished.

23. Municipal Corporations ⇨721(1)

Fact that city regulation limiting use of municipal plunge to residents only had not been uniformly enforced against all violators did not render it discriminatory.

24. Municipal Corporations ⇨625

The arbitrary and discriminatory character of a city regulation that vitiates does not lie in its misapplication or maladministration by those entrusted with executing it.

25. Municipal Corporations ⇨721(1)

Fact that municipal plunge was constructed at least in part from funds obtained by municipality from federal government did not give all persons resident in the United States right to use it. West's Ann. Civ.Code, §§ 51, 52; West's Ann.Gov.Code, §§ 37351, 37354, 37355, 39732.

26. Municipal Corporations ⇨734

In maintaining and operating municipal plunge, municipality acted in a governmental capacity, even though an admission fee was charged.

27. Municipal Corporations ⇨597

A fundamental function and prime duty of a municipality is to preserve the health of its residents.

28. Municipal Corporations ⇨721(1)

A regulation designed to prevent congestion in a municipal plunge is a valid exercise of the police power for the health, safety, morals, and general welfare.

29. Municipal Corporations ⇨721(1)

Regulation excluding all nonresidents, irrespective of race, color, or creed, from use of municipal plunge bore a reasonable and substantial relation to the health, safety, morals, and general welfare of the residents of the city and was a reasonable classification. West's Ann.Civ.Code, §§ 51-53; West's Ann.Gov.Code, § 34111; West's Ann.Const. art. 1, § 21; U.S.C.A.Const. Amend. 14.

1. In August 1955 section 34111 of the Government Code provided that cities having a population of more than 8,000 and not exceeding 20,000 are cities of the fifth class. Effective September 7, 1955 section 34111 and other sections classify-

A. L. Wirin and Hugh R. Manes, Los Angeles, for appellant.

Braeme E. Gigas, City Atty., South Pasadena, and Dunlap, Holmes, Ross & Woodson, Pasadena, for respondents.

VALLÉE, Justice.

Plaintiff, a Negro, brought this suit for damages and an injunction against the city of South Pasadena and officers and employees thereof on the alleged ground she had been unlawfully excluded from the municipal plunge on August 2, 1955 because of her race. The complaint alleges "plaintiff now brings this action under Sections 51, 52 and 53 of the Civil Code." The prayer is for \$1,000 damages against each defendant and for an injunction restraining defendants from excluding plaintiff from the South Pasadena municipal plunge.

Defendants admitted plaintiff had been excluded from the plunge but alleged the exclusion was solely on the ground she was a nonresident of South Pasadena and that one of the requirements for admission to the plunge was that admittees be residents of South Pasadena.

The cause was tried by the court without a jury. At the trial plaintiff moved for judgment on the pleadings on the ground the regulation excluding nonresidents from the plunge is unlawful. The motion was denied. Judgment was for defendants. Plaintiff appeals.

On August 2, 1955 South Pasadena was a city of the fifth class located in the County of Los Angeles with a population of about 19,000.¹ At that time there apparently were no Negroes residing within the city.

Since 1939 the city has owned and operated through its Department of Recreation a municipal plunge. An admission fee is

ing unchartered cities were repealed and section 34102 added reading: "Cities organized under the general law shall be 'general law cities.'" Stat.1955, c. 624, p. 1120, §§ 53, 54.

charged. In 1942 the Recreation Commission adopted this regulation:

"The use of the pool and the recreational facilities adjacent thereto is limited to residents of the City of South Pasadena."²

The regulation was adopted due to the fact that so many nonresidents were making use of the plunge that residents of South Pasadena had difficulty in obtaining entrance to it.

The plunge is 50 by 100 feet and has a comfortable capacity of about 350 simultaneous users. In June 1955 there were about 6,000 users; in July, about 14,000. The peak usage is in the month of August. In August 1955 over 15,000 users, or about 500 a day, were recorded. It is the only municipally owned plunge in South Pasadena.

In the afternoon of August 2, 1955 John H. Abbott, a Caucasian residing in the city of Los Angeles, took his two daughters and plaintiff, a 9-year-old Negro girl, also a resident of Los Angeles, to the plunge. He purchased and received four tickets of admission. At this point the cashier, defendant McColgan, noticed plaintiff and asked Abbott if she was in his party. He

said, "Yes." McColgan told him, "We couldn't let them in because we have a policy that we reserve the right of use of the pool to residents." She testified she knew plaintiff was not a resident because at that time there were no Negro families living in South Pasadena. She then called the assistant manager, defendant Skraba. Skraba asked Abbott if he were a resident of South Pasadena and Abbott said, "No." Skraba said, "Therefore, according to our policy, you must be excluded because you are non-resident." Abbott, his two children, and plaintiff were denied admission to the plunge.

Dr. Martin, a member of the Recreation Commission from 1941 to 1944, testified the plunge was the only one of any size in the vicinity and that when it was newly built it attracted so many nonresidents that residents of South Pasadena had difficulty in obtaining entrance to the use of the facilities. Consequently, the Recreation Commission approved the regulation restricting use of the plunge to residents of South Pasadena.

Skraba testified he worked as a lifeguard and assistant plunge manager during the summer seasons for the years 1953 through

2. The regulation was one of several adopted at the same time. They read:

"City of South Pasadena
"Department of Recreation

"The Superintendent and employees of the South Pasadena Recreation Department will endeavor to maintain these premises so that patrons can enjoy them to the utmost and at the same time be assured of health and safety.

"We request the full cooperation of our patrons in obeying these Rules and Regulations.

"1. The use of the pool and the recreational facilities adjacent thereto is limited to residents of the City of South Pasadena.

"2. No profane or indecent language will be permitted.

"3. The conduct of patrons shall be above reproach at all times.

"4. No smoking by players in competitive games will be permitted. (Good sportsmen refrain from smoking while playing in any game.)

"5. The use of intoxicating beverages on the playgrounds is strictly prohibited and also those persons under its influence.

"6. Dogs are not allowed on the playgrounds except on leash.

"7. Good sportsmanship shall be practiced in the use of the courts.

"8. Additional rules for the plunge.

"(a) The management does not assume liability for articles checked, although reasonable care will be taken to prevent loss.

"(b) The management reserves the right to refuse admittance to any person not presenting a currently dated medical certificate from a resident physician.

"(c) Showers are required before entering the plunge.

"(d) Smoking prohibited on plunge deck except in designated area.

"(e) Smoking by children prohibited at all times.

"(f) No candy or gum allowed in the pool.

"(g) No lunches on pool deck or locker room."

1955 and that he was instructed by the superintendent of the Department of Recreation, defendant Seiler, and the manager of the plunge, defendant Cornell, that the city had a regulation limiting use of the plunge to residents of the city; he was not instructed to exclude from the plunge any person on the ground of race, color, or creed. He testified the regulation was invoked in 1955 to exclude nonresident Caucasians.

The plunge is open from about the middle of June through September for use by residents of South Pasadena on Monday through Saturday from 10:00 to 12:00 and from 1:00 to 5:00; Monday, Wednesday, and Friday evenings from 7:00 to 10:00; and Sundays from 1:00 to 5:00. Occasionally at other hours the plunge has been rented to various organizations without restriction as to race, color, or creed. There was testimony by a Mr. Acorn, who made arrangements with the Recreation Department for rental of the plunge by the churches of South Pasadena in 1955, that no restriction was made with regard to the use of the plunge by members of the Negro race or any other race, color, or creed who might be using it as a part of his group. In 1955 the plunge was rented to a Japanese Buddhist organization and no restriction was specified by South Pasadena as to the use of the plunge by members of the organization with respect to race, color, or creed.

There was much evidence from past and present city officials that South Pasadena has never adopted a regulation, rule, policy, or schedule of any kind limiting, restricting, or excluding Negroes from any recreation facility owned or operated by the city because of race or color.

There was no evidence that any Negro resident of South Pasadena was denied admission to the plunge at any time since it was built.

The court found: 1. On August 2, 1955 there was in existence a regulation of the city of South Pasadena and its Department of Recreation requiring persons who

used the plunge to be residents of the city, and on that day McColgan and Skraba knew of the regulation. 2. The plunge was the only such facility publicly owned and operated in and by the city; the plunge was of such size and capacity, the city was so populated, and the seasonal use of the plunge was of such extent and character that the regulation was reasonably justified to assure the orderly use of the plunge and its maximum usefulness. 3. Plaintiff was not a resident of South Pasadena and she was denied permission to use the plunge solely because of the regulation and not on account of her race or color. 4. At no time did South Pasadena, its Department or Recreation, or any of its officers or employees adopt or issue any regulation, rule, policy, custom, or usage which prohibited persons of Negro extraction from use of public recreation facilities on account of their race or color. 5. Persons of Negro extraction have always been permitted to use the public recreational facilities of South Pasadena on the same basis as persons of all other races and colors. 6. Plaintiff did not sustain any embarrassment, humiliation, chagrin, mental anguish, hurt feelings, or physical or mental suffering because of any act, conduct, practice, or omission on the part of defendants. 7. Injunctive relief is not necessary or proper. 8. Plaintiff has not been damaged at all by reason of any regulation, rule, act, or omission of any defendant. The court concluded plaintiff was lawfully denied permission to use the plunge on the occasion alleged and she was not on that occasion denied any right, privilege, or immunity, or deprived of due process of law or the equal protection of the laws.

[1-3] It is asserted the court erred in denying plaintiff's motion for judgment on the pleadings. A plaintiff may recover judgment on a motion for judgment on the pleadings only if his complaint states facts sufficient to constitute a cause of action and the answer neither raises a material issue nor states a defense. *Barasch v. Epstein*, 147 Cal.App.2d 439, 440, 305 P.2d 283. The complaint alleged that the regula-

tion of South Pasadena prohibited entry into or use of the plunge by all persons of Negro extraction and that plaintiff was excluded solely because she is a Negro. The answer denied these allegations and alleged that in addition to a ticket of admission another requirement to gain admission to the plunge was that persons be residents of South Pasadena. The complaint alleged and the answer denied that Abbott purchased four tickets of admission including one for plaintiff. The answer alleged plaintiff was denied entrance to the plunge solely on the ground she was a nonresident of South Pasadena; to wit, a resident of Los Angeles. The answer alleged, "Persons of negro extraction have always been permitted and are now permitted to use, and have used, the public recreational facilities of the City on the same basis as persons of all other races and colors." Every allegation affirmatively pleaded in the answer must be deemed true. *Cuneo v. Lawson*, 203 Cal. 190, 193, 263 P. 530. Issues of fact were raised. The motion for judgment on the pleadings was properly denied.

[4-6] It is next asserted the finding that plaintiff was not denied admission to the municipal plunge on account of her race or color is against the weight of evidence. The point is without substance. The prerogative of weighing the evidence is in the trier of fact. We do not reweigh the evi-

dence on review. When it is claimed the evidence is insufficient to support the findings the function of a reviewing court ends when it finds substantial evidence in the record which supports the findings. The evidence related supports the finding in this respect.

Plaintiff challenges the validity of the regulation on the ground it violates sections 51-53 of the Civil Code. Section 51 provides that all citizens under state jurisdiction are entitled to the full and equal accommodations, advantages, facilities, and privileges of bathhouses, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law applicable alike to all citizens.³ Section 52 prescribes the liability of persons who deny such accommodations and privileges "except for reasons applicable alike to every race or color," or make "any discrimination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever."⁴ Section 53 provides that it is unlawful for the proprietor of any place of public amusement or entertainment to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such

3. Section 51 reads: "All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens."

4. Section 52 reads: Whoever denies to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty-one of this code, or who aids, or incites, such denial, or whoever makes any discrim-

ination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating house, place where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shop, bath house, theater, skating rink, public conveyance, or other public place of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction or restriction, for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose."

ticket, and who demands admission to such place.⁵

[7] Contrary to the suggestion of plaintiff, section 53 has no application. It applies only to the refusal of admittance "to any person over twenty-one years." See *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal.2d 833, 838, 198 P.2d 514. Plaintiff was nine years old in August 1955. *Jones v. Kehrlein*, 49 Cal.App. 646, 194 P. 55, 58, does not decide otherwise. *Jones*, a minor, recovered under sections 51 and 52 and, the court held, properly so. The court said section 53 "was never intended to form a defense to an action by one whose rights under sections 51 and 52 have been violated."

[8,9] The intent of section 51 is to give all persons full and equal accommodations and privileges in places of public accommodation and amusement, "subject only to the conditions and limitations established by law, and applicable alike to all citizens." Sections 51 and 52 are to be read and construed together. Under section 52 liability is imposed only if the denial of the accommodations, facilities, and privileges enumerated in section 51 is not "for reasons applicable alike to every race or color," or only if the citizen is discriminated against on account of race or color and the discrimination is not "for good cause, applicable alike to citizens of every color or race whatsoever." The regulation in question is applicable "alike to every race or color," and it applies "alike to citizens of every color or race whatsoever." The phrase in section 52 "or except for good cause" is to be read "or [whoever makes any discrimination, distinction, or restriction] except for good cause." In other words, any unreasonable discrimination is

forbidden. If the ground of exclusion is reasonable it is valid. *Orloff v. Los Angeles Turf Club*, 36 Cal.2d 734, 737, 740-741, 227 P.2d 449. The question remains whether the regulation restricting use of the plunge to residents of South Pasadena is reasonable.

[10-14] Plaintiff invokes the equal protection of the laws provision of the Constitution of the United States⁶ and the privileges or immunities provision of the Constitution of California.⁷ Problems of classification under the California Constitution are similar to those presented by the equal protection clause of the Fourteenth Amendment. Under either provision "the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary', or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. [Citations.] When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification." *People v. Western Fruit Growers*, 22 Cal.2d 494, 506-507, 140 P.2d 13, 20. When a municipal regulation is within the power of the municipality the presumption is that it is reasonable unless on its face unreasonableness is apparent, and reasonable doubts regarding its validity, if any, will be resolved in its favor. *Nat. Milk Producers Ass'n of Cal. v.*

5. Section 53 reads: "It is unlawful for any corporation, person, or association, or the proprietor, lessee, or the agents of either, of any opera house, theater, melodeon, museum, circus, caravan, race course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase,

or who tenders the price thereof for such ticket, and who demands admission to such place. Any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement."

6. Fourteenth Amendment.

7. Article I, section 21.

City & County of San Francisco, 20 Cal.2d 101, 114, 124 P.2d 25; Matter of Application of Miller, 162 Cal. 687, 696, 124 P. 427; Glass v. City of Fresno, 17 Cal.App.2d 555, 560, 62 P.2d 765; Sawyer v. Barbour, 142 Cal.App.2d 827, 833, 300 P.2d 187.

[15-17] All differentiation by municipal regulation as to nonresidents is not constitutionally prohibited and void. Hansen v. Town of Antioch, 18 Cal.2d 110, 114 P.2d 329. See Webb v. State University of New York, D.C., 125 F.Supp. 910, appeal dismissed 348 U.S. 869, 75 S.Ct. 113, 99 L.Ed. 683.⁸ It is only when the municipal regulation discriminates unreasonably that it violates constitutional requirements. People ex rel. Village of Larchmont v. Gilbert, Co. Ct., 137 N.Y.S.2d 389, 392; People ex rel. Village of Lawrence v. Kraushaar, 195 Misc. 487, 89 N.Y.S.2d 685, 688; City of Ottumwa v. Zekind, 95 Iowa 622, 64 N.W. 646, 647, 29 L.R.A. 734. A regulation making different provision for people residing outside a municipality from those residing in it is valid if the classification is based on a reasonable distinction. Such a regulation is not unconstitutional because it results in some practical inequality. All so-called local option regulations are based on this principle. Heartt v. Village of Downers Grove, 278 Ill. 92, 115 N.E. 869, 870. See Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505. A municipal regulation applying alike to all persons similarly situated, without distinction as to nationality, race, color, or creed, is not in violation of the federal or state Constitutions. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923, 924-925; Hing v. Crowley, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145, 1147; Ex parte Moynier, 65 Cal. 33, 36, 2 P. 728. Under the requirements of the Constitutions the question is whether the regulation restricting use of the plunge to residents of South Pasadena is reasonable.

8. In Sivertsen v. City of Menlo Park, 17 Cal.2d 197, at page 199, 109 P.2d 928, at page 930, the court stated: "It is not denied by the appellant and it is well established by the authorities that there

[18-22] Plaintiff says the regulation is not a lawful exercise of the police power. Any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. Const. art. XI, § 11; Simpson v. City of Los Angeles, 40 Cal.2d 271, 278, 253 P.2d 464. The power to make local and police regulations is very broad and far-reaching. Except to the extent that the Legislature has decreed otherwise, South Pasadena may pass and enforce any reasonable regulation with respect to the use of its municipal plunge. "A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * * Every intendment is to be indulged by the courts in favor of the validity of its exercise, and unless the measure is clearly oppressive it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals or general welfare that it will be nullified by the courts." Magruder v. City of Redwood, 203 Cal. 665, 672, 265 P. 806, 809. If good grounds for a classification in a municipal regulation exist, such classification is not void because it does not embrace within it every other class which might be included. Keenan v. San Francisco Unified School Dist., 34 Cal.2d 708, 713, 214 P.2d 382. It is implicit in the theory of the police power that an individual cannot complain of incidental injury, if the power is exercised for proper purposes of public health, safety, morals, and general welfare, and if there is no arbitrary and unreasonable application in a particular case. McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 890, 264 P.2d 932. A classification is reasonable if it has a substantial relation to a legitimate objective to be accomplished. Dribin v. Superior Court,

may be discrimination between businesses of the same character located within and those located without the boundaries of a municipality in regard to license fees."

37 Cal.2d 345, 352, 231 P.2d 809, 24 A.L.R. 2d 864. Thus the regulation is a valid exercise of the police power if it is reasonable.

[23, 24] It is argued that nonresidents on occasions used the plunge prior to August 1955 and that such use invalidated the regulation. The fact that a municipal regulation may not have been enforced uniformly against all violators does not render it discriminatory. The arbitrary and discriminatory character of a regulation that vitiates it does not lie in its misapplication or maladministration by those entrusted with executing it. *Zucht v. King*, Tex.Civ. App., 225 S.W. 267, 273; *City of Denver v. Girard*, 21 Colo. 447, 42 P. 662, 664; *City of Omaha v. Lewis & Smith Drug Co.*, 156 Neb. 650, 57 N.W.2d 269, 272; *Hoyne v. Wurstner*, Ohio App., 63 N.E.2d 229, 233; *Cunningham v. City of Niagara Falls*, 242 App.Div. 39, 272 N.Y.S. 720, 722-723; *Wade v. City and County of San Francisco*, 82 Cal.App.2d 337, 339, 186 P.2d 181.

[25] It is asserted that because the plunge was constructed at least in part from funds obtained by South Pasadena from the federal government that all persons resident in the United States have the right to its use. Section 37351 of the Government Code provides that the legislative body of a city of the fifth class may purchase or receive such personal property and real estate as is necessary or proper for municipal purposes, and that it may control "*such property for the benefit of the city.*" (Italics added.) At the time in question section 39732 of the Government Code authorized the legislative body of a city of the fifth class to "Acquire, own, construct, maintain, and operate * * * parks, and baths." Section 37354 authorizes the legislative body of any city to accept any gift made to the city. Section 37355 provides that if the terms of a gift do not prescribe or limit the uses to which the gift may be put, it may be put to such uses as the legislative body prescribes. The terms of the gift of whatever funds may have been received from the federal government did not prescribe or limit the use to

which the gift might be put other than it was "to aid in financing the construction of a municipal swimming pool and bath house." The fact that South Pasadena may have received part of the funds with which to build the plunge from the federal government does not give all persons resident in the United States the right to use it. Whatever the source of the funds, the plunge is the property of South Pasadena.

The crux of the case is, therefore, whether the regulation restricting use of the plunge to residents of South Pasadena is reasonable. We think it is. There is no arbitrary formula by which the reasonableness of a regulation such as that in question can be tested. Its validity depends, to a considerable extent, on surrounding circumstances and its purposes and operation. Regard must be had for its object and necessity.

[26, 27] In maintaining and operating the plunge South Pasadena is acting in a governmental capacity. This is true even though an admission fee is charged. *Crone v. City of El Cajon*, 133 Cal.App. 624, 628-629, 24 P.2d 846; *Kellar v. City of Los Angeles*, 179 Cal. 605, 608, 178 P. 505; *Hannon v. City of Waterbury*, 106 Conn. 13, 136 A. 876, 57 A.L.R. 402. The maintenance and operation of a municipal plunge is primarily for the especial benefit of the inhabitants of the municipality in which the plunge exists. *Hannon v. City of Waterbury*, 106 Conn. 13, 136 A. 876, 877, 57 A.L.R. 402. The plunge is maintained by the taxpayers of South Pasadena. It is maintained to promote the health, morals, comfort, convenience, and general welfare of the residents of the city. A fundamental function and prime duty of a municipality is to preserve the health of its residents. *Kellar v. City of Los Angeles*, 179 Cal. 605, 609, 178 P. 505, 506. "Children's playgrounds and recreation centers established and maintained by a city for the general use of the children of the city, where so conducted as to partake in no degree of the nature of a private business enterprise, do not substantially differ from a public park in so far as the question

here involved is concerned. Like the public parks, they are referable solely to the duty of maintaining the public health, and have nothing of the nature of an ordinary business enterprise." (Italics added.) *Kellar v. City of Los Angeles*, 179 Cal. 605, 609, 178 P. 505, 506. See *In re Thomas*, 10 Cal.App. 375, 377, 102 P. 19.

In *People ex rel. Village of Larchmont v. Gilbert, Co.Ct.*, 137 N.Y.S.2d 389, the village of Larchmont established a parking lot exclusively for the inhabitants of the municipality. The court stated (at page 392):

"The Court sees no good reason why a municipality should not be permitted to set aside a parking area exclusively for the use of its own residents. * * *

"All residents of the Village of Larchmont are similarly treated in furtherance of a legitimate public object. The attempt to control the difficult problem of parking cannot be held to be arbitrary."

Jones v. Hammer, 143 Wash. 525, 255 P. 955, says that a classification based on residence in a county as against residence outside is neither arbitrary nor unreasonable. Also, see, *Haavik v. Alaska Packers' Ass'n*,

263 U.S. 510, 44 S.Ct. 177, 68 L.Ed. 414, 417; *McCready v. Commonwealth of Virginia*, 94 U.S. 391, 24 L.Ed. 248; *Lyman v. Adorno*, 133 Conn. 511, 52 A.2d 702, 707-708; *People ex rel. Village of Lawrence v. Kraushaar*, 195 Misc. 487, 89 N.Y.S.2d 685, 688. Cf. *Pasadena City High School Dist. of Los Angeles County v. Upjohn*, 206 Cal. 775, 276 P. 341, 63 A.L.R. 408.

[28] A regulation designed to prevent congestion in a municipal plunge is a valid exercise of the police power for the health, safety, morals, and general welfare. The very nature of a plunge limits the number of those who may use it at one time. The purpose of the regulation is to avoid congestion in the plunge; for a proper distribution of patrons; and for the better protection, safety, comfort, convenience, and health of persons using it. As the trial court found, the plunge was of such size and capacity, the city was so populated, and the seasonal use of the plunge was of such extent and character that the regulation was reasonably justified to assure the orderly use of the plunge and its maximum usefulness. Bathing is a recognized public use, and one of the objects of regulation is to secure the orderly use of municipal facilities.⁹

9. "Swimming is a universal recreation of the highest order. It is a most healthful, invigorating, and agreeable exercise. It has an economic as well as a social value in conserving health. It strengthens one's lungs, because it compels deep breathing. It strengthens the nervous system, because it induces natural sleep. It strengthens the spine and enlarges the chest, because it causes the head to be thrown back and the chest out. It strengthens and sets right the pelvic organs, because the body is in motion on the horizontal plane. It strengthens the skin and prevents the growth of gray hair. It reduces the corpulent and rounds out the attenuated. One forgets his business cares while swimming, and thus it helps to preserve his mental balance as well as muscular symmetry. By correcting tendencies to weakness in various ways, it improves one's temper and disposition, for 'a healthy liver maketh a cheerful man.' It relieves strain on the human constitution caused through inactivity. There is no better exercise than

swimming to offset the evils of a sedentary life, as it brings into activity every muscle in the body without any undue strain on any one set of muscles. It keeps the muscles supple, enlarges the diaphragm and the thorax, wards off tuberculosis, straightens the spinal column, corrects humpback, and evils that arise from the use of improper clothing. It strengthens the skin, the muscles of which are brought into action being released from the weight and tension of heavy garments. See *At Home in the Water*, pp. 6, 7, by Geo. H. Corsan.

"We conclude that cities with propriety may have parks with modern, sanitary pools to which its citizens may resort for the benefit of their health. Whatever encourages or induces the ordinary 'city shut-in' to seek exercise, relaxation, recreation, or healthful amusement is a means redounding to the public welfare and should be approved." *Smith v. Fuest*, 125 Kan. 341, 263 P. 1069, 1070. Italics added.

[29] The regulation excludes all non-residents, irrespective of race, color, or creed. It operates equally on all persons similarly situated and uniformly on all persons within the same class. Nonresidents are not situated similarly to residents. Persons are not similarly situated if there is any reasonable difference in their relation to the purposes of the regulation. The classification is reasonably related to the end in view. It bears a real and substantial relation to the health, safety, morals, and general welfare of the residents of South Pasadena. South Pasadena has the sovereign duty of maintaining the health of its residents. *Kellar v. City of Los Angeles*, 179 Cal. 605, 608, 178 P. 505. It owes no such duty to nonresidents. Residents are entitled to preference over nonresidents and such action is not in contravention of the rights of nonresidents. The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness, and interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits. 37 Am.Jur. 736, § 122. There is no classification of racial groups residing within South Pasadena. If plaintiff's position were sustained, nonresidents of South Pasadena from anywhere in the country would have carte blanche to use the plunge. The regulation restricting use of the plunge to residents of South Pasadena was a reasonable regulation.

We are not to be understood as implying that an owner of property in a municipality who is a nonresident thereof could be excluded from use of a plunge owned by the municipality. That question is not before us.

Plaintiff was not excluded from the plunge because she is a Negro. She was excluded, like the Caucasians who were with her, because she was a nonresident. If she had been a resident of South Pasadena, under the uncontradicted evidence, she would have been admitted. There was no unreasonable or unlawful discrimination.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

155 Cal.App.2d Supp. 861

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
Plaintiff and Appellant,**

v.

**Jose SALAZAR, Defendant and
Respondent.**

No. 45222.

**Appellate Department, Superior Court,
Ventura County, California.**

Nov. 4, 1957.

Action by automobile insurer against driver of automobile that collided with its insured vehicle to recover damages. The Municipal Court of the Oxnard-Port Hueneme Judicial District, County of Ventura, entered judgment of dismissal and insurer appealed. The Appellate Department of the Superior Court, Blackstock, P. J., held that where motorist had commenced action against driver for damages to automobile as result of collision and damages sued for were exactly amount motorist's insurer paid him under collision policy, and judgment of summary dismissal was entered, such judgment was res judicata as to subsequent action by the insurer alone against driver under subrogation rights, for the same damages.

Affirmed.

1. Judgment ⇨540

Doctrine of res judicata is applicable where there has been final judgment on merits and case between the same parties or persons in privity.

2. Judgment ⇨564(1)

Doctrine of res judicata applies only to judgment and orders which are final in the sense that no further judicial action remains to be taken. West's Ann.Code Civ.Proc. §§ 437c, 1910.

3. Judgment ⇨665

Substantial identity of parties is all that is required in order to render doctrine of res judicata applicable. West's Ann.Code Civ.Proc. §§ 437c, 1910.

4. Judgment ⇨678(1, 2)

A former judgment may be binding on persons who, though not parties to former

judgment, were in privity with a party, and "privity" involves a person so identified in interest with another one that he represents the same legal right.

See publication Words and Phrases, for other judicial constructions and definitions of "Privity".

5. Judgment $\S$ 678(2)

Where motorist commenced action against other driver for damages to motorist's automobile as result of collision and damages sued for were exactly the amount motorist's insurer had paid him under collision policy, summary judgment of dismissal was *res judicata* as to subsequent action by insurer under subrogation rights against driver for the same damages.

6. Judgment $\S$ 570(1)

A summary judgment of dismissal may operate as *res judicata*.

John Hay, Santa Barbara, for plaintiff.

Francis Gherini, Oxnard, for defendant.

BLACKSTOCK, Presiding Judge.

This is an appeal by State Farm Mutual Automobile Insurance Company, a corporation, from a judgment rendered against it in the Municipal Court of the Oxnard-Port Hueneme Judicial District, County of Ventura, State of California, which judgment is as follows:

No. C 5341

"State Farm Mutual Automobile
Insurance Company, a corporation,
Plaintiff(s)

vs

Jose Salazar,

Defendant(s)

Before Hon. Clarence E. Pecht
This cause came on regularly for
trial on ———

Plaintiff appearing by attorneys Kuit-
tinen, Hay & Allison.

Defendant appearing by attorney
Francis Gherini.

and a jury trial having been duly
waived, the Court having heard the

testimony and considered the evidence, and findings not having been requested The Court ordered the following judgment:

It is Adjudged that

Action dismissed under principal of *res judicata*. Summary Judgment of Dismissal granted."

It seems that on or about the 6th day of April, 1954, Henry Thrasher and Jose Salazar each was the owner of and was operating a motor vehicle at or near the intersection of Rice Road and State Highway 101. That the two automobiles then and there collided. And as is more or less usual in such cases each claimed that the collision was the fault of the other. Thrasher claimed that as a result of the collision his automobile was damaged in the sum of \$742.47.

Apparently the said State Farm Mutual Automobile Insurance Company, a corporation, on the 6th day of April, 1954, and prior thereto had duly issued to Henry Thrasher a policy of accident insurance insuring said Henry Thrasher against loss or damage to his automobile in excess of \$50. Pursuant to said policy plaintiff paid to said Henry Thrasher the sum of \$692.47, that being the amount of damages in excess of \$50 sustained by said Thrasher's automobile in the accident hereinabove referred to, and said Henry Thrasher did thereafter subrogate said plaintiff to all his rights, claims and interest which he had against any party or parties for said loss or damage.

The further fact appears to be that on or about April 22, 1955, an action was filed in the said Municipal Court entitled, "Henry Thrasher, plaintiff, vs. Jose Salazar, defendant, No. C-4585" and that judgment for defendant in said action was entered on December 6, 1955.

The fact is that on July 10, 1954, said Thrasher executed in writing a release releasing the defendant Salazar from all claims and causes of action arising from the accident which was involved in the case of Thrasher v. Salazar, and State Farm

Mutual Automobile Insurance Company, a corporation, v. Salazar.

It further appears that said insurance company had filed said action No. C-4585 in the name of its assured, Henry Thrasher. However, after judgment was entered against the defendant in the case of Thrasher v. Salazar said insurance company in its own name filed an action against Salazar which obviously was predicated on the same set of facts involved in the said case of Thrasher v. Salazar.

And the suit last hereinabove referred to resulted in a judgment for the defendant as aforesaid, the trial judge having been of the opinion that the judgment in the case of Thrasher v. Salazar was a bar to the subsequent action in which the insurance company itself was the plaintiff, that is, judgment was entered as the trial judge said, on the principle of res judicata. The plaintiff could have appealed from the judgment in the case of Thrasher v. Salazar, but failed to do so and the same became final.

As respondent says in his brief, the doctrine of res judicata gives certain conclusive effects to a former judgment and subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.

[1] The doctrine is applicable where there has been a final judgment on the merits in a case between the same parties or persons in privity. Hence, in a new action on the same cause of action, a prior judgment for the defendant is a complete bar. See 3 Cal.Procedure, Witkin, 1926 and cases there cited.

[2] The doctrine of res judicata applies only to judgments and orders which are final in the sense that no further judicial action remains to be taken. (3 Cal. Procedure, Witkin, 1934.) In the action between Thrasher and Salazar judgment in favor of Salazar based on the release given by Thrasher was a final judgment. C.C.P. § 437c, proceedings without trial.

Sections 51 and 52, 3 Cal.Procedure, Witkin, pages 1936 and 1937, to the effect that a judgment entered after granting a motion for summary judgment is as final and conclusive a determination of the merits as a judgment after trial. It is true that the doctrine of res judicata calls for identity of the parties to the action, but C.C.P. § 1910 states, "the parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either."

[3] Substantial identity is all that is required. French v. Rishell, 1953, 40 Cal. 2d 477, 254 P.2d 26, where an action by an agent was held to bar subsequent action by the principals.

[4] A former judgment may be binding on persons who, though not parties to the former judgment, were in privity with a party. 3 Cal.Procedure, Witkin, 1956. Privity involves a person so identified in interest with another one that he represents the same legal right. Zaragosa v. Craven, 1949, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461.

[5] In the case now under consideration the same legal right was being sued on first by the insured, now by the insurer. The amount of the claim in both actions is precisely the same, \$692.47, which represents the alleged reasonable cost of repairs to the Thrasher automobile. In the first action the plaintiff could have sued for loss of use and the deductible feature of his policy, namely \$50. Both claims would have been his own. That he did not sue for those but simply for the property damage indicates that in reality the first action was an action brought by the State Farm Mutual Automobile Insurance Company on their subrogation rights for the repairs made to Thrasher's automobile and such fact is confirmed by the plaintiff's own points and authorities filed in the case of Thrasher v. Salazar. It is evident, therefore, that there does exist an identity in in-

terest between Thrasher and the State Farm Mutual Automobile Insurance Company and that both actions concern the same legal rights.

The plaintiff, State Farm Mutual Automobile Insurance Company, had the right to sue and did sue in its insured's name in the first action; having lost said action now seeks a second chance to effect a recovery.

[6] It is true that the judgment in the case of Thrasher v. Salazar was a summary judgment of dismissal. Nevertheless, such a judgment may operate as res judicata. See Best v. Fitzgerald, 81 Cal.App.2d 965, 185 P.2d 377.

We are of the opinion that the trial judge was correct and the judgment rendered by him should be, and is hereby, affirmed.

REPPY and CHURCHILL, JJ., concur.

49 Cal.2d 448

CHRISTIAN NATIONALIST PARTY, a Political Party, et al., Plaintiffs and Appellants,
v.

Frank M. JORDAN, as Secretary of State of the State of California, Defendant and Respondent.

L. A. 24658.

Supreme Court of California,
In Bank.

Nov. 27, 1957.

Rehearing Denied Dec. 23, 1957.

Political party's action against Secretary of State to secure declaration as to validity of statute prescribing requirements to be met by political parties desiring to participate in a primary election. The Superior Court, Los Angeles County, Leon T. David, J., entered judgment upholding validity of statute and political party appealed. The Supreme Court, Gibson, C. J., held that statutory requirements were not so stringent that a minor party could not qualify although representing a substantial number of adherents, and statute did not impose unwarranted limitation on right of suffrage.

Affirmed.

Carter, J., dissented.

1. Elections ⇨21

Purpose of constitutional amendment giving Legislature power to enact laws relative to determining tests and conditions upon which political parties may participate in primary election is to give Legislature a free hand in eliminating existing evils by providing for direct nomination of candidates through an efficient primary election system in which the integrity of the parties will be preserved. West's Ann. Elections Code, § 2540(b, c); West's Ann. Const. art. 2, § 2½.

2. Elections ⇨21

Under constitutional provision giving Legislature power to enact laws relating to primary elections, determination of what measures will effectuate the objects of the

constitutional provision is peculiarly within domain of legislative department, and courts will not interfere if there is any theory upon which Legislature might reasonably conclude that a statute is essential to carrying out of those objects. West's Ann. Elections Code, § 2540(a-d).

3. Elections ⇨21

Statute prescribing requirements to be met by political party before it may participate in a primary election is not so stringent that minority parties cannot qualify although representing a substantial number of adherents and does not impose unwarranted limitation on right of suffrage. West's Ann. Elections Code, § 2540.

Bertraint L. Comparet, San Diego, for appellants.

A. L. Wirin and Hugh R. Manes, Los Angeles, as amici curiae on behalf of appellants.

Edmund G. Brown, Atty. Gen., and Delbert E. Wong, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

The Christian Nationalist Party brought this action against the Secretary of State to secure a declaration as to the validity of section 2540 of the Elections Code, which prescribes the requirements to be met by a political party before it may participate in a primary election. Gerald L. K. Smith and Charles F. Robertson, members of the party who were its candidates for president and vice president in 1956, are also plaintiffs.

The complaint alleges that defendant refused to print the name of the party or of any of its candidates on the primary election ballot in 1956 because it had not complied with the requirements of the challenged section and that, although desiring to participate in the 1958 primary election, the party will find it impossible to satisfy those requirements. A general demurrer was sustained without leave to

amend, and plaintiffs have appealed from the ensuing judgment of dismissal.

Section 2540 of the Elections Code provides:

"A party is qualified to participate in any primary election:

"(a) If at the last preceeding gubernatorial election there was polled for any one of its candidates * * * for any office voted on throughout the State, at least 3 percent of the entire vote of the State * * *; or

"(b) If on or before the 135th day before any primary election it appears to the Secretary of State as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters, equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election, have declared their intention to affiliate with that party; or

"(c) If on or before the 135th day before any primary election there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated therein, which proposed party those voters desire to have participate in that primary election. * * *

"(d) Except that whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary

election would be an unjustifiable expense and burden to the State for so small a group. * * *

A total vote of approximately 4,100,000 was cast at the last gubernatorial election in 1954, and a party's participation in the 1958 primary election would be dependent, respectively, under the alternatives set forth in subdivisions (a), (b) and (c), upon having polled 123,000 votes in 1954, obtaining 41,000 registrants or filing a petition signed by 410,000 voters. The position of plaintiffs is that the requirements of section 2540 are so stringent that minor parties cannot qualify, although representing a substantial number of adherents, and that, therefore, the section imposes an unwarranted limitation on the right of suffrage. It is alleged in the complaint that the Christian Nationalist Party has never participated in a gubernatorial election in California and must resort to either subdivision (b) or subdivision (c), that, because voters are reluctant to become registered members of a party until it is qualified, extensive publicity and advertising costing at least \$100,000 is necessary for a new party to obtain the number of registrants required under subdivision (b), that an expenditure of over \$430,000 is essential to comply with subdivision (c), and that plaintiffs are financially unable to expend such sums.

[1,2] Section 2540 of the Elections Code was enacted pursuant to a constitutional amendment which expressly empowers the Legislature to establish tests governing the right of political parties to participate in primary elections. Cal.Const., art. II, § 2½ (adopted in 1900, amended 1908).¹ In general, the purpose of the amendment was to give the Legislature a free hand in eliminating existing evils by

1. Section 2½ of article II of the Constitution provides, in part: "The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties; and the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without con-

ventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. It shall also be lawful for the Legislature to prescribe that any such primary election shall be mandatory and obligatory."

providing for the direct nomination of candidates through an efficient primary election system in which the integrity of parties would be preserved. See *Communist Party of United States of America v. Peek*, 20 Cal.2d 536, 552-553, 127 P.2d 889; *Schostag v. Cator*, 151 Cal. 600, 605, 91 P. 502. The determination of what measures will effectuate the objects of the constitutional provision is peculiarly within the domain of the legislative department, and, the usual presumption in favor of constitutionality being applicable, the courts will not interfere if there is any theory upon which the Legislature might reasonably conclude that a statute is essential to the carrying out of those objects. *Heney v. Jordan*, 179 Cal. 24, 27-28, 175 P. 402. We must, therefore, uphold the provisions of section 2540 of the Elections Code unless they are clearly unreasonable.

[3] Percentage restrictions on the right to participate in primary elections exist in the large majority of the states (see Note (1948) 57 Yale L.J. 1276), and they have long been recognized as proper in California. In *Katz v. Fitzgerald*, 1907, 152 Cal. 433, at page 436, 93 P. 112, at page 114, the court held that such a restriction was reasonable, stating, "Some classification is made necessary, else any two, three, or four men might call themselves a party, and impose the burden of placing the names of their candidates upon the ballot provided by the state law—a condition which could easily be made intolerable to the state, as well as to the voter." In accord, *Socialist Party v. Uhl*, 1909, 155 Cal. 776, 103 P. 181.

In *Communist Party of United States of America v. Peek*, 20 Cal.2d 536, 127 P.2d 889, we approved section 2540 while contrasting it with a statute which we held invalid. The defective statute provided that, notwithstanding section 2540, a political party could not participate in a primary election unless it had 2,500 registered voters before the preceding primary election. It was pointed out that the test was an absolute one predicated upon the number of

registered voters two years in the past, although information existed as to current registration, and that there was no alternative method of qualification. We concluded that a party with a substantial number of new adherents might be excluded and that the reasonableness of any test based upon numerical data depends for its validity upon the theory that the Legislature is seeking to bar "only insubstantial groups the deprivation of whose rights can be justified by the larger good derived from a more efficient operation of the primary system." With respect to section 2540, we said that " * * * it is clear that any substantial party could establish its right to participate in the primary election under some one of the various numerical tests therein provided." 20 Cal.2d at pages 552-553, 127 P.2d at page 899.

The number of citizens which constitutes a substantial group for purposes of an election law is not, of course, an absolute matter but a relative one which is to be measured in the light of the size of the entire voting population. Otherwise, a statute of the type before us would soon prove ineffective in a state which, like ours, is experiencing rapid growth. The standards for qualification in section 2540, being stated in percentages of the total vote, are designed to respond to fluctuations in the size of the electorate, and they are set forth in the form of alternatives, so that provision is made for established parties, regardless of prior success, as well as for entirely new political groups.

Under subdivision (a), a party which participated in the last gubernatorial election may qualify, notwithstanding the fact that up to 97% of the electorate may have rejected its candidates. A party which was even less successful than necessary to meet the lenient three per cent requirement of that subdivision or one which did not participate in the election is not barred from entering the forthcoming primary election but may take advantage of subdivision (b), should its program convince persons amounting to only one per cent of the 1954 vote (41,000 electors) to register as

members. The ease with which subdivision (b) may be satisfied is demonstrated by the fact that, in 1956, when there were 24,984 voting precincts in the state, a party having an average registration of less than two voters per precinct could qualify. Yet, satisfaction of this moderate registration requirement is not essential to qualification because, alternatively, a party may come within the terms of subdivision (c) by filing a petition signed by voters who are equivalent in number to ten per cent of the earlier vote and who, without being required to become members, are willing to state that they represent the party and desire to have it participate in the 1958 primary election.

It is true, of course, that a presently insubstantial group may be required to make expenditures in seeking qualification, but any numerical test would have the same effect. The statute does not impose any financial requirement but only restrictions based on numerical data, and the circumstance that every group calling itself a party may not be able to obtain funds which it estimates would enable it to win the necessary support among the voters of the state does not show that the restrictions are not reasonably designed to advance a vital public purpose. The right to participate in primary elections is an important one, and it is precisely that fact which justifies the enactment of measures designed to establish a workable primary election system so that the public may exercise the right effectively. To that end, the exclusion of insubstantial groups is proper, and, in our opinion, section 2540, when taken as a whole, does not exclude any substantial party.²

It is argued that section 2540 applies qualification standards which vary significantly in harshness, thereby discriminating

between parties qualifying under subdivision (a) and those which did not participate in the preceding gubernatorial election and must resort to subdivision (b) or subdivision (c). In seeking to formulate fair qualification standards for all parties, the Legislature was confronted with the fact that, although the number of votes received at a prior election could reasonably be treated as reflective of the present strength of a party which participated therein, other criteria were necessary with respect to nonparticipating parties. The registration in support of such parties and their ability to secure signatures on an appropriate petition were selected, and the Legislature was justified in concluding that there was a sufficient difference between these matters and the winning of votes to warrant variations in the applicable percentages. It must again be emphasized that the subdivisions under which nonparticipating parties may qualify are alternatives, and they may not be taken separately in considering whether they are discriminatory. While the percentage in subdivision (c) is substantially larger than that in subdivision (a), the percentage in subdivision (b) is only one-third as great. In view of the weight to be accorded legislative determinations in this field, section 2540 may not be regarded as discriminating among parties of the same size.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER,
SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

This case comes to this court upon the question of the correctness of a judgment entered pursuant to an order sustaining a demurrer without leave to amend, to appel-

2. A candidate of a party which is excluded from a primary election may nevertheless be elected to office. He is not only eligible to receive write-in votes at the general election (Elec.Code, § 5710) but may have his name printed on the general election ballot with the designation "Independent," if, subsequent to the

primary election, nomination papers are filed on his behalf by voters in the area involved who did not participate in the primary election and who number at least five per cent of the entire vote cast in that area at the preceding general election (Elec.Code, §§ 3040, 3041, 3815).

lants' complaint challenging the constitutionality of section 2540 of the Elections Code. When reviewing such an order the facts stated in the complaint must be accepted as true for the purposes of appeal. Therefore, for our purposes the question before this court is, assuming the facts to be true, does the complaint state facts sufficient to demonstrate a violation of appellants' constitutional rights? I believe it does.

Without discussing the facts alleged in the complaint, the majority opinion holds that the Legislature is empowered to establish tests governing the rights of political parties to participate in primary elections. With this holding I am in general agreement. However, from this determination the majority of the court further concludes that the percentage requirements set forth in subdivisions (a), (b) and (c) of section 2540 are reasonable, and therefore, constitutional. In view of the facts as stated in the complaint, I am constrained to disagree with such a conclusion.

Appellant, the Christian Nationalist Party, nominated appellants Gerald L. K. Smith and Charles F. Robertson, as its candidates for the offices of President and Vice-President of the United States at the 1956 election. The Secretary of State of California, respondent herein, refused to print on the official ballot the names of the Christian Nationalist Party, Gerald L. K. Smith, Charles F. Robertson or any other candidate for office nominated by appellants, on the ground that they had not complied with the provisions of any of the subdivisions of section 2540 of the Elections Code, and therefore, were not eligible to have their names printed upon the ballot.

Appellants now desire to participate in the 1958 elections as a party, but this right will be denied them because of the provisions of section 2540. It is pointed out that in order to appear on the general election ballot as a party, they must first participate in the primary, and to do this the requirements of section 2540 must be satisfied.

The complaint alleges that appellants are a new political party, and that they can only qualify for the primary under subdivisions (b) and (c) of section 2540. To demonstrate the unreasonableness of these provisions it is alleged that "Until a political party is qualified to have the names of its candidates printed upon the ballot under the designation of said Party's name, it is substantially impossible to induce any substantial number of electors to register as affiliated with such proposed Party; and such reluctance of electors to register as affiliated with what is not yet qualified as a political party can only be overcome by very extensive—and very expensive—publicity and advertising, in all major newspapers of every large city, and on most of the major radio and television stations; that the cost of such publicity and advertising required to induce electors to register as affiliated with such a proposed political party is in addition to all expenses of the actual political campaign for any primary or general election; that * * * the cost of such publicity and advertising necessary to get the required number of electors to register as affiliated with a proposed new political party would be \$100,000.00 or more." In connection with the requirements of subdivision (c), it is contended that the time limitation renders this alternative unreasonable in addition to the monetary considerations. It is pointed out that based on the figures of the last election 410,000 valid signatures are needed to meet the ten percent requirement of subdivision (c), and to accomplish this within the time allotted—130 days—an additional \$400,000 is needed.

From these facts it is contended that the restrictions imposed by these subdivisions are unreasonable and impossible to satisfy, and thus violate their constitutional rights.

The right being asserted by appellants is that of suffrage. This is a fundamental right inherent in a free government and guaranteed by the Bill of Rights in the Constitution of the United States and by article II, section 1, of the California Constitution. (U.S.Const. Amend. IX, see, United Public

Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 94, 67 S.Ct. 556, 91 L.Ed. 754.) It has been well established that the direct primary is an integral part of the election process, and the right of the electorate to nominate candidates in the primary has become an essential attribute of the right of suffrage (*United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L. Ed. 987; *Communist Party of United States of America v. Peek*, 20 Cal.2d 536, 127 P. 2d 889).

A necessary corollary of the right of the electorate to nominate candidates of their party in the primary election, is the right of political parties to form and participate in elections by running their candidates for political office. The fundamental nature of this right has been affirmed by this court in *Socialist Party v. Uhl*, 155 Cal. 776, 103 P. 181, 188, wherein it was stated: "A political party is an organization of electors believing in certain principles concerning governmental affairs, and urging the adoption and execution of those principles through the election of their respective candidates at the polls. The existence of such parties, the dominant party and the parties in opposition to it, lies at the foundation of our government, and it is not expressing it too strongly to say that such parties are essential to its very existence." *Socialist Party v. Uhl*, supra, 155 Cal. 776, 793, 103 P. 181.

A recent elaboration of this principle is found in the case of *Independent Progressive Party v. County Clerks*, 31 Cal.2d 549, 191 P.2d 6. Defining the nature of a political party's right to participate in the elective processes, it was stated (31 Cal.2d at page 552, 191 P.2d at page 8): "In any election where the party system furnishes the means by which the citizen's right of suffrage is made effective, *denial of his party's right to participate in the election accomplishes*, in the words of the court in the Britton case [*Britton v. Board of Election Com'rs*, 129 Cal. 337, 61 P. 1115, 51 L.R.A. 115], '*the disfranchisement of voters, or * * * [compels] them, if they vote at all, to vote for representatives of political parties other than that to which they belong. The deprivation*

of the right of selection is a deprivation of the right of franchise.'" (Emphasis added.) From the language of these cases there can be no doubt that the right of a political party to participate in primary elections is one guaranteed by both the federal and California Constitutions.

It does not follow, however, that this right of political parties to participate in elections, is, in every case, entitled to protection, since the right to vote is not absolute, the state having an interest in keeping elections free from violence and corruption and in providing fair and efficient election procedures. It is only where the state fails to justify the diminishment of such right by a demonstration that the state has an interest paramount to the right, that the state's restriction will be stricken as violating the Constitution. But when we balance the interest of the state against the constitutional right of political parties to participate in elections, as we must here, we must remain mindful that the latter occupy a preferred position. See, *Jones v. City of Opelika*, 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691; *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292. The right to exercise freedom of choice in primary and general elections lies at the foundation of free government by free men and we must in all cases "weigh the circumstances and * * * appraise the * * * reasons * * * in support of the regulation * * * of the right." *Schneider v. State of New Jersey*, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155; see, *Marsh v. State of Alabama*, 326 U.S. 501, 509, 66 S.Ct. 276, 90 L.Ed. 265; *Communist Party of United States of America v. Peek*, supra, 20 Cal.2d 536, 544, 545, 127 P.2d 889.

Considering the facts alleged in the complaint as true, it is my opinion that the percentage requirements set forth in section 2540 go beyond the area in which the state may legitimately act in regulating political parties in order to maintain an efficient election system, for the reason that too great a financial burden is placed on new political parties attempting to establish themselves. The constitutional attack on the reasonableness of section 2540, is based primarily on

financial factors. The amounts alleged to be necessary to secure a party's name on the ballot are of sufficient size to bear out the contention of unreasonableness. Certainly there can be little doubt that if a new political party, in order to get on the primary ballot, must spend \$100,000, in addition to normal campaign costs, very few, if any, new political parties will be developed in California. This results, therefore, in the exclusion of new political parties in California, not because of a paramount state interest, but because the new political parties lack the funds to enable them to qualify. In other words the effect of the statute does not necessarily exclude unsubstantial parties, but impecunious parties. Whatever may be the right of the Legislature to exclude unsubstantial parties from elections in the name of efficiency, it does not extend to their exclusion on the ground of lack of money (*United States v. Classic*, supra, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; *Smith v. Allwright*, supra, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; *Independent Progressive Party v. County Clerks*, supra, 31 Cal.2d 549, 191 P.2d 6). It appears that this is the effect of section 2540.

For the foregoing reasons I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.



49 Cal.2d 864

**SOCIALIST PARTY, USA, a Political Party,
et al., Plaintiffs and Appellants,
v.**

**Frank M. JORDAN, as Secretary of State
of the State of California, Defendant
and Respondent.**

L. A. 24657.

Supreme Court of California,
In Bank.

Nov. 27, 1957.

Rehearing Denied Dec. 23, 1957.

Appeal from Superior Court, Los Angeles County; Kenneth N. Chantry, Judge.

A. L. Wirin and Paul M. Posner, Los Angeles, for appellants.

Cal.Rep. 317-318 P.2d-39

Edmund G. Brown, Atty. Gen., and Delbert E. Wong, Deputy Atty. Gen., for respondent.

PER CURIAM.

This appeal presents the same question as that involved in *Christian Nationalist Party v. Jordan*, 318 P.2d 473, and our decision in that case is controlling here.

The judgment is affirmed.

CARTER, Justice (dissenting).

For the reasons stated in my dissenting opinion in *Christian Nationalist Party v. Jordan*, 318 P.2d 476, I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.



155 Cal.App.2d 649

**Aurora Christina SIEGER, Edward Harold
Sieger and Richard Joseph Sieger, as Co-
Executors of the Estate of W. Edward
Sieger, Deceased, Plaintiffs, Cross-Defendants
and Appellants,**

and

**Edward Harold Sieger, Richard Joseph Sieger
and Eileen Deavault, Individually and
as the Heirs and Devisees of W. Edward
Sieger, Deceased, Cross-Defendants and
Cross-Complainants and Appellants,**

v.

**STANDARD OIL COMPANY of California,
a corporation, Paul W. McCollister and
Charles McCollister, Defendants, Cross-
Defendants, Cross-Complainants and Re-
spondents.**

Civ. 22246.

District Court of Appeal, Second District,
Division 2, California.

Nov. 29, 1957.

Suit to quiet title to a parcel of land and for declaratory relief and an accounting of rents wherein defendants filed a cross-complaint seeking reformation. From a judgment reforming the deed in the Superior Court of Los Angeles County, Jesse J.

Frampton, J., the plaintiffs appeal and certain defendants cross appeal. The District Court of Appeal, Ashburn, J., held that substantial evidence supported a finding that the deceased was not a bona fide purchaser of the contested parcel without notice of defendant's rights; that substantial evidence justified reformation of deed on the ground of mutual mistake and that rulings of the admissibility of evidence were not erroneous.

Judgment affirmed.

1. Vendor and Purchaser ⇨220

To become a bona fide purchaser one must have acquired title without notice, actual or constructive, of another's rights and also must have paid value for the property.

2. Appeal and Error ⇨990

In equity suit, the appellate court is bound by the substantive evidence rule and if the court's finding has such support in the record the appellate court's inquiry as to the alleged insufficiency of the evidence there ends.

3. Vendor and Purchaser ⇨231(1)

A purchaser is charged with constructive notice of the existence and contents of all instruments properly of record, affecting the property purchased and constituting his chain of title. West's Ann.Civ.Code, § 1213.

4. Vendor and Purchaser ⇨231(14)

One whose search of the record would disclose a defective property description is charged with the duty of further investigation and with knowledge of whatever it would have disclosed. West's Ann.Civ. Code, § 1213.

5. Vendor and Purchaser ⇨232(9)

Possession of the disputed parcel by defendant oil company was notice of its title as lessee and of the title or claims of those under whom it held possession. West's Ann.Civ.Code, § 1213.

6. Vendor and Purchaser ⇨244

In suit to quiet title to a parcel of land, evidence supported finding that plaintiff

acquired his title with notice of defendant's equitable right to reformation of the deed running to their predecessor in interest upon the ground of mutual mistake. West's Ann.Civ.Code, §§ 1213, 3399.

7. Deeds ⇨210

In suit to quiet title to a parcel of land, substantial evidence supported finding that plaintiff paid no consideration for his second deed.

8. Deeds ⇨195

In suit by executors of deceased to quiet title to a parcel of land, burden rested upon plaintiffs to prove that deceased grantee paid value for deed. West's Ann.Civ. Code, §§ 1213, 3399.

9. Reformation of Instruments ⇨45(5)

Direct evidence of the manner in which a mistaken description becomes incorporated in a deed is not an indispensable requisite to its reformation and if the circumstances proven are sufficient to induce a conviction in the mind of a reasonable man that there was a mutual mistake and to show clearly in what such mistake consisted, a reformation may be decreed, although no witness testifies to personal knowledge of how it occurred.

10. Reformation of Instruments ⇨45(4)

Substantial evidence sustained finding of mutual mistake inhering in a deed so as to justify a reformation thereof.

11. Evidence ⇨317(15)

In suit to quiet title, transactions respecting escrows which were verbal acts of the parties involved independently relative evidence of what they intended of the manner in which the mistakes in the deeds occurred were not excludable as hearsay.

12. Evidence ⇨121(9), 278

In suit to quiet title, statements made by deceased grantor such as his letter stating that he was selling a certain parcel to purchaser were admissible not only as part of res gestae of mistake in description of premises, but also as acts or declarations of a deceased donor made against his interest in respect to his real property. West's Ann. Code Civ.Proc. §§ 1849, 1853, 1870, subd. 4.

Thomas F. McCue, North Hollywood, for appellants.

Burr & Smith, Los Angeles, for respondents McCollister.

Lawler, Felix & Hall, Los Angeles, for respondent Standard Oil Co. of California.

ASHBURN, Justice.

Appeal from judgment reforming a deed by correcting the description upon the ground of mutual mistake. The action was brought by W. Edward Sieger against Standard Oil Company of California, Paul W. McCollister and Charles McCollister, to quiet title to the disputed parcel of land, for declaratory relief and an accounting for rents. By cross-complaint the McCollisters sought reformation of the deed running to their predecessor in interest, Howard J. McCollister, and did so upon the ground of mutual mistake. The deed runs from George W. Carter and wife to Howard J. McCollister and his wife. Plaintiffs Aurora Christina Sieger, Edward Harold Sieger and Richard Joseph Sieger, claim the disputed parcel under a subsequent deed which the court found to have been obtained by their predecessor W. Edward Sieger from Carter without consideration and with notice of McCollister's equitable right to reformation.¹ Defendant and respondent, Standard Oil Company of California, is lessee in possession of the disputed premises.

The title chain starts with one Charles B. Stanford who owned an entire parcel situated on the northwest corner of the intersection of Atlantic Boulevard (running north and south) and Mission Road (which runs northeast and southwest), in the city of Alhambra; that property is part of Lot 12, Range 15 of Alhambra Addition Tract, in the county of Los Angeles. The difficulty in descriptions, which are in terms of metes and bounds, seems to have

arisen largely from the fact that Atlantic Boulevard was widened 20 feet on the west side, thus injecting into future conveyances uncertainty as to the proper starting point, —whether it should be the southeasterly corner of lot 12 of the southeasterly corner of the portion left after the street widening.

As a matter of convenience the trial court designated as parcels 1, 2 and 3 the different portions of the property originally belonging to Stanford. Parcel 1 is a parallelogram, being 105 feet along the southerly line of the lot and 94 feet along the easterly line; it begins at the southeast corner of the lot and includes the 20 feet of the original property which had become a part of Atlantic Boulevard, but excludes 20 feet on the west side which is the subject of this action and designated as parcel 3. The exclusion of this 20 feet grew out of the mistake giving rise to the instant litigation. Parcel 2 embraces all of parcel 1 except the easterly 20 feet lying within Atlantic Boulevard and also includes parcel 3, the area here in litigation. Parcel 3 is shaped like a boomerang and lies on the north and west sides of parcel 1, the property which plaintiffs concede to belong to the McCollisters, the area described in the original deed to McCollister; parcel 3, due to the angle, is about 22 feet in width on the southerly line and five feet on the easterly line.

The Carters, Siegers and McCollisters, died before the trial of this action and the subject of mistake had to be canvassed through circumstantial proof. This fact seems to warrant the somewhat elaborate review of the evidence which follows.

On September 10, 1941, Stanford, the original owner, made a ten-year lease to Standard Oil Company of California for service station purposes. The description contained this language: "Beginning at the southeasterly corner of said Lot 12,

1. Plaintiffs are successors in interest to W. Edward Sieger, now deceased, and defendants McCollister are like successors to Howard J. McCollister and his wife, both of whom are now deceased.

As the wives of McCollister, Carter and others seem to have been but formal parties to respective instruments, the husband's name is frequently used herein to represent both spouses.

thence westerly along the south line thereof, parallel to Mission Road a distance of 105 feet; thence northerly, parallel with Atlantic Boulevard a distance of 94 feet; thence easterly parallel with Mission Road a distance of 105 feet; thence southerly along the east line of said Lot 94 feet to the point of beginning, said property being the northwesterly corner of Atlantic Boulevard on Mission Road in Alhambra, California." (Emphasis added.) A memorandum of said lease was recorded on October 25, 1941. The lease provided that Stanford should construct the service station and that rents should begin upon delivery of possession, which latter event occurred on November 15, 1941. A 20-foot street easement for Atlantic Boulevard had been granted by a prior owner, was recorded in February, 1941, and the street work completed prior to delivery of possession to the Standard Oil Company. The construction of the service station included black top asphalt paving of all of parcel 2 (including parcel 3); the installation of a three-foot fence along the entire western and northern boundaries of parcel 3; location of an electrolier in the southwest corner of that parcel; access ramps had been built upon the 20-foot strip which was a part of the improved street; the public curbs and sidewalk were in place on the service station side of the street. These physical evidences of the fact and nature of the possession by Standard Oil Company had never been altered prior to the trial of the case and Standard Oil Company had been in continuous possession at all times.

During the process of construction of the service station the parties to the lease executed an amendment thereto, changing the description to include parcel 3 and exclude the 20-foot strip: "Beginning at the point of intersection of the *westerly line of Atlantic Boulevard, now established*, with the southeasterly line of said lot; thence southwesterly along the southeasterly line of said lot a distance of 105 feet; thence, northerly, parallel with the westerly line of Atlantic Boulevard, 106 feet; thence easterly in a

direct line to a point in the westerly line of said Atlantic Boulevard, a distance northerly thereon 96 feet from the point of beginning; thence southerly along said westerly line, 96 feet to the point of beginning." (Emphasis added.) This document was recorded on December 19, 1941. The westerly line of Atlantic Boulevard is 20 feet west of the easterly boundary of lot 12. Such was the physical condition of the property and the state of the record title before Sieger or McCollister came upon the scene.

In 1944 Stanford conveyed all his interest in parcels 1, 2 and 3 to one Eshelman, and assigned to him the lessor's interest in the lease. Eshelman in turn granted the same property and assigned the lease to George W. Carter in June, 1946. In that escrow Carter demanded a bill of sale covering electric hoist, air compressor, underground tanks and electroliers complete with flood lights and reflectors. He also advised the escrow holder, Security-First National Bank, that "we are selling property *covered by lease* through a concurrent escrow, Beverly Hills National Bank." (Emphasis added; the Carter-McCollister escrow was handled by the last named bank.) Also: "As you know, I am selling *the service station part* of this deal and wish to record, together with Escrow No. 15592-A at the Beverly Hills National Trust and Savings Bank, Beverly Hills. Will you please send to the Beverly Hills Escrow *the lease, assignment and bill of sale of the service station.*" (Emphasis added.) Carter then gave Standard Oil an option to extend its lease until September 30, 1966, which option was executed on July 30, 1946 and recorded September 23, 1946; this document describes the land in the same way as the amended lease, thus including the disputed parcel 3.

Clearly, Carter intended to sell the entire service station area and he was talking about his deal with McCollister which was handled through escrow in the Beverly Hills National Bank and opened on August 2, 1946. The description used in the deed to McCollister was obtained from the Pasadena branch of the Security-First National

Bank (which handled the Eshelman-Carter escrow) and seems to have originated in a preliminary title report of Title Insurance & Trust Company. It was the erroneous one, beginning with the southeasterly corner of lot 12 instead of the westerly line of Atlantic Boulevard. The assignment of lease from Carter to McCollister reflected the same mistake as to description. That this was an error is inferable from the fact that Carter, on September 17, 1946, wrote Eshelman that he had "*sold the Standard Oil Station* located at the corner of Mission Road and Atlantic Boulevard in Alhambra, *which I purchased from you*, to Mr. H. J. McCollister," (emphasis added) and asking him to notify Standard Oil "without delay to make payable all rent and overage checks" to McCollister. This Eshelman did on the same day. The Standard complied with the request and paid all rents to McCollister and his successors in interest and was doing so at the time of trial. The court found that Carter and McCollister at the time of the deed to the latter "mutually believed and considered that said grant deed, recorded August 7, 1946, correctly described Parcels 2 and 3 as described in Findings III and IV herein, respectively. The erroneous description in said grant deed, recorded August 7, 1946, was caused by the mutual mistake of the parties thereto. By said grant deed, recorded August 7, 1946, Carter intended to convey legal title to said Parcels 2 and 3 to Mr. and Mrs. McCollister, who intended to acquire the legal title to said Parcels 2 and 3 thereby."

W. Edward Sieger, by deed dated November 12, 1949 and recorded on November 25th, acquired from Carter for a consideration of \$115,000 a portion of lot 12 lying westerly of parcel 2; the description excluded the land described in the McCollister deed and the 20 feet lying within Atlantic Boulevard; it did not embrace parcel 3. On December 1, 1949, Carter deeded the last mentioned parcel to Sieger and the conveyance was recorded on December 19, 1949. The court found: "Said grant and conveyance, however, was with-

out consideration, and was accepted by said W. Edward Sieger with full notice that said Parcel 3 and title and ownership thereof was and at all times thereafter has been and is now claimed by Mr. and Mrs. McCollister and their successors and occupied and used by Standard as Lessee and as tenant of Mr. and Mrs. McCollister and their successors under said Lease."

This later deed bears no revenue stamps. The only evidence as to any consideration for it was the opinion or guess of plaintiff Edward Harold Sieger (son of grantee) that it was all one deal; "that this actually should have been all part of one deed, instead of two separate deeds"; "[t]here must have been a mistake or Carter would not have given him another deed." The first the witness knew of any claim that his father asserted to parcel 3 was after the death of the latter. He had begun this action on November 24, 1954 and died on December 11, 1954. The first knowledge that the McCollisters had of any such claim was a letter received by them from plaintiffs' attorney in July, 1954, which notice was also given at the same time to defendant Standard Oil Company; it contained a demand for past and future rents. Prior thereto all rents had been paid to McCollister—from September, 1946 until Sieger got his deed in 1949, and continuously thereafter until said demand of July, 1954—all without a word of complaint or demand from Sieger.

Of course, Sieger had at all times constructive notice of McCollister's claim of ownership of the entire area included within the oil station,—both through the recording of the amended lease and the physical occupation of the entire area by Standard Oil as tenant of McCollister.

On the basis of the mutual mistake found to have entered into the Carter-McCollister deed, the court ordered the reformation thereof by inserting the pertinent language above quoted from the amended lease; adjudged defendants McCollister to be owners in fee of parcels 2 and 3; declared the amended lease to be valid and the McColl-

listers entitled to rents and adjudged that the Siegers have no right to past or future rentals. The Siegers have appealed from this judgment.

Appellants' counsel argues that the evidence is insufficient to support the finding of mistake in the McCollister deed or the finding that Sieger's second deed was made without consideration and accepted with full notice of McCollister's rights; also that there was reversible error in the receipt of evidence of documents and conversations in and pertaining to the escrow through which McCollister acquired title and related escrows.

[1] If W. Edward Sieger was a bona fide purchaser of the contested parcel, the admissibility of the evidence of which appellants complain becomes a matter of no importance for there could be no reformation affecting his rights. Section 3399, Civil Code, provides for reformation because of mutual mistake of the parties to an instrument, but only "so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." The conjunctive used in the last phrase is expressive of the general common law on the subject. To become a bona fide purchaser one must have acquired title without notice, actual or constructive, of another's rights and also must have paid value for the same. (25 Cal.Jur. § 268, p. 821, § 279, p. 829; 55 Am.Jur. § 685, p. 1066; 76 C.J.S. Reformation of Instruments § 59, p. 410.)

[2] In considering both aspects of the matter this court is bound by the substantive evidence rule; if the court's finding has such support in the record our inquiry as to alleged insufficiency of the evidence there ends. *Nichols v. Mitchell*, 32 Cal.2d 598, 600, 197 P.2d 550; *Primm v. Primm*, 46 Cal.2d 690, 693-694, 299 P.2d 231.

[3] Upon the subject of Sieger's notice of McCollister's equitable right the inquiry starts with the recorded instruments. "Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time

it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees * * *." Civ.Code, § 1213. "A purchaser is charged with constructive notice of the existence and contents of all instruments properly of record, affecting the property purchased and constituting his chain of title, and is bound by grants, reservations, and recitals contained therein, if sufficiently clear and certain to convey the requisite information or to put him on inquiry, regardless of actual notice or of the question whether the instrument imparting notice appeared in the abstract of title furnished him. * * *" (25 Cal.Jur. § 281, p. 832.)

[4] Standard Oil Company was openly in possession of all of parcel 2 and its lease was of record. The one originally recorded contained the erroneous description which crept into the deed to McCollister; in less than a month after its recordation an amendment to the lease was placed of record (on December 19, 1941), containing a corrected description which included parcel 3. In 1946, prior to Sieger's purchase, there was recorded an option from Carter to Standard Oil to extend the lease for ten years from October 1, 1956, and the description therein used is that of the amendment to lease. The McCollister deed was made on August 2, 1946, and recorded on August 7th; this option was executed on July 30, 1946, and recorded on September 23rd. The instruments were practically contemporaneous and the significance thereof lies in the rule that one whose search of the record would disclose a defective property description is charged with the duty of further investigation and with knowledge of whatever it would have disclosed. *Leonard v. Osburn*, 169 Cal. 157, 161, 146 P. 530, 532. Though the lease had been assigned by Carter to McCollister on August 2, 1946, that document was not of record. Sieger, had he examined the record, would have discovered that the description in the lease which corresponded to that in the McCollister deed had been corrected to include all property lying south and east of the Standard Oil fence, i. e., to

include parcel 3. He knew he was receiving no assignment of the lease and could expect none of the rents; investigation would have disclosed that McCollister claimed to be the owner of the lease and all land covered thereby and had been receiving all rents since 1946.

[5-7] Another approach to the problem yields the same result. Possession of the disputed parcel by Standard Oil Company was notice of its title as lessee and of the title or claims of those under whom it held possession. *Peasley v. McFadden*, 68 Cal. 611, 615, 10 P. 179; *Manig v. Bachman*, 127 Cal.App.2d 216, 221, 273 P.2d 596; *Whitney v. Sherman*, 178 Cal. 435, 439, 173 P. 931; *Fowler v. Lane Mortgage Co.*, 58 Cal.App. 66, 69, 207 P. 919; 25 Cal.Jur. § 282, p. 835. Mere inquiry would have elicited the information that Standard Oil was holding under McCollister, that he claimed to be owner of all the land occupied by it and that all rents had been and were being paid to him. It cannot be held that the evidence was insufficient to support the finding that Sieger acquired his title with notice of McCollister's equitable rights. This ends his asserted status of innocent purchaser, but the finding that he paid no consideration for his second deed, the one including parcel 3, is also sustained by substantial evidence.

[8] The deed bears no internal revenue stamps and is covered by no direct evidence of the reason for its execution,—none other than the speculation of plaintiff, Edward Harold Sieger, to the effect that it must have been made to correct a mistake. It did not go through the escrow which handled the purchase. That it was not intended to correct a mistake on Sieger's part is evidenced by the fact that from its receipt in December, 1949, to July, 1954, when his attorney served a demand, Sieger voiced no claim to parcel 3 or to the rents therefrom, and his son and executor never heard of such claim until after his death. Appellants herein are joint executors, as well as

distributees of Mr. Sieger's estate. If consideration had been paid for the deed in question they probably could and would have produced a check or book entry to prove the fact; one of them testified that in his opinion parcel 3 was worth \$15,000 in August, 1955. The burden of proof rested upon plaintiffs to establish that Mr. Sieger paid value for the second deed. *Beattie v. Crewdson*, 124 Cal. 577, 579, 57 P. 463; *Huntington v. Donovan*, 183 Cal. 746, 751, 192 P. 543; *Bell v. Pleasant*, 145 Cal. 410, 413-416, 78 P. 957; *Manig v. Bachman*, supra, 127 Cal.App.2d 216, 223, 273 P.2d 596; *Hall v. Chamberlain*, 31 Cal.2d 673, 676, 192 P.2d 759; 76 C.J.S. Reformation of Instruments § 82, p. 450. In the absence of evidence the finding necessarily went against them.

[9, 10] Concerning the issue of mistake appellants argue that, although the evidence may show an intention on Carter's part to convey parcel 3 to McCollister, there was no mutuality of mistake because it is not shown that McCollister intended to buy that part of parcel 2. True, there is in the evidence no such specific declaration of McCollister but his conduct furnishes sufficient indirect evidence of his intention. "[D]irect evidence of the manner in which a mistaken description became incorporated in a deed is not an indispensable requisite to a reformation thereof. If the circumstances proven are sufficient to induce the conviction in the mind of a reasonable man that there was a mutual mistake in drawing the deed and to show clearly in what such mistake consisted, a reformation may be decreed, although no witness testifies to personal knowledge of how it occurred." *Owsley v. Matson*, 156 Cal. 401, 407, 104 P. 983, 985. McCollister immediately began and continued to collect the rents from the entire Standard Oil occupancy which of course included parcel 3. In area it (3) constituted 31 per cent of the entire Standard Oil leasehold. It is not permissible to infer from the instant record that McCollister intended, without so

stating, to buy only part of a property which was fully occupied by Standard Oil and fenced in so as to include the disputed parcel. Nor is it to be inferred that he was not cognizant of Carter's request to Eshelman to notify Standard Oil to pay all rents to McCollister, or that he was not instrumental in procuring the same. The evidence above reviewed adequately sustains the finding of mutual mistake inhering in the Carter-McCollister deed.

[11,12] It now becomes necessary to determine whether there was prejudicial error in receiving the evidence of which appellants complain. The conclusion must be a negative. The transactions had in the respective escrows are not hearsay within the exclusionary rules. They are verbal acts of the parties involved, independently relative evidence of what they intended and of the manner in which the mistake occurred. See *Roush v. Kirkman*, 42 Cal.App. 115, 118, 183 P. 353; *Lestrade v. Barth*, 19 Cal. 660, 674-675; 19 Cal.Jur.2d § 378, p. 109; 31 C.J.S. Evidence § 239, p. 988; 76 C.J.S. Reformation of Instruments § 83, p. 451. Statements made by Carter, such as his letter saying that he was selling the Standard Oil parcel to McCollister, were admissible not only as part of the res gestae of mistake but also as acts or declarations of a deceased person done or made against his interest in respect to his real property. See Code Civ.Proc. § 1870, subd. 4; *Horton v. Winbigler*, 175 Cal. 149, 157, 165 P. 423; also, Code Civ.Proc. §§ 1849, 1853.

There is no sound basis for disturbing the judgment ordering reformation of the deed in favor of the McCollisters. It follows that plaintiffs have no right to collect from defendant Standard Oil Company any rents, past or future, for they have been paid to the persons lawfully entitled thereto.

Judgment affirmed.

FOX, Acting P. J., and RICHARDS, J. pro tem., concur.

155 Cal.App.2d 573

Dean DE GONIA, Don F. Moehlman, Merrill A. Townsend, Larry Fickle, Plaintiffs and Appellants,
v.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS LOCAL UNION 420, an unincorporated association; Wallace Holt, individually and as President of said Union; Earnest Metzinger, individually and as Secretary of said Union; Alex Robertson Construction Company, a corporation; S. E. Pipe Line Construction Company, a corporation; Pacific Pipeline Construction Company, a corporation; J. E. Young Pipe Line Contractor, Inc., a corporation, Defendants and Respondents.

Civ. 22461.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1957.

Hearing Denied Jan. 23, 1958.

Action by foremen against union, certain officers thereof, and employers for injunctive relief and for damages. From adverse judgment of the Superior Court, Los Angeles County, Lothrop E. Smith, J., the plaintiffs appealed. The District Court of Appeal, White, P. J., held that under constitution of union requiring that every member against whom adverse rulings or decisions have been rendered shall exhaust all remedies provided by constitution before resorting to any other court or tribunal, complaint, that union and its officers discriminated against plaintiffs by insisting that they confine their work of pipefitter foremen and let other workers drive truck to and from job sites constituted an "adverse ruling or decision" against the plaintiffs, and plaintiffs were not entitled to judicial review in absence of showing that internal procedures of union would not afford them substantial justice or that the union violated its rules for review, or that to revoke those rules would be futile.

Judgment affirmed.

I. Pleading ☞ 129(5), 350(3)

In action by foremen against union, certain officers thereof, and employers for

injunction and damages wherein union set forth constitution and by-laws of union in its answer and plaintiffs did not deny authenticity and due execution of such documents by opposing affidavits, contents of such documents were admitted and court did not err in considering constitution and by-laws in passing on defendants' motion for judgment on the pleadings. West's Ann.Code Civ.Proc. § 448.

2. Stipulations ⇨14(4)

In action by foremen against union, certain officers thereof, and employers for injunction and damages wherein union incorporated constitution and by-laws of union in its answer and plaintiffs' counsel stated that constitution was before court, constitution and collective bargaining contract pleaded in the answer were properly before the court.

3. Pleading ⇨221

Overruling of demurrers to amended complaint was not res judicata with respect to claim made on motion for judgment on the pleadings that the pleadings failed to state a cause of action.

4. Associations ⇨7

A plaintiff, who seeks judicial relief against an organization of which he is a member, must first invoke and exhaust remedies provided by that organization applicable to his grievance, provided the internal procedure will afford a member substantial justice and the organization has not violated its rules for review or invocation of rules will not be futile.

5. Labor Relations ⇨136

Where union constitution afforded redress for violation of a member's rights by other members, officers or the union itself foremen who were members of union, were required to exhaust internal remedies before resorting to courts to set aside a decision or order by union by which they were deprived of right to receive overtime pay for work done after completion of their daily work as foremen.

6. Labor Relations ⇨92

The constitution of a labor union constitutes a contract with the members and is binding on the members.

7. Labor Relations ⇨136

Under constitution of union requiring member against whom adverse decision has been rendered to exhaust all remedies provided by constitution before resorting to any other court or tribunal, complaint, that union and its officers discriminated against plaintiffs by insisting that they confine their work to duties of pipefitter foremen and let other workers drive trucks to and from job sites, constituted an "adverse ruling or decision" against plaintiffs, and plaintiffs were not entitled to judicial review in absence of showing that internal procedures of union would not afford them substantial justice or that union violated its rules for review, or that to invoke those rules would be futile.

8. Labor Relations ⇨796

Where pipefitter foremen did not contend that their rights with respect to overtime truck-driving activities were based upon any contract or collective bargaining agreement or that its curtailment was in violation of any federal or state labor relations statute or that employers discriminated against them by reason of race, sex, color or religion, but that employers orally agreed to relieve them of such duties by virtue of union pressure, foremen had no cause of action against employers to enjoin them from assigning overtime truck-driving activities to other employees. West's Ann.Labor Code, § 2922.

Frank A. Mouritsen, Los Angeles, for appellant.

Meserve, Mumper & Hughes, Lewis T. Gardiner, Los Angeles, for respondents Alex Robertson Const. Co., Pacific Pipeline Const. Co., and J. E. Young Pipe Line Contractor, Inc.

Stevenson & Hackler, Los Angeles, for respondents Building Material and Dump

Truck Drivers Local Union 420, Wallace Holt, as President of said Union, and Earnest Metzinger, as Secretary of said Union.

WHITE, Presiding Justice.

This is an appeal by plaintiffs from a judgment in favor of defendants upon the latters' motion for judgment on the pleadings. The action is one for injunction and damages. Plaintiffs are employed as foremen by defendant companies and are members of defendant union. They instituted this action on behalf of themselves and approximately 100 other foremen similarly situated and interested. The amended complaint is in three counts. The pertinent facts of the first cause of action are as follows:

"For a number of years last past prior to March 5, 1956, plaintiffs and those similarly situated, were required as part of their duties to drive a company truck. Their duties started prior to the starting time of the employees whom they supervise. They were required to report to the company yard where they received instructions concerning the day's work, picked up a company truck containing tools, supplies and materials and drive it to the job site. At the job site they supervised the work of the crew, and at the end of the work day for the crew, they were required to return the truck to the company yard. For the time which the foremen spent in excess of eight hours per day they were compensated at the rate of one and one-half times their foremen's rate. For such overtime work prior to March 5, 1956, plaintiffs and those similarly situated, received as compensation an average payment of between \$26.50 and \$50.00 per week, depending on the distance of the jobsite from the yard." It is then alleged that plaintiffs are members of defendant union which owes to them "the duty of not taking action which is detrimental to plaintiffs". That "Commencing in October, 1955, the defendant Union, the individual defendants, Jack Todd, a business representative of the defendant Union, disregarding the

duties which it as collective bargaining agent owed plaintiffs and those similarly situated, demanded of the defendant companies that they remove plaintiffs and those similarly situated from their duties in driving truck and give such duties to others not members of the defendant Union. That on March 5, 1956, the defendant companies, solely because of defendant Union's demands and threats discharged plaintiffs and others similarly situated from their duties in driving trucks, and such duties were assumed by others who theretofore had not been members of defendant Union, and said employees have continued to perform such duties up to the date of this complaint. Since said date plaintiffs and those similarly situated have been deprived of the truck driving work and the overtime pay incident thereto." It is then alleged that "defendant union caused the defendant companies to discharge plaintiffs and those similarly situated as aforesaid for the purpose of financial gain to said Union, in that said Union is thereby enabled and has started to collect \$50.00 initiation fee from approximately one hundred new members, or approximately \$5,000.00."

The second cause of action incorporates all of the first cause of action and adds an allegation that "Between plaintiffs and those similarly situated and defendant Union, their collective bargaining agent, there exists an implied contract that said agent will diligently, honestly and fairly do everything possible to further their interests; etc." and then alleges a breach of such implied contract.

The third cause of action realleges all of the first cause of action and adds a paragraph as follows: "Plaintiffs and those similarly situated have a fundamental and inalienable right to sell their labor, and of liberty of contract, which right is guaranteed by the Constitution of the United States of America, and of the State of California" and alleges the union defendant's actions a violation of this right.

As against defendant union, plaintiffs' prayer was for an injunction enjoining it from:

"(a) Demanding of defendant companies that they discharge plaintiffs and those similarly situated from their duties in driving truck, and the resultant overtime work and pay;

"(b) Threatening defendant companies with picketing or causing abolition of the 'composite crew' arrangement if they do not discharge plaintiffs and those similarly situated from their duties in driving truck, and the resultant overtime work and pay;

"(c) Causing the defendant companies to discharge plaintiffs and those similarly situated from their duties in driving truck and depriving them of the compensation they received therefor, as such duties and compensation existed prior to March 5, 1956."

Plaintiffs' prayer against defendant companies is that they be enjoined from: "(a) Depriving the plaintiffs and those similarly situated of their duties in driving truck and the compensation derived therefrom, as such duties and compensation existed before March 5, 1956. (b) Intimidating, threatening, or discriminating against plaintiffs and those similarly situated in any manner, because they have filed and are prosecuting this action."

The prayer further sought injunctive relief restraining both defendant union and defendant companies from: "(a) Carrying out or performing any agreement whereby plaintiffs and those similarly situated are deprived of or denied the duties performed as truck drivers and the compensation they received therefor, as such duties and compensation existed prior to March 5, 1956."

The prayer also sought, "Judgment for damage in the amount of \$20,100.00 actual damages, and for such additional amount as is necessary to compensate plaintiffs and those similarly situated for damages suffered after the date hereof."

The defendants filed general demurrers to the foregoing amended complaint which, as to the three counts now under consideration, were overruled. Answers were filed on behalf of all defendants, and when the cause was called for trial they moved for a judgment upon the pleadings which motion was granted. From the judgment accordingly entered, plaintiffs prosecute this appeal.

[1] It is first contended by appellants that the trial court erred in considering the Constitution and By-laws of defendant union in as much as they were both incorporated in the union's answer. It is argued that a motion for judgment on the pleadings must be determined upon the same principles as those governing determination of a general demurrer, and that therefore, the court may not consider any matter outside the complaint or any defense thereto contained in the answer (21 Cal. Jur., sec. 166, p. 240; *Hibernia Savings & Loan Soc. v. Thornton*, 117 Cal. 481, 49 P. 573; *Weisz v. McKee*, 31 Cal.App.2d 144, 87 P.2d 379, 88 P.2d 200; *Gross v. Bank of America Nat. T. & S. Ass'n*, 4 Cal.App.2d 353, 41 P.2d 178). While it is true that a motion for judgment on the pleadings tests the sufficiency of the complaint, we are here confronted with a situation wherein the authenticity and due execution of the written document set forth in the answer was not denied by an opposing affidavit (Code Civ.Proc. sec. 448). The contents thereof are therefore admitted. Failure to file such an affidavit has been held an admission for the purpose of a motion for a summary judgment (*Zepeda v. International Hodcarriers, etc., Union*, 143 Cal.App.2d 609, at page 612, 300 P.2d 251, at page 253, wherein it was stated, "There was no denial of the claimed affirmative defenses set forth in the verified answer which set up the written documents. Accordingly, the genuineness and due execution of such instruments are deemed admitted. Code Civ.Proc. § 448." We perceive no reason why the same rule should not apply to motions for judgment on the

pleadings (Witkin, California Procedure, p. 1704).

[2] Furthermore, when the matter was before the trial court on the motion for judgment on the pleadings, the court remarked, "Very well. I am interested particularly, Counsel, in your position regarding the Constitution and by-laws". With regard to this remark from the bench counsel for appellant stated, "Now, first, so there may be no misunderstanding, I agree with Mr. Hackler (one of counsel for respondent Union)—I mean it is not denied that the Constitution is there, so factually, I think it is fair to say that it is before this Court, as well as the contract to which he alluded (Collective Bargaining Agreement, "Southern California Utilities Pipe Trade Agreement between the Pipeline Contractors Association of Southern California and Southern California Pipe Traders District Council No. 16 of the United Association."). Now, they weren't attached to my copy, but I have copies of them, and I do not make a point that, so we understand ourselves, I know what they are speaking about and I am acquainted with the constitution." The record reflects that appellant's counsel thereupon argued at considerable length the issue of exhaustion of remedies in the light of the constitution and collective bargaining agreement above referred to. In their brief before this court, appellants concede that "At the time of the trial, however, counsel for appellants did not object that the constitution and by-laws were not properly before the court. Counsel does not raise the objection at this time, inasmuch as it appears that the trial court erred not only in considering such documents, but also in the conclusion reached on the basis of his consideration of such documents." In view of the foregoing, we are persuaded that the union constitution and the collective bargaining contract pleaded respectively in the answers of respondent union and respondent companies were properly before the court.

[3] Equally without merit is appellants' assertion that the previous ruling upon demurrers to the amended complaint was *res*

adjudicata with respect to respondents' contention on the motion for judgment on the pleadings that appellants' pleading fails to state a cause of action. Our attention is not directed to any authority which prohibits the trial judge from granting a motion for judgment on the pleadings after another judge, in another department of said court, had overruled a demurrer, thereby sustaining the validity of the complaint. The authorities are to the contrary. See *Wrightson v. Dougherty*, 5 Cal.2d 257, 265, 54 P.2d 13; *O'Moore v. Driscoll*, 135 Cal. App. 770, 772, 28 P.2d 438; *Ser-Bye Corp. v. C. P. & G. Markets, Inc.*, 78 Cal.App.2d 915, 918, 179 P.2d 342.

We shall first give consideration to the appeal from the judgment in favor of respondent union. The court filed a memorandum opinion and from a perusal thereof it is manifest that the basis for decision was that appellants had failed to exhaust their remedies contained within respondent union's constitution before resorting to the court. We are in accord with this conclusion of the trial court.

[4] The rationale of the so-called "exhaustion of remedies" within the union rule and judicial recognition thereof is thus set forth in *Holderby v. International Union, etc., Engrs.*, 45 Cal.2d 843, 846, 291 P.2d 463, at page 466:

"It is the general and well established jurisdictional rule that a plaintiff who seeks judicial relief against an organization of which he is a member must first invoke and exhaust the remedies provided by that organization applicable to his grievance. *Lawson v. Hewell*, supra, 118 Cal. 613, 50 P. 763 [49 L.R.A. 400]; *Levy v. Magnolia Lodge No. 29, I.O.O.F.*, 110 Cal. 297, 42 P. 887. This rule is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (see 2 Cal.Jur.2d 304), and to the rule requiring the parties to a contract for arbitration of disputes to exhaust those remedies before seeking judicial relief. See *Cone v. Union Oil Co.*, 129 Cal.

App.2d 558, at page 563, 277 P.2d 464, and cases collected. Such rules are based on a practical approach to the solution of internal problems, complaints and grievances that arise between parties functioning pursuant to special and complex agreements or other arrangements. They make possible the settlement of such matters by simple, expeditious and inexpensive procedures, and by persons who, generally, are familiar therewith. Such internal remedies are designed not only to promote the settlement of grievances but also to promote more harmonious relationships, and the courts look with favor upon them."

In the same case it was held, 45 Cal.2d at page 849, 291 P.2d at page 467, "A violation of other laws and wrongs done within the organization are intended to be conciliated and corrected by the appellate machinery provided therein, if properly invoked by an aggrieved party and applied by the organization. If recourse to such appellate machinery is not sought an aggrieved party foregoes his right to a judicial review regardless of the breach of its own rules by the organization in causing the grievance in the first instance." See, also, *Gonzales v. International Ass'n of Machinists*, 142 Cal.App.2d 207, 211, 298 P.2d 92; *Zepeda v. Internat. Hodcarriers'*, etc., Union, *supra*, 143 Cal.App.2d at page 614, 300 P.2d at page 253.

That the foregoing rule is subject to certain exceptions, however, was the holding in the cases just cited, and was reaffirmed in the recent case of *Mooney v. Bartenders Union Local 284*, 48 Cal.2d 841, at page 843, 313 P.2d 857, at page 858, wherein it is said: "Provisions in union constitutions requiring the exhaustion of internal remedies are generally recognized by the courts as binding on the members. (Citing cases.) This rule, however, is subject to certain exceptions. Thus the internal procedure must be such as will afford an accused member substantial justice, and further pursuit of internal relief is excused when a union violates its rules for review

or when invocation of those rules would be futile. (Citing cases.) In the application of these principles we must weigh both the protection of the rights of the individual members in the specific matter involved and the right of the union to govern itself. (Citation.)"

[5] Appellant insists that the facts in the instant case differ substantially from those involved in the *Holderby*, *Gonzales*, and *Zepeda* cases, *supra*, and do not come within the purview of the law enunciated therein as to exhaustion of internal remedies. They argue that such cases involve attempts to secure reinstatement after expulsion or to compel the union to dispatch the complainant to jobs, while in the case at bar, appellants are not seeking reinstatement to membership, but are seeking to set aside a decision or order of the union by which they were deprived of a property or material right to receive overtime pay for work done after the completion of their daily work as foremen. In the light of the provisions of the union constitution and the law set forth in the above cited cases, we fail to recognize any such distinction.

Appellants do not challenge respondents' contentions that, according to the union constitution, the former have internal union remedies for redress for the violation of a member's rights by other members, officers or the union itself, including the right to appeal any decision with respect to any complaint through the International Executive Board and the conventions of the international union, but, as heretofore pointed out, contend that such internal union procedures are inapplicable to appellants' present complaint. To us, the provisions of the union constitution would seem to refute appellants' contention. Article XV, Sec. 4(a) reads: "Joint Councils shall have full power to adjust all questions of jurisdiction between local unions, subject to the provisions of Article XII, Section 13, to try cases against local unions, cases appealed from local unions, and to try individual cases which local unions refuse

or neglect to try in accordance with the trial procedure provided for in Article XVIII." Said Article XVIII sets forth the procedure affecting trials and appeals by local officers and members.

Article XVIII, Section 14(a) deals with the exhaustion of remedies, and reads: "Every member, officer, local union, Joint Council or other subordinate body against whom charges have been preferred and disciplinary action taken as a result thereof, *or against whom adverse rulings or decisions* have been rendered, shall be obliged to exhaust all remedies provided for in this Constitution and by the International before resorting to any other court or tribunal." (Emphasis added.)

[6,7] The constitution of the union constitutes a contract with the members and is binding on appellants (*DeMille v. American Fed. of Radio Artists*, 31 Cal.2d 139, 146, 187 P.2d 769, 175 A.L.R. 382). Therefore, when appellants accepted membership in respondent union they agreed to postpone the commencement of any action in the courts against the union until they had afforded the internal tribunals of the union an opportunity to pass upon the merits of their complaint. To us there seems no escape from the conclusion that appellants' complaint herein that the union and its officers discriminated against them by insisting that they confine their work to that of pipefitter foremen and let other workers drive the trucks to and from the jobsites constituted an "adverse ruling or decision" against appellants. Union Constitution, Article XVIII, Sec. 14(a) *supra*. There is no showing in appellants' complaint that the internal procedure of the union would not afford appellants substantial justice; or that the union violated its rules for review, or that to invoke those rules would be futile. And, the very nature of the rights asserted by appellants at once suggests the absence of judicial intervention on the ground of public policy (*Mooney v. Bartenders Union Local No. 284*, *supra*, 48 Cal.2d at page 843, 313 P.2d at page 858).

We therefore conclude that there is nothing in the instant proceeding to remove it from the normal rule of exhaustion of internal remedies generally recognized by the courts as binding on the members of union labor organizations.

Furthermore, as pointed out by respondent union, "Aside from the formal trial and hearing procedures set forth in the defendant union's constitutions, there is a simple expedient which plaintiffs could have used and which they can still use within the democratic framework of their union. The local is autonomous and its constitution provides for regular monthly meetings at which plaintiffs may present a motion, debate it, call for a vote upon it and if a majority agrees with them, local union officers are bound to give effect to the decision of the membership. (Local Constitution, Art. VII, Sec. 2, p. 15; Rules of Order, p. 17.)"

Appellants further contend that they were absolved from the necessity of exhausting the remedies provided in the union constitution because the union and its officials were appellants' agents and were bound to the utmost good faith in their dealings with the former and that the union and its officials by their actions herein, denied to appellants their constitutional right to work guaranteed by the Fourteenth Amendment to the Federal Constitution and Article I, Sections 1 and 13 of the California Constitution. We are not called upon to decide the question of whether a union is an agent of its members in dealing with employers, or the question of appellants' claimed constitutionally guaranteed right to work because these questions are not here involved. In this proceeding we are confronted with a situation wherein appellants have a contract with a union which provides for submission of controversies, such as the one now before us, to an internal union forum for settlement before resorting to the courts. Such a contract does not deny judicial relief, but on the contrary, permits of it when the contractual requirements are complied with. The requirement

for exhaustion of internal union procedures is analogous to the exhaustion of administrative remedies so well known in many fields of the law.

Appeal As To Contractor Defendants

[8] A reading of appellants' amended complaint immediately suggests that the primary gravamen therefor is directed toward respondent union, of which they are members. As to contractor respondents, the complaint alleges that respondent union made threats of economic pressure upon the contractor respondents for the alleged purpose of causing the replacement of certain of the contractor respondents' employees with other non-member individuals with respect to the overtime truck-driving activities of the employees in question, on whose behalf appellants sue; that the contractor respondents orally agreed to this and thereafter relieved said employees from such duties, giving such work to other employees; that the respondent companies did not wish to do this but did so solely by virtue of such union pressure, and that the union was motivated by the possibility of financial gain under the union security clause of the agreement; that this has damaged the appellants because the curtailment of overtime pay has handicapped them in meeting current obligations.

Upon these facts, and because of an alleged breach of duty by the respondent union and its officers toward appellants, the amended complaint urges that appellants' employers be enjoined from assigning the overtime truck driving activities to employees other than plaintiffs.

We are impressed that a complete answer to appellants' contention is contained in the California Labor Code, Section 2922, which provides:

"An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

Appellants do not contend that their right to continue overtime employment is based

upon any contract or collective bargaining agreement or that its curtailment was in violation of any federal or state labor relations statute, nor do they make any claim that respondent contractors have in any way discriminated against them by reason of race, sex, color or religion. As was said in *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n*, 186 Cal. 604, 611, 200 P. 1, 4: "From the foregoing authorities these principles may be deducted: In the absence of contract, the right of a workman to quit his employment is as absolute as the right of a fellow employee to remain in the employment, or of another workman to take the place vacated by the one who has quit, or the right of the employer to dispense with an employee's services." Other California cases in accord with this principle are, *De Briar v. Minturn*, 1 Cal. 450, 451; *Lynch v. Gagnon*, 96 Cal.App. 512, 518, 274 P. 584, and *Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co.*, 158 Cal. 551, 554, 112 P. 886, 888, 33 L.R.A., N.S., 1034.

In the case last cited we find the following language:

"This was purely a matter between employer and employe, and where no contract between them stands in the way, it is the unquestioned right of the employee to leave the employment at his pleasure, and it is equally the right of the employer to discharge at his pleasure, or to impose conditions upon the retention of the employee in his employment. If imposed conditions are regarded as unjust, unfair, or onerous, the employee need not comply with them, but may resign, and, as has been said in the cases above cited, he may do this as an individual, or he may do so by concerted action as a member of an organized body or trades union. *Precisely as may the employee cease labor at his whim or pleasure, and, whatever be his reason, good, bad, or indifferent, leave no one a legal right to complain; so, upon the other hand, may the employer discharge, and, whatever be his reason, good, bad, or indifferent,*

no one has suffered a legal wrong."
(Emphasis added.)

As was stated by the trial judge in his memorandum opinion:

"To ask this court to order the defendant companies to give these plaintiffs or any other of its employees, certain specified overtime seems so preposterous as to not require further comment. * * * In the present case had the defendant companies, by their own independent action eliminated overtime, the plaintiffs would have had no cause of action against them."

That respondent contractors chose to terminate appellants' overtime employment at the request of respondent union does not alter the foregoing legal principles under the pleadings herein. In other words, had respondent contractors upon their own volition, eliminated overtime employment of appellants, the latter would have had no cause of action against them. Furthermore, since appellants' amended complaint failed to state a cause of action against respondent union, the argument seems irrefutable that none exists against respondent contractors. Appellants rely heavily upon the cases of *James v. Marinship Corp.*, 25 Cal.2d 721, 742, 155 P.2d 329, 160 A.L.R. 900, and *Williams v. International, etc., of Boilermakers*, 27 Cal.2d 586, 165 P.2d 903, but under the facts presented to the court in those cases we find nothing in the decisions which militates against what we have herein stated when consideration is given to the issues framed by the pleadings in the case at bar.

Since what we have heretofore said is determinative of the appeal from the judgment in favor of respondent contractors, we deem it unnecessary to discuss the constitutional question and exhaustion of remedies under the collective bargaining agreement heretofore referred to, raised by respondent contractors. Suffice it to say, however, they are not without merit.

For the foregoing reasons, the judgment is affirmed.

FOURT, J., and DRAPEAU, J. pro tem.,
concur.

155 Cal.App.2d 544

Pearl KERSHAW, Petitioner and
Appellant,
v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF The State of CALIFORNIA; Russell S. Monro, Director, Department of Alcoholic Beverage Control, State of California, W. E. Pendergast, Supervising Agent, Department of Alcoholic Beverage Control, State of California, Respondents.

No. 17693.

District Court of Appeal, First District,
Division 1, California.

Nov. 27, 1957.

Mandamus proceeding brought for review of revocation of on-sale liquor license. The Superior Court, Alameda County, A. T. Shine, J., denied the relief sought, and the petitioner appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence, warranting inference that sex perverts used place as a haunt or gathering place for mutual stimulation of their sexually aberrant urges and a place of assignation for renewal of old and making of new associations looking toward consummation of those urges, justified revocation of on-sale license, (1) on ground of keeping, disorderly place resorted to for purposes injurious to public morals, (2) on ground that continuance of license would be contrary to public welfare or morals, and (3) on ground that a portion of premises where sale of liquor was permitted was a resort for sexual perverts.

Affirmed.

1. Intoxicating Liquors ☞108(5)

Evidence, warranting inference that sex perverts used place as a haunt or gathering place for mutual stimulation of their sexually aberrant urges and a place of assignation for renewal of old and making of new associations looking toward consummation of those urges, justified revocation of on-sale liquor license (1) on ground of keeping disorderly place resorted to for purposes injurious to public morals, (2)

on ground that continuance of license would be contrary to public welfare or morals, and (3) on ground that a portion of premises where sale of liquor was permitted was a resort for sexual perverts. West's Ann.Bus. & Prof.Code, §§ 24200 (a, b, e), 25601.

2. Criminal Law ☞13

That there might be marginal cases in which it would be difficult to determine whether statute had been violated would not render unconstitutionally indefinite statute proscribing use of portion of premises where sale of liquor is permitted as a resort for sexual perverts. West's Ann. Bus. & Prof.Code, § 24200(e).

Popper, Burnstein & Michaels, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Richard H. Perry, Deputy Atty. Gen. for respondents.

FRED B. WOOD, Justice.

Petitioner-appellant holds an on-sale general distilled spirits, beer and wine license and operates a restaurant and bar in Oakland. The respondent department revoked the license upon each of four

counts: Two counts for violation of section 25601, Business and Professions Code [cause for revocation under subdivision (b) of Section 24200]; one count charging grounds for revocation pursuant to section 24200, subdivision (a); and one count charging grounds for revocation pursuant to section 24200, subdivision (e).¹ The penalty of revocation was pronounced separately in respect to each count.

[1] In this mandamus proceeding conducted under authority of section 1094.5 of the Code of Civil Procedure, the trial court found that the evidence before the respondents was sufficient to support the findings of fact and that respondents' findings support the order of revocation.

We will consider first the counts charging violations of section 25601, which declares that every "licensee, or agent or employee of a licensee" is guilty of a misdemeanor "who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety." Violation thereof

1. The original charges were filed in June, 1955; amended in November to include the charge under subdivision (e) which had been added to section 24200 by Ch. 1217, p. 2230, and Ch. 1842, p. 3411, of the Stats. of 1955, effective September 7, 1955.

The decision of the respondent department contains detailed findings of fact under two headings (Count I, concerning events occurring between April 23 and May 29, 1955; Count II, events occurring between November 18 and November 27, 1955), followed by "Count III" expressly finding that subsequent to September 7 up to and including November 27, 1955, the portion of the licensed premises where alcoholic beverages were sold "was a resort for sexual perverts." This, in turn, is followed by "Count IV" declaring that each and all of the findings of fact set forth in Counts I, II and III are incorporated by reference and that by reason of said facts the continuance of the license would be contrary

to public welfare and morals and that said facts constitute grounds for the suspension or revocation of the license pursuant to § 24200, subdivision (a) of the Alcoholic Beverage Control Act and § 22 of Article XX of the state Constitution.

Under the head of determination of issues presented, the decision declares, in reference to the several counts by number, the following: Count I, licensee violated § 25601; Count II, licensee violated § 25601; Count III, grounds constituting basis for suspension or revocation under § 24200, subdivision (e); Count IV, continuance of license would be contrary to public welfare and morals, a basis for suspension or revocation under § 24200, subdivision (a); furthermore, with reference to charges set forth in Counts I, II, III, continuance of the license would be contrary to public welfare and morals as said terms are used in § 22 of Article XX of the state Constitution.

is "the violation or the causing or the permitting of a violation by a licensee of *this division* [Div. 9, Bus. and Prof.Code]" [in the predecessor statute it read "*of this act*"] and therefore is cause for revocation of license. § 24200, subd. (b).

The cumulative effect of certain of the evidence convinces us that the findings of violations of section 25601 are "supported by substantial evidence in the light of the whole record." Code Civ.Proc., § 1094.5 subd. (c). That evidence consists of the testimony of eye witnesses, two members of the Oakland police department and seven officers of the State Department of Alcoholic Beverage Control. They visited the licensed premises and observed what took place. Their several visits were made on April 23 and 30, May 1, 6, 24, 25, 27, 28, 29, and November 18, 19, 25, 26, and 27, 1955. A brief summary of the salient features of their testimony will serve to indicate its sufficiency.

Dancing occurred in the rear portion of the premises. By far the greater number of couples were men dancing with men and women with women. There were very few mixed couples.² Some of the male couples danced cheek to cheek in close embrace. There were numerous incidents of male couples kissing one another. Some danced with their legs intertwined. In many instances both arms were wrapped around the partner's buttocks with loins pressed tightly against each other. Occasionally, a couple would stop dancing and engage in gyrations of the body with each partner's loins rubbing against the other partner's loins.

On May 28 or 29 one woman was observed sitting on another woman's lap. The latter had her hand on the other's thigh near her privates and was rubbing her hand up and down. On November 19 a similar incident occurred with two other women. On the same evening a mixed couple was observed fondling each other's genitals. April 23, a male couple was observed sitting on a bar stool tandem fashion, the one in

the rear embracing the other and caressing his thigh. On May 27 a male couple seated at a table or booth were observed kissing and embracing for some 18 minutes; one of them placed a jacket on his lap and the other inserted a hand under the jacket in the vicinity of the privates and rotated his hand in a rubbing fashion. There were two incidents of a male grabbing the genitals of another male (May and November). In April an employee was seen grabbing one of the dancers in the buttocks and the dancer called the employee a vile name; also, the licensee goosed one of the entertainers and the entertainer said to the licensee "Are you inclined toward Lesbianism?" In November one male couple declared that they had been married some three months and displayed their wedding rings.

One officer testified that on November 18 he observed two dozen male couples dancing. While he was standing with his back to the wall a male patron moved directly in front of him and slowly backed up until he was pressing the witness against the wall and then began to rub his buttocks against the witness' groin and lower abdominal area with a circular and up and down motion. Later, when the witness was at the bar, the same person came up behind the witness and began to rub his groin against the witness' buttocks with an up and down motion. This officer also observed that the door to the men's room was left open and any man using the urinals would be visible to most of the people entering the rear room of the place.

On May 29 one male couple seated at a table was observed embracing, hugging and kissing. The younger of the two, seventeen years of age, testified that he sat down to watch the floor show and another male patron kissed him on the cheek and then on the mouth and "asked me if I wanted to go with him."

There is evidence that such conduct was readily observable by the licensee and her agents, that much of it was observed by

2. Unless otherwise indicated the events recited in this summary occurred both

before and after September 7, 1955, according to the officers' testimony.

them, and that they took no measures to prevent or curb it. The evidence also supports an inference that these were not mere isolated, occasional, unexpected, unpreventable and uncontrollable incidents as the licensee would have us hold.

The same evidence supports revocation of the license upon the ground that "continuance of [the] license would be contrary to public welfare or morals." Bus. and Prof.Code, § 24200, subd. (a). No further elaboration of the facts in evidence seems necessary.

*Does the evidence support the finding and determination that between September 7 and November 27, 1955, the portion of the premises where the sale of liquor is permitted was "a resort for * * * sexual perverts," in violation of section 24200, subdivision (e), of the Business and Professions Code?*

We entertain no doubt that it does. It amply warrants inferences that the place is customarily and regularly used by persons who are prone to and do engage in aberrant sexual conduct to the extent of qualifying as "sex perverts" under the statute, and that they use this public place as a haunt or gathering place for mutual stimulation of their sexually aberrant urges and a place of assignation for the renewal of old and the making of new associations looking toward the consummation of those urges.³

[2] The licensee claims that the provisions of subdivision (e) of section 24200 of the Business and Professions Code are too indefinite and uncertain to be constitutional. She says the term "sex pervert" is too vague to be meaningful and that it in turn infects the whole clause with the same weakness and ineffectiveness. We do not so view it. One of the meanings of "perversion" given in Webster's New Collegiate Dictionary (2d ed.) is: "* * * 2. *Psy-*

chopatho. A maladjustment of the sexual life, such that satisfaction is sought in aberrant ways." Seeking and obtaining sexual satisfaction with a person of the same sex is considered an aberrant method by the great majority of people. The methods of copulation available to two persons of the same sex would certainly be so regarded. No more precise definition is necessary for the purposes of this case.

The standard required by the Constitution for criminal statutes was recently stated by the United States Supreme Court in *Roth v. U. S.* (*Alberts v. State of California*), 354 U.S. 476, 77 S.Ct. 1304, 1312-1313, 1 L.Ed. 2d 1498, in a discussion of a statute prohibiting distribution of "obscene or indecent" matter: "'* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' *United States v. Petrillo*, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877. These words, applied according to the proper standard for judging obscenity * * * give adequate warning of the conduct proscribed and mark '* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.'"

The *Roth* and *Alberts* cases involved situations closer to the one in the instant case than the case cited by the appellant, *People v. Building Maintenance Contractors' Ass'n*, 41 Cal.2d 719, 724-725, 264 P.2d 31, where an exemption of agreements, combinations, or associations designed to conduct operations at a *reasonable profit* rendered the whole statute without a fixed

portrayed by the eye-witness testimony is too cogent and convincing to make the cause reversible even if the reputation testimony were erroneously admitted, as to which we express no opinion.

3. The licensee claims reversible error in the admission of testimony tending to show that this place has the reputation of being a resort for sexual perverts. We deem it unnecessary to consider that question. The conduct and the events

standard of guilt. "Obscenity" and "sex pervert" have a core of meaning to the average person. Homosexual activity, to the extent indicated by the patrons of the licensee's bar, is within the general meaning of sexual perversion. That there may be borderline situations about which opinion may be divided should not vitiate the statute. *People v. Building Maintenance, Contractors' Ass'n*, *supra*, involved a statute, which itself described only a borderline situation.

It is not necessary, under the circumstances of this case, that we seek to ascertain and mark with precision the extreme outer limits of the meaning of the expression "sex perverts"; and then to read the statute as if it prohibited any liquor licensee from suffering any portion of the premises to be patronized by sex perverts no matter how orderly their conduct or circumspect their behavior while in attendance. That is but one of a number of hypothetical situations that might be conjured up. "The answer is that those situations are not here involved and the petitioner is limited in its attack to the factual situation now before this court. *Max Factor and Co. v. Kunsman*, 5 Cal.2d 446, 468, 55 P.2d 177; *Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co.*, 11 Cal.2d 634, 661, 82 P.2d 3, 118 A.L.R. 486; *Ferrante v. Fish & Game Comm.*, 29 Cal.2d 365, 373, 175 P.2d 222; *People v. Bowlin*, 19 Cal.App.2d 397, 399-400, 65 P.2d 840; *In re Estate of Monks*, 48 Cal.App.2d 603, 604, 614, 120 P.2d 167." *City and County of San Francisco v. Industrial Acc. Comm.*, 142 Cal.App.2d 494, 501, 298 P.2d 651, 656.

As a part of her argument in this connection the licensee points to the ruling in *Stoumen v. Reilly*, 37 Cal.2d 713, 234 P.2d 969, 971, to the effect that evidence that a restaurant was reputed to be a "hangout" for homosexuals indicated merely that it was a meeting place for such persons, which might be for purely social and harmless purposes, such as the consumption of food and drink, not in itself a violation of former section 58 of the Alcoholic Beverage Control Act (now § 25601 of the Business

and Professions Code) nor "contrary to public welfare or morals" (Const., Art. XX, § 22). She then asks us to conclude that the Legislature sought to overturn that judicial principle and make the holding of such a meeting cause for revocation when it added subdivision (e) to section 24200 in 1955.

We do not feel compelled to infer any such legislative intent. It would seem a fair inference to conclude that in making that amendment the Legislature acted in the light of and consistently with the rule of the *Stoumen* case, by inference excluding from the coverage of subdivision (e) the type of conduct which the Supreme Court had declared harmless and not inimical to public welfare or morals. The court having so recently and with such clarity said it, why should the Legislature say it again? However, as we have indicated, that is a hypothetical situation not presented by the facts of this case. It involves a question that need not be and is not decided at this time.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



155 Cal.App.2d 526

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Freddie Escamila CALDERON and Pete M. Vasquez, Defendants,
Pete M. Vasquez, Appellant.
Cr. 5930.

District Court of Appeal, Second District,
Division 1, California.

Nov. 26, 1957.

Prosecution for robbery. The Superior Court, Los Angeles County, Charles T. Smith, J., entered judgment of conviction and one of the defendants appealed. The District Court of Appeal, Fourth, J.,

held that where defendant did not request instruction that lesser crime of assault is necessarily included in crime of robbery in second degree, he could not contend on appeal that trial court erred in failing to give such an instruction.

Judgment affirmed.

1. Criminal Law ⇨1038(3)

In prosecution for robbery, where defendant did not request instruction that lesser crime of assault is necessarily included in crime of robbery in second degree, he could not contend on appeal that trial court erred in failing to give such an instruction.

2. Criminal Law ⇨419(11)

Witnesses ⇨389

In robbery prosecution, testimony of a witness that he overheard a conversation between prosecuting witness and another, in absence of defendants, to the effect that if prosecuting witness would drop the case such other person would get prosecuting witness cash and his papers, was not objectionable as hearsay and was admissible for purpose of impeaching such person who denied making such offer to prosecuting witness.

3. Witnesses ⇨346

An attempt to procure a witness to commit perjury, if proved, is material in weighing testimony of one guilty of such attempt.

4. Criminal Law ⇨1169(1)

In robbery prosecution, even if trial court erred in permitting a witness to testify as to a conversation between prosecuting witness and another in absence of any defendants, on ground it was hearsay under the evidence of case, such ruling was not sufficiently prejudicial to require reversal.

David C. Marcus, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment wherein the appellant was convicted of robbery.

In an information filed in Los Angeles county, defendants were charged with the crime of robbery in that they did on August 4, 1956, forcibly take from the person of Louis A. Balomenos the sum of \$80. The defendants pleaded not guilty and the case was consolidated for trial with a cause in which a defendant Perez was charged with robbery. Calderon was found not guilty. Perez and Vasquez were each found guilty as charged and the offense was found to be robbery in the second degree. Probation was denied and appellant Vasquez was sentenced to the state prison and thereafter filed this appeal.

A substantial résumé of the facts as testified to is as follows: Louis Balomenos, while walking along Avalon Boulevard near the Den Cafe, Wilmington, with a companion, Miss Jeanne Schinke, about 12:45 a. m., August 4, 1956, saw the three defendants crossing the boulevard coming toward him. Balomenos had never seen any of the defendants before. Vasquez apparently spoke first, saying something in Spanish and then in English asked Balomenos if he wanted to fight, and further saying something like "Look at the big shot—big boy—sissy." Balomenos answered that he did not wish to fight. Vasquez said, "We are dirty Mexicans", and Balomenos countered with "I am a clean Greek." Miss Schinke and Balomenos told the defendants to leave them alone and she and Balomenos started walking on. The defendants smelled badly of intoxicating liquor. After a few steps had been taken Balomenos felt a blow from behind, the three defendants grabbed him and pulled his sweater up on to his head. Balomenos was struck with some object under the right eye and was struck otherwise with a stick. His sweater was ripped. Balomenos hit one of the defendants and the latter went down. One or both of the other defendants ran off to a parking lot. Balomenos had a wallet in his rear left pocket containing about \$79, and some

personal papers. During the scuffle Balomenos felt a hand in his pocket pulling out the wallet. Soon after the one defendant was knocked down two persons known as "Tony" and "Hot Rod" came upon the scene in answer to a call for help from Miss Schinke. Balomenos was bleeding badly where he had been struck on the face and hands. The man known as "Hot Rod" offered to take Balomenos to the nearby Den Cafe bar to help fix his eye and hand, but Balomenos stated that he would prefer to go to his nearby hotel room, and did go thereto with his companion, Miss Schinke. Balomenos changed some of his clothes and then went to the Den Cafe bar and inquired of Tony whether he knew the names of the defendants. Miss Schinke, about twenty minutes after the altercation, called the police. After the arrival of the police a search was made of the area and some papers of one of the defendants was found. Balomenos did not drink intoxicating liquor, he was not mad at the defendants or anyone else before the fighting began. Miss Schinke saw the defendant Perez with his hands in Balomenos' rear pocket and saw Perez run away. Calderon, one of the defendants, said that as he and his co-defendants approached Balomenos and Miss Schinke, Vasquez said, "Hi Red", and Balomenos made inquiry as to whether he was trying to get smart and Vasquez' reply was in the negative. He also stated that he could smell liquor on the breath of Perez and Vasquez. Further, he testified that Balomenos was furious and that Balomenos picked up a board and started charging at Perez and that he, Calderon, tried to stop him and fell to the ground; that Hernandez (Tony) and Vasquez picked him up and he left with them. Calderon also testified that on Sunday morning, after the scuffle, he heard from Balomenos by telephone and that Balomenos stated in the talk that one of the defendants had taken his wallet and that \$79 was missing, and if he did not get it back he was going to court. Calderon thereafter spoke to the other defendants

and they denied knowing about the missing wallet.

Perez testified that he and Vasquez had drunk some beer and that he knew Miss Schinke by sight, that he did some scuffling with Balomenos, that he did not take the wallet and did not intend to rob anyone. Otherwise his statements coincided largely with Calderon's testimony.

Vasquez stated that he knew Miss Schinke and that he told her to get Balomenos away as the defendants did not want to fight and that Balomenos did want to fight. He further stated that Balomenos swung at Perez with a stick, and that he, Vasquez, grabbed Balomenos and pushed him aside; that he did not take the wallet, but the way Balomenos was acting, he (Vasquez) thought Balomenos must be under the influence of intoxicating liquor.

Frank Phillips testified that he was with Tony Hernandez when Miss Schinke came running into the Den Cafe bar about midnight and said three persons were beating up Balomenos, and that they then ran out and saw Balomenos standing with his hands up and Calderon on the ground; that he tried to hold Balomenos back and told Vasquez and Perez that if they wanted to fight Balomenos they should fight him one at a time. He stated that he and Hernandez returned to the Den and Balomenos came to that establishment about 1:15 o'clock a. m. in an excited condition and asked Hernandez if the defendants were Hernandez' friends; that Balomenos stated that he had beaten "hell" out of them and that Balomenos had indicated an offer to fight. Phillips also stated that Balomenos left the Den and came back in shortly and inquired of Hernandez if he knew "those guys"; that Balomenos had said they had stolen his wallet. Hernandez' testimony was substantially the same as that of Phillips and he testified further that he had seen Balomenos drinking on occasion. On cross-examination, Hernandez stated that he had heard that night that Balomenos' wallet had been taken. He denied ever telling Balomenos that if the latter would drop the

matter he, Hernandez, could get Balomenos' wallet back and \$300 in cash. He said that he heard of the offer, but that it was made by the bartender.

Clarence Carroll, a police officer, testified that he arrived at the Den about 1:00 o'clock a. m., August 4, 1956, and contacted Balomenos there and observed no odor of alcohol on his breath. He made a search of the area and found a Selective Service Registration card and some photographs.

Balomenos, on rebuttal, testified that shortly before August 23, 1956, the date of Perez' preliminary hearing, he was with Bill Arvanitis at the Den Cafe, where he saw Hernandez and that Hernandez told him at such time that he would give Balomenos \$300 and Balomenos' papers if he, Balomenos, would go with Hernandez to a lawyer with respect to dropping the case.

Balomenos, as a defense witness on sur-rebuttal, denied that he had wanted to fight when he went back to the Den on the night in question. Further, that Hernandez had later given him the names of the defendants.

Bill Arvanitis testified that he was in the Den Cafe during August with Balomenos and that he overheard Hernandez say to Balomenos that if Balomenos would drop the case, Hernandez could get Balomenos some \$300 in cash and his papers. An objection was made upon the ground that the conversation was hearsay as to the defendants. The court overruled the objection and told the jury that the testimony was not for the purpose of proving the truth of what was said, but for the purpose of impeaching the testimony of Hernandez.

[1] Appellant first contends that the court erred in failing to instruct the jury on the lesser "crime of assault but necessarily included in the crime of robbery in the second degree."

The record is devoid of any request upon the part of appellant for any such an instruction. Appellant cited as authority for his position the cases of *People v. Chessman*, 38 Cal.2d 166, 187-188, 238 P.2d 1001, and *People v. Williams*, 141 Cal.App.2d 849,

852-853, 297 P.2d 759. However, the cases mentioned by appellant do not militate against the settled rule that if an appellant wishes to contend that an instruction on a lesser offense should have been given, he must first request such an instruction. See, *People v. Welsh*, 7 Cal.2d 209, 211, 60 P.2d 124; *People v. Johnson*, 99 Cal.App.2d 717, 727, 222 P.2d 335; *People v. Zabel*, 95 Cal.App.2d 486, 489, 213 P.2d 60.

It was appropriately set forth in *People v. Dunlop*, 79 Cal.App.2d 207, at pages 210-211, 179 P.2d 658, at page 660:

"The appellant Dunlop contends, as his first point on appeal, that the court committed error in failing to give an instruction of its own motion defining grand theft and kindred lesser offenses included in the crime of robbery, even though no such instruction was offered by this appellant or his co-defendants. He argues that such an instruction is one of the general principles of law pertinent to this case making it incumbent upon the court to give it of its own motion. He relies upon the case of *People v. Best*, 1936, 13 Cal.App.2d 606, 57 P.2d 168, in support of this contention. In that case the defendant was charged with murder, the jury was instructed that manslaughter was an included offense, a form of verdict of manslaughter was given the jury, but no instruction was given defining the crime of manslaughter, even though one was offered by the prosecution. In that case it was held to be prejudicial error for the court to have failed to instruct the jury on the definition of manslaughter. In the instant case no instruction was given by the court concerning any lesser but included offense, nor that the jury could find the appellant guilty of any crime excepting robbery, which was fully defined, and no instruction was here offered by anyone in the case relating to included or lesser offenses. Where, as here, the record fails to disclose that the defendant requested an instruction regarding lesser and included offenses, he may not for the first time on appeal urge the omission to instruct the jury thereon, as reversible error. (Citing cases.)"

[2-4] The second contention of the appellant is that the court erred in permitting the witness Arvanitis to testify to the conversation between Balomenos and Hernandez in the absence of any of the defendants, on the grounds that the testimony was hearsay as to the defendants, and that there was no testimony by Hernandez which would warrant the court admitting such evidence for impeachment purposes.

On cross-examination, Hernandez was asked, without objection, if he had approached Balomenos about August 21st, at the Den, and had said in substance to Balomenos that if the latter would drop the matter he (Hernandez) could get Balomenos his wallet back and \$300 in cash. Hernandez denied making this statement to Balomenos.

On re-direct examination Hernandez was asked if he had heard of such a \$300 offer to Balomenos, and he said that he had heard of it, but that the statement was made by the bartender.

The testimony of Arvanitis in question, was in our opinion proper. It is to be noted that the defendants' testimony was to the effect that Balomenos was in an angry, quarrelsome mood at the time of the altercation, which sharply contradicted Balomenos' testimony. An implication of the defense testimony was that Balomenos fabricated the charge of the crime from a spirit of vindictiveness. The statements of Phillips and Hernandez tended to show that Balomenos was still in a quarrelsome mood after the scuffle, thereby in some measure corroborating the description of Balomenos which the defendants had presented in their testimony. Hernandez also said he had seen Balomenos drinking, which Balomenos denied. Hernandez' testimony did go to material matters and had a tendency to refute significant parts of Balomenos' testimony. The attempt to suborn witnesses, if proved, is material in weighing the testimony of the one guilty of the attempt. See, *People v. Wong Chuey*, 117 Cal. 624, 627-628, 49 P. 833; *People v. Alcalde*, 24 Cal.2d 177, 184-185, 148 P.2d 627; *People v. Dorland*, 2 Cal.2d 235, 249-250, 40 P.2d 474; *People v.*

Kendall, 111 Cal.App.2d 204, 214, 244 P.2d 418; *People v. De Santis*, 11 Cal.App.2d 86, 87-88, 52 P.2d 936.

Even assuming for the moment that the trial court's rulings were held to be erroneous, it could not be held to be sufficiently prejudicial to require a reversal.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.



Pearl Anna KOLLERT, Steven Kollert, a minor by Pearl Anna Kollert, his guardian ad litem; Michael Kollert, a minor by Pearl Anna Kollert, his guardian ad litem; Mary Cleveland, a minor by Pearl Anna Kollert, her guardian ad litem; Marlene Cleveland, a minor by Pearl Anna Kollert, her guardian ad litem; Gertrude C. Abrahamson, Plaintiffs and Appellants,

v.

Albert Franklin CUNDIFF; The Termo Co.; The Termo Company, a Corporation; The Termo Corporation, Ltd.; The Termo Corporation, Ltd., a Corporation; Does 1 to XX, Inclusive, Defendants,

Albert Franklin Cundiff and The Termo Company, a corporation, Respondents.*
Civ. 22303.

District Court of Appeal, Second District,
Division 3, California.

Dec. 6, 1957.

As Modified on Denial of Rehearing

Jan. 3, 1958.

See 319 P.2d 643.

Hearing Granted Feb. 26, 1958.

Action for injuries sustained in an automobile collision at an intersection. From a judgment of the Superior Court of Los Angeles County, Fred Miller, J., the plaintiffs appealed. The District Court of Appeal, Vallée, J., held that the affidavits of jurors could not be used to impeach the verdict and that an instruction imputing negligence of the driver of the car in which a passenger was riding to the passenger was prejudicial error.

* Opinion vacated 329 P.2d 897.

Judgment in part reversed and in part affirmed.

1. New Trial ⇐143(1)

An affidavit of a juror may not be used to impeach a verdict except to show it was arrived at by chance.

2. New Trial ⇐143(5)

In action for injuries, affidavits of jurors that foreman advised other members they would have to abide by verdicts completed by him or they would never again be allowed to act as jurors could not be used to impeach the verdict.

3. Negligence ⇐93(14)

In action for injuries sustained in an automobile collision, negligence of the driver could not under the facts be imputed to a passenger riding in the automobile.

4. Appeal and Error ⇐1064(1)

In action for injuries sustained in an automobile collision at an intersection, error in instruction in submitting imputed negligence of the driver of car to a passenger riding therein was prejudicial error where the record did not exclude the probability that the verdict as to the passenger in favor of defendants was based on theory that the contributory negligence of the driver of the car in which she was riding was imputed to her. West's Ann.Vehicle Code, § 551.

Robert H. Lund, Long Beach, for appellants.

Parker, Stanbury, Reese & McGee and J. H. Peckham, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from an adverse judgment entered on a jury verdict in an action for damages for personal injuries resulting from a collision between two automobiles.

The accident occurred about 8:30 p.m. on July 1, 1955 at the intersection of Carson Avenue and Paramount Boulevard in Long

Beach. Carson runs east and west; Paramount north and south. Carson has three eastbound and three westbound traffic lanes. The intersection was controlled by stop-and-go signal lights, with a "caution" light appearing after the "go" signal and before the "stop" signal.

Prior to the accident plaintiff Pearl Kollert was driving her Oldsmobile westerly along Carson in the lane next to the double white line. Plaintiff Gertrude Abrahamson, an elderly woman who did not drive an automobile, was seated on the right side of the front seat. Four minor children were on the rear seat. Defendant Cundiff was driving a Chrysler in the course and scope of his employment for his principal and codefendant, The Termo Corporation, in an easterly direction along Carson next to the double white line.

Cundiff stopped at the west edge of the intersection with the intention of making a left turn to go north on Paramount. He gave a hand signal and turned on his flicker lights. The traffic signal was green. He permitted three westbound cars to pass. He then proceeded about 12 feet into the intersection: "The signal was still green. When the amber light came on he turned in a northeasterly direction across the double white line and proceeded about 14 feet when the collision occurred. The Kollert car came to rest about the center of the intersection. Cundiff's car careened about the intersection, striking other cars.

The evidence was conflicting as to whether traffic in the two westbound lanes closest to the north curb had stopped when Cundiff made the left turn and entered the intersection.

Plaintiffs filed a notice of intention to move for a new trial. In support of the motion they filed affidavits by four members of the jury. The substance of the affidavits was that after the jury had retired to deliberate, not having arrived at a verdict, they were sent home at 5 p.m.; the next morning after resuming deliberation the foreman told the other members of the jury he had visited the scene of the accident

the night before, told them the exact periods of the signal control lights at the intersection; and that the periods of control thus stated were considered by the other jurors in arriving at a verdict. The affidavits further stated that in taking four polls the jury only considered the case of Pearl Kollert against defendants; by a poll of 9 to 3 it was found both drivers were negligent and Pearl Kollert should be denied recovery; the bailiff was summoned for the purpose of securing additional instructions as to the remaining plaintiffs; the bailiff asked how the deliberations stood; the foreman said, 9 to 3; the bailiff then left, returned, and advised there would be no need for further instructions since a verdict had been reached; the foreman then completed the remaining five verdicts without any deliberation on the remaining five plaintiffs; the foreman was advised by other jurors the verdicts thus completed had not been the product of deliberation. Two of the affidavits stated the foreman advised the other members of the jury they would have to abide by the verdicts completed by him or they would never again be allowed to act as jurors.

[1,2] At the hearing of the motion for a new trial the court ordered the affidavits stricken from the record. Plaintiff contends it was error to strike the affidavits. There was no error. When the verdicts were returned the jury was polled as to each verdict; 9 answered in the affirmative, 3 in the negative. An affidavit of a juror may not be used to impeach a verdict except to show it was arrived at by chance.

1. The instructions as modified by the court read:

"Although there are six plaintiffs in this action, the case of each is separate from, and independent of, that of the others. The law permits them to join as plaintiffs solely because their claims involve the same accident. However, their rights, if any, are separate, not joint. The instructions given you apply to each plaintiff unless otherwise stated, and you will determine each plaintiff's case separately, to the same effect as if you were trying two separate actions.

"In this connection, however, there is

Peterson v. Peterson, 121 Cal.App.2d 1, 9, 262 P.2d 613. There was nothing in the affidavits indicating that the verdicts were arrived at by chance. It would have been error not to have stricken them from the record. *Mish v. Brockus*, 97 Cal.App.2d 770, 775-776, 218 P.2d 849.

Since the affidavits were properly stricken, it is unnecessary to consider plaintiffs' contention that they were deprived of a fair and impartial trial due to misconduct of the jury foreman in obtaining evidence out of court and imparting the same to the other jurors, and that plaintiff's guests were denied a fair and impartial trial due to the failure of the jury to deliberate on their causes.

[3,4] Defendants did not plead that plaintiff Gertrude Abrahamson was contributively negligent, nor was there any evidence that she was negligent. Mrs. Abrahamson testified the first she was aware a collision was impending was immediately before it occurred. Plaintiff offered instructions submitting and limiting the issue of the alleged contributory negligence of plaintiff Kollert. The court modified the instructions by adding plaintiff Gertrude Abrahamson's name therein, thus submitting to the jury the issue with respect to the contributory negligence of Mrs. Abrahamson.¹ It is asserted the court erred in so modifying the instructions. Manifestly it was error. The negligence of plaintiff Kollert, the driver of the car, may not on the facts be imputed to Mrs. Abrahamson. Defendants in effect concede error. Their position is that the error was not

one exception to be noted. The defense of contributory negligence is submitted to you as against only the plaintiffs Pearl Anna Kollert and Gertrude C. Abrahamson and, therefore, instructions concerning the subject of contributory negligence apply only as between each of those plaintiffs, respectively and the defendants."

"You are instructed the issue of contributory negligence in this case is to be considered by you only in relation to plaintiffs Pearl Anna Kollert and Gertrude C. Abrahamson and not to any other plaintiffs."

prejudicial. We think it was. There was evidence from which the jury reasonably could conclude that defendant Cundiff was negligent, that in making the left turn he did not yield the right of way as required by section 551 of the Vehicle Code. There was evidence that vehicles traveling west on Carson were entering the intersection at the time Cundiff made the left turn.

A similar contention was urged in *Miller v. Peters*, 37 Cal.2d 89, 230 P.2d 803. The court answered (37 Cal.2d at page 95, 230 P.2d at page 807):

"From the general verdict of the jury in favor of respondents, it cannot be determined on what basis the jury absolved respondents from any liability in this case: whether it found that the accident (1) occurred solely through the negligence of the son; or (2) was the result of the joint negligence of both the son and respondent bus driver in the operation of their respective vehicles, and the failure of the mother to caution her son in his driving as an 'ordinarily prudent person' would have done under the circumstances precluded her recovery. [Citation.] In such circumstances it is apparent that the error in giving an instruction on a matter not within the issues, and the error in refusing to give the instruction correctly defining the issues operated to the prejudice of appellants."

Also see *Barton v. Messmore*, 122 Cal.App. 2d 813, 817, 265 P.2d 949, 38 A.L.R.2d 138. Cf. *Lein v. Parkin*, 49 Cal.2d 397, 318 P.2d 1.

The record does not exclude the probability that the verdict as to Gertrude Abrahamson in favor of defendants was based on the theory that the contributory negligence of Pearl Kollert was imputed to Mrs. Abrahamson. Accordingly, the judgment in favor of defendants and against Gertrude Abrahamson must be reversed.

The judgment in favor of defendants and against plaintiffs Gertrude C. Abrahamson, Mary Cleveland, and Steven Kollert is re-

versed. In all other respects the judgment is affirmed. Defendants shall pay half the costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.



CITY OF LONG BEACH, a municipal corporation, Plaintiff and Respondent,
v.

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY, and County of Los Angeles, a body corporate and politic, Defendants and Appellants.*

Civ. 22459.

District Court of Appeal, Second District,
California.

Nov. 20, 1957.

Rehearing Denied Dec. 10, 1957.

Hearing Granted Jan. 15, 1958.

Action by city for declaratory judgment that county board of supervisors should have granted claim for cancellation of taxes and for recovery of taxes collected. The Superior Court of Los Angeles County, Joe Raycraft, J., rendered judgment for city, and board of supervisors and county appealed. The District Court of Appeal, Ashburn, J., held that where city acquired title to three parcels of land before tax lien date and title to another parcel after that day, and county taxes were assessed before city annexed the parcels, city was entitled to refund of taxes paid under protest on parcel to which title passed after tax lien date, but was not entitled to recover taxes paid on other parcels.

Judgment modified and as modified affirmed.

1. Taxation ☞195

Primary object of amendment to constitutional provision, which exempts any

property belonging to state, county or city from general taxation, excepting from provision such lands outside of county or city owning same as were subject to taxation at time of acquisition by county or city, was to protect small counties against serious loss of tax revenues through large acquisitions of outside lands by big cities, but language was broader and scope of amendment more extensive than that. West's Ann.Const. art. 13, § 1.

2. Taxation ⚡217

Where city acquired title to land lying outside its boundaries and land became subject to tax lien, land was discharged through subsequent annexation by city from the existing tax lien and lien was rendered unenforceable. West's Ann.Const. art. 13, § 1.

3. Statutes ⚡230

An intention to change the law is ordinarily to be inferred from amendment of a statute but when it is apparent from surrounding circumstances or otherwise that amendment was designed merely to clarify meaning of the existing statute, that effect will be attributed to it.

4. Taxation ⚡204(3)

Under statute providing that uncollectible tax may be cancelled if levied on property acquired after lien date by state or other political subdivision and because of public ownership was not subject to sale for delinquent taxes, annexation of outside property, which had been acquired after lien date, operated to afford right to cancellation of tax both before and after amendment to statute which added words "and on property annexed after lien date by city owning it." West's Ann.Rev. & Tax.Code, § 4986, and (e).

5. States ⚡119

Cancellation of county tax as a result of its becoming uncollectible through incorporation of property, upon which lien had been imposed, into city was not a gift, and did not violate constitutional provision proscribing gifts of public funds or prop-

erty. West's Ann.Rev. & Tax.Code, §§ 4986(e); West's Ann.Const. art. 4, § 31.

6. Taxation ⚡204(3)

Where city acquired title to parcel of land lying outside its boundaries after tax lien date, and taxes were assessed before city annexed land, it was duty of county board of supervisors to cancel taxes pursuant to application by city. West's Ann.Rev. & Tax.Code, § 4986, and (e).

7. Taxation ⚡535

The right to refund of taxes paid under protest is not dependent upon tax being originally erroneous or invalid, it is the collection that must have been erroneous. West's Ann.Rev. & Tax.Code, § 5096(b).

8. Taxation ⚡535

Where right to cancellation of county taxes on property arose because tax was upon property whose public ownership by city forbade sale for delinquent taxes, denial of cancellation was wrongful, subsequent collection of money was erroneous, and city was entitled to refund of taxes paid under protest. West's Ann.Rev. & Tax.Code, §§ 4986 and (e), 5096(b).

9. Taxation ⚡535

Where city acquired land lying outside its boundaries and title to land passed before tax lien date, and city subsequently annexed land, city, which had paid taxes under protest, was not entitled to refund in absence of showing of practical necessity to make payments or threat of county to sell for non-payment of tax or existence of intention of county to bring action to collect tax, especially where pursuit of declaratory relief action would have effectively nullified the apparent lien. West's Ann.Rev. & Tax.Code, §§ 3003, 4986 and (e).

10. Taxation ⚡538

Where city acquired land lying outside its boundaries and title to land passed before tax lien date, assertion by city, which subsequently annexed land, that it was uncertain as to appropriate remedy to be

pursued with respect to apparent tax lien, was insufficient to make its payment of taxes under protest involuntary. West's Ann.Const. art. 13, § 1; West's Ann.Rev. & Tax.Code, §§ 5136, 5138, 5139, 5141.

11. Declaratory Judgment ⇨216

Mandamus would not lie to compel favorable action upon city's petition for cancellation of tax and lien upon property it had annexed after assessment of taxes, and failure to seek mandate would not be bar to maintenance of action for declaratory judgment that board of supervisors should have granted cancellation and for recovery of taxes collected. West's Ann. Rev. & Tax.Code, § 4986, and (e).

Harold W. Kennedy, County Counsel, Los Angeles, by Gordon Boller, Asst. County Counsel, Los Angeles, for appellants.

Walhfred Jacobson, City Atty., John R. Nimocks, Deputy City Atty., Long Beach, for respondent.

ASHBURN, Justice.

Section 1 of Article XIII of the State Constitution exempts from general taxation any property belonging to the state or any county, city and county or municipal corporation "except such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation * * *." The quoted excep-

tion to the exemption was inserted by amendment of 1914. Where a city acquires such outside property and it becomes subject to a tax lien does subsequent annexation of that land render the lien unenforceable and afford the city a right to cancellation or to refund of the tax in event of its payment under protest? That is the principal question presented by this appeal.

In 1953 and 1954 plaintiff, City of Long Beach, acquired by condemnation three parcels of land lying outside its boundaries and by deed a fourth one; title to three of them passed before tax lien date and the other after that day, which was March 1, 1954. County taxes for the year 1954-1955 having been assessed upon each, the city thereafter annexed all of them and applied to the defendant, Board of Supervisors of Los Angeles County, for cancellation of the tax and lien upon each parcel pursuant to § 4986 Revenue and Taxation Code¹; this was denied and the city thereafter paid the taxes under protest, an aggregate of \$27,049.04. Thereupon the instant action was brought; it involves 1954-1955 taxes only; the complaint is in two counts, the first being for declaratory relief to the effect that the Board of Supervisors should have granted each claim for cancellation, and the second being for recovery under Revenue and Taxation Code, § 5096² of taxes erroneously or illegally collected. Defendants Board of Supervisors and County of Los Angeles demurred to the complaint generally and specially;³ same was overruled with leave to answer within 30 days; defendants declined to do so and default judgment was entered. It recites the taking of evidence,

1. § 4986. "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged: * * * (e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes * * *."

pervisors, any taxes paid before or after delinquency shall be refunded if they were: (a) Paid more than once. (b) Erroneously or illegally collected. (c) Paid on an assessment in excess of the cash value of the property by reason of the assessor's clerical error. (d) Paid on an assessment of improvements when the improvements did not exist on the lien date."

3. See, as to the limited function of a demurrer to the complaint in an action for declaratory relief, *Bennett v. Hibernia Bank*, 47 Cal.2d 540, 549, 305 P.2d 20.

2. § 5096. "On order of the board of su-

declares "that each parcel of property listed in plaintiff's complaint is exempt from taxation and became so exempt on the date each such parcel was annexed to the City of Long Beach under the provisions of Article XIII, Section 1, of the Constitution of the State of California. The Court further declares that when there was filed with the defendants, by the plaintiff, the applications for cancellation of taxes, attached to plaintiff's complaint herein and marked as Exhibits 'A', 'B', 'C' and 'D', it became the duty of said defendants to cancel all taxes on each parcel of such property; that the defendants should have granted each of such applications and cancelled all of such taxes." It was further adjudged that plaintiff recover said sum of \$27,049.04 with interest and costs. Defendants have appealed from said judgment.

Concerning the merits, appellants argue that a valid tax lien having attached to the property at a time when it was subject to tax by the county, although owned by the city, a subsequent absorption of the property into the city through annexation could not impair the existing lien and therefore the judgment is erroneous. Respondent city contends that, though the tax lien upon this city property was valid prior to annexation, the incorporation of the subject property into the municipality rendered the tax lien thereafter unenforceable, both upon general principles heretofore declared by the courts and the statutory command of § 4986(e), Revenue and Taxation Code.

[1] Prior to the 1914 amendment to § 1 of Article XIII of the Constitution, it was settled law that all property owned by a municipality was tax exempt (*City & County of San Francisco v. County of Alameda*, 5 Cal.2d 243, 245, 54 P.2d 462; *City & County of San Francisco v. County of San Mateo*, 36 Cal.2d 196, 199, 222 P.2d 860), and the sole test of the right to exemption was ownership,—devotion to public use not being of the essence. *Anderson-Cottonwood Irr. Dist. v. Klukkert*, 13 Cal.2d 191, 198, 88 P.2d 685; *Sutter-Yuba Inv. Co. v. Waste*, 52 Cal. App.2d 785, 790, 127 P.2d 25. The primary object of the amendment was to protect

small counties against serious loss of tax revenues through large acquisitions of outside lands by big cities, but the language was broader and the scope of the amendment more extensive than that. *City & County of San Francisco v. County of Alameda*, supra, 5 Cal.2d at pages 245-246, 54 P.2d at pages 463-464. Both sides postulate their arguments at bar upon the assumption that the lands under discussion were subject to valid taxation as city owned property prior to their annexation, and that event would exempt them from future taxation. They disagree as to the effect of annexation upon a valid existing tax lien.

[2] *County of Mariposa v. Merced Irr. Dist.*, 32 Cal.2d 467, 196 P.2d 920, holds that: "Correctly construed the constitutional provision contemplates that very power, that is, the power to annex additional area and thus incidentally achieve tax exemption." 32 Cal.2d at page 474, 196 P.2d at page 924. In that case an irrigation district (which has the status of a municipality for the purposes of the constitutional provision; *Rock Creek Water Dist. v. County of Calaveras*, 29 Cal.2d 7, 172 P.2d 863), was in the process of "including" within its boundaries pursuant to the Water Code certain outside property which it owned. That land was situated in the county of Mariposa which brought a mandamus proceeding to compel the district to discontinue such annexation proceeding, the theory being "that the law authorizing the inclusion of that land within the boundaries of the district is invalid in that it will frustrate the purpose of the constitution (Cal.Const., Art. XIII, sec. 1, *infra*) to require irrigation districts to pay taxes on land owned by them to the county in which the land is located but which land is not within the boundaries of the district." 32 Cal.2d at page 469, 196 P.2d at page 921. This view was rejected by the Supreme Court whose holding is epitomized in the sentence first above quoted. In the course of its discussion the court used language which throws some light upon the present problem though not determinative of it. "The real issue is whether the 1914 amend-

ment to section 1 of Article XIII froze the boundaries of cities, irrigation districts and and the like as of 1914 in so far as the taxation of the land of such public organizations is concerned. That is so because the acceptance of petitioner's contention would mean that no municipal corporation could thereafter annex property to it whether it then belonged to it or was acquired after the annexation and thereby secure the tax exemption to which it is entitled by reason of the location of the property within its boundaries." 32 Cal.2d at page 471, 196 P.2d at page 923. "The amendment, by referring to property which is not exempt, characterizes it—describes it as 'outside' the municipal corporation. Constitutional and statutory provisions on exemptions should be construed to apply prospectively as well as presently, that is, to act upon property from time to time as it is acquired or loses its character with reference to ownership, use and the like. Ordinarily their application is not limited to the character the property happens to possess at the particular time such provisions become effective." 32 Cal.2d at page 472, 196 P.2d at page 923. "The constitutional amendment puts two qualifications on lands which are excluded from the exemption. They must be outside the municipal corporation and such 'as were subject to taxation at the time of the acquisition of the same' by the municipal corporation. Manifestly, the phrase 'at the time of acquisition of the same' refers to and modifies only the clause 'as were subject to taxation' and not the clause 'located outside of the * * * corporation owning the same.' That is to say, the amendment does not mean that property located outside the boundaries at the time of acquisition is taxable even though later included within the boundaries of the corporation, while property inside the corporation at the time of acquisition is not taxable." 32 Cal.2d at page 473, 172 P.2d at page 924. The reasoning of this case points to the conclusion that outside property is discharged through annexation from an existing tax lien, for it has been basic law of this state for many years that the mere

acquisition of taxable land by a municipality renders it thereafter tax exempt and immune to enforcement of any tax lien which was upon it at the time of acquisition. This rule is based on grounds of public policy and exists independently of any statutory provision. See *Smith v. City of Santa Monica*, 162 Cal. 221, 222, 121 P. 920.

While it does not involve an annexation of outside land owned by a city, *People v. Board of Supervisors*, 126 Cal.App. 670, 15 P.2d 209, exemplifies the principles of the *Smith* case, *supra*, and gives it application which is persuasive at bar. That was a proceeding in mandate to compel cancellation of an assessment upon land which had been acquired by the state for park purposes, the property being subject to an existing tax lien at the time of its purchase by the state. The question was whether § 3804a Political Code required such cancellation. The terms of the statute are summarized on page 672 of 126 Cal.App., on page 210 of 15 P.2d: "The question then for determination is whether or not [a tax on] lands acquired by the state after the lien for taxes thereon has attached can be canceled by complying with the requirements of section 3804a of the Political Code. This section of said Code provides in part that when property is acquired and owned by the state, county, city, etc., and that prior to such ownership there had been an assessment of said property, which at the time of said assessment became a lien, and which because of such public ownership is not subject to sale for delinquent taxes, [the assessment] may, upon satisfactory proof thereof, be canceled by the officer having custody of the record thereof upon the order of the board of supervisors, or other governing board, with the written consent of the district attorney, city attorney, or other legal adviser of said board." The Board of Supervisors contended that the statute was violative of article XIII, § 6 and article XI, § 12 of the Constitution, reliance being placed upon *City of Santa Monica v. Los Angeles County*, 15 Cal.App. 710, 115 P. 945. The court differentiated that case as

having arisen before the enactment of § 3804a Political Code, and further said: "[S]ince that decision was rendered there has been the enactment of a law providing for the cancellation of a lien for taxes attaching prior to the acquisition of the premises by the state. This law is contained in section 3804a of the Political Code, and if it is not in violation of the Constitution, then unquestionably the petitioner has the right to have the said assessment canceled." 126 Cal.App. at page 673, 15 P.2d at page 210. "We find nothing in this record indicating that the power of taxation has been surrendered by the state either by grant or contract. The facts before us show that the power of taxation was exercised, and that by operation of law it has ceased to be a charge upon the land for the reason that the land is now the property of the state. We are of the opinion that, upon the showing made by petitioner, it was the duty of respondents to order the cancellation of the said assessment." 126 Cal.App. at page 674, 15 P.2d at page 211.

This case was cited with approval in Department of Veterans Affairs of California v. Board of Supervisors, 31 Cal.2d 657, 659, 192 P.2d 22. The department there sought mandate to cancel an assessment upon property owned by it subject to a conditional sale to a veteran who was entitled to a tax exemption. The writ was denied upon the ground that the veteran was the real owner for tax purposes. Petitioner relied upon § 4986(e) and § 4986.4, Revenue and Taxation Code. (The former is quoted *supra* and the latter is here set forth in the margin.)⁴ In its discussion of the problem

thus raised the court said at page 659 of 31 Cal.2d at page 23 of 192 P.2d: "By the provisions of section 1, Article XIII of the Constitution, property belonging to the state is exempt from taxation. Under section 4986 of the Revenue and Taxation Code, where the state acquired land after the lien for taxes has attached, such taxes may, under certain conditions, cease to become a charge upon the land. *People v. Board of Supervisors of Calaveras County*, 126 Cal. App. 670, 15 P.2d 209. The purpose, as stated in the code section is that the property 'because of this public ownership' should not be subjected to sale for delinquent taxes. Had the state agency been the owner of the property at the time the application for the cancellation of taxes was made, it would have been entitled to the relief sought. *People v. Board of Supervisors of Calaveras County*, *supra*."⁵

Throughout the decisions runs the consistent principle that acquisition of property by a public agency automatically exempts it from taxation and from the enforcement of a tax lien previously attaching to the land. See *Smith v. City of Santa Monica*, *supra*, 162 Cal. 221, 121 P. 920; *City of Los Angeles v. Ford*, 12 Cal.2d 407, 410, 84 P.2d 1042; *People v. Board of Supervisors*, *supra*, 126 Cal.App. 670, 15 P. 2d 209; *Department of Veterans Affairs of California v. Board of Supervisors*, *supra*, 31 Cal.2d 657, 192 P.2d 22; 6 Cal.Op. Atty. Gen. 72; 4 Cal.Op. Atty. Gen. 308. Appellants' reply brief says, at page 6: "We will concede that if respondent had, as it suggests, 'done nothing' as to payment it could have had review of the Board's

4. § 4986.4. "Whenever any property has been deeded to the Veterans' Welfare Board pursuant to Division 4 of the Military and Veterans Code and a petition has been filed with any county or city for the cancellation of taxes pursuant to this article, the district attorney or city attorney, as the case may be, shall investigate the facts stated in the petition, and if he finds them to be true, shall approve the petition and recommend to the legislative body that the taxes described in the petition be canceled."

5. In its discussion of § 4986.4, the court said: "In 1932, this court held that a state agency which had acquired property, could obtain cancellation of the taxes which were a lien on the property only if the property was impressed with a public use. *La Mesa etc. Irr. Dist. v. Hornbeck*, 216 Cal. 730, 17 P.2d 143." 31 Cal.2d at pages 659-660, 192 P.2d at page 24. This test of devotion to public use was definitely rejected in *Anderson-Cottonwood Irr. Dist. v. Klukkert*, *supra*, 13 Cal.2d 191, 198, 88 P.2d 685, and the *La Mesa* case was held not controlling.

denial of its application for cancellation. The taxes were unenforceable by reason of public ownership of the property. The city's ownership was a sure defense. (Smith v. City of Santa Monica, 162 Cal. 221 [121 P. 920])." At page 25: "Cancellation under Section 4986 may merely clear dead wood from the tax roll, may merely eliminate uncollectible or unenforceable items therefrom."

158 A.L.R. 563, 565: "While there is substantial authority to the contrary, it has been held or recognized in a majority of the cases, in the absence of specific controlling statutes relating thereto, that the acquisition of the title to land by a state or other governmental body acts to extinguish prior tax liens against the property." The principle is of course subject in this state to the exception stated in § 1 of article XIII, but there is nothing therein which expressly or impliedly forbids its application to property which is annexed to a city and thus ceases to be within the purview of the constitutional exception to the general rule of exemption. Controlling effect to the contrary cannot be given to City of Santa Monica v. Los Angeles County, *supra*, 15 Cal.App. 710, 115 P. 945, for it is out of line with the current of Supreme Court decisions.

This rule of exemption has been implemented by statute. Section 3804a, Political Code, is the predecessor of § 4986 Revenue and Taxation Code, quoted in footnote 1 *supra*. As amended in 1925 the Political Code section included as one of the grounds for cancellation the fact that an assessment was upon property "which after the time said tax or assessment became a lien was acquired and owned by the state, or by any county, city and county, municipal corporation, school district or other political subdivision and which, because of such public ownership, is not subject to sale for delinquent taxes." Stats., 1925, p. 432. That phrasing was carried substantially into Revenue and Taxation Code, § 4986. Of course, this language could not apply to outside lands mentioned in the constitutional provision because they were expressly made

subject to taxation, which connoted a right of sale to enforce the lien. But this remained true only so long as the land in question lay outside the owning city's boundaries. When it was annexed it ceased to be within the terms of a constitutional exception and § 3804a and its successor, § 4986(e) became operative, requiring, because of the immunity to tax sale, that the tax be cancelled upon proper application to the Board of Supervisors. Though it uses the word "may" the statute places a mandatory duty upon the board to cancel the tax when facts are shown which make a case under any subdivision of the statute. City of Los Angeles v. Board of Supervisors, 108 Cal.App. 655, 666, 292 P. 539; 6 Cal.Op. Atty.Gen. 72, 74.

Rock Creek Water Dist. v. County of Calaveras, 133 Cal.App.2d 141, 283 P.2d 740 is cited by appellant as being to the contrary. The Rock Creek Water District was located in Stanislaus County and in 1942 purchased property lying in Calaveras County which was "included" within the district in December, 1948. The County of Calaveras continued to tax those lands for the years 1949-1950, 1950-1951, and 1951-1952. The district paid the taxes and then sued for refund. It was denied recovery of the 1949-1950 tax payment but prevailed with respect to the later ones. The ruling upon the 1949-1950 assessment stemmed from the fact that the inclusion proceeding of 1948 was found to be void. A validating act was passed which became effective on June 30, 1949. The court held that it could not be retroactive to the destruction of vested rights and therefore the tax which was levied while the land was not legally within the boundaries of the district could not be recovered. The right to collect that tax was declared to be a vested right which could not be defeated by subsequent validation of the inclusion proceeding. With this concept we cannot agree. Any vesting of the tax lien could be only conditional and would be defeated by annexation or inclusion in the district. The Rock Creek opinion does not discuss the effect of annexation upon an existing

lien; it turns upon the effect of the validating act and rests upon the assumption that the tax lien was a vested right. We do not consider this case controlling at bar. See *Wrenn v. Sutton*, 65 Cal.App.2d Supp. 823, 827, 150 P.2d 589; 14 Am.Jur. § 79, p. 293.

In effect, *Oakdale Irr. Dist. v. County of Calaveras*, 133 Cal.App.2d 127, 283 P.2d 732 (decided the same day as *Rock Creek*), makes a holding contrary to the last mentioned case with respect to the effect of "inclusion" upon an existing tax lien. Mandamus was there granted requiring cancellation of county taxes for 1948-1949 to 1953-1954 inclusive. Two irrigation districts were joint owners of the included lands. The proceeding therefor was not concluded by one of the districts until September 6, 1948, which was after the 1948-1949 tax lien date. But the court ordered cancellation of all the taxes in question. In this case, as in *Rock Creek*, there was no discussion of the effect of inclusion of outside lands upon an existing lien and this case cannot be considered authority upon that point.

[3,4] Subdivision (e) of § 4986 was amended in 1955 by adding the words "and on property annexed after the lien date by the city owning it," thus making the subdivision read: "On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes, and on property annexed after the lien date by the city owning it." While it is true that an intention to change the law is ordinarily to be inferred from the amendment of a statute, that does not necessarily follow. When it is apparent from surrounding circumstances or otherwise that the amendment was designed merely to clarify the meaning of the existing statute, that effect will be attributed to it. *Martin v. California Mut. Bldg. & Loan Ass'n*, 18 Cal.2d 478, 484, 116 P.2d 71; *W. R. Grace & Co. v. California Emp. Comm.*, 24 Cal. 2d 720, 729, 151 P.2d 215; *Koenig v. Johnson*, 71 Cal.App.2d 739, 753, 163 P.2d 746. In the instant case the applications for can-

cancellation were filed before the passage of the amending act which was signed by the Governor on June 1, 1955. The only amendment to § 4986 was the addition of the words "and on property annexed after the lien date by the city owning it" to subdivision (e). "[T]he paramount purpose of all rules of construction is to ascertain the intent of the Legislature; and the rule is not operative and the presumption falls when it clearly appears that the change in the statute was made to express more clearly the original legislative intent. The Legislature does not necessarily admit that it did not by its prior enactment embrace a particular case by an amendment directly applicable to such case." *Kennedy v. Truss*, 1 Terry 424, 40 Del. 424, 13 A.2d 431, 434. "[A] change in a statute may be made merely to express more clearly the original intention of the Legislature [citation]. Thus an amendment to a statute making it directly applicable to a particular case is not necessarily an admission on the part of the Legislature that it did not originally cover such a case." *School Dist. No. 18 v. Pondera County*, 89 Mont. 342, 297 P. 498, 502. The amendment under discussion did not operate as a substantial change in the statute so far as concerns proceedings had before its effective date; it must be treated as a clarifying or interpretive enactment; that is to say, the annexation of outside property which had been acquired after lien date operated both before and after the amendment to afford a right to cancellation of the tax under § 4986(e).

[5] Appellants say that the construction herein given to § 4986(e) would violate the constitutional provision proscribing gifts of public funds or property (Art. IV, § 31). We perceive no basis for this contention. The cancellation of the tax as a result of its becoming uncollectible (through incorporation into plaintiff city) is in no sense a gift. It is but the relinquishment of a nominal right, one which no longer possesses any substance.

[6] We conclude that the annexation of the subject property rendered the tax no longer collectible, and that the court prop-

erly declared, so far as parcel 3 is concerned, that it was the duty of the Board of Supervisors to cancel said taxes pursuant to the application made by plaintiff. This ruling is limited to parcel 3, for it is the only one which was acquired after the tax lien date, and § 4986(e) was so limited at the time of the applications under discussion.

[7, 8] The tax having been paid under protest, § 5096(b), Revenue and Taxation Code, gave rise to a right to refund on parcel 3. This right is not dependent upon the tax being originally erroneous or invalid; it is the collection that must have been erroneous. *Evans v. County of San Joaquin*, 67 Cal.App.2d 452, 454-455, 154 P.2d 468; *S. Siwel Co. v. County of Los Angeles*, 27 Cal.2d 724, 731, 167 P.2d 177. When a right to cancellation has arisen under § 4986(e) because the tax is upon property whose public ownership forbids sale for delinquent taxes, the denial of cancellation is wrongful and the subsequent collection of the money is erroneous.

[9, 10] The court properly awarded judgment for such refund of taxes paid on account of parcel 3, unless perchance appellants are correct in their contention that mandamus to compel cancellation was plaintiff's exclusive remedy. The contrary is true with respect to parcels 1, 2 and 4, for they were not acquired after the lien date⁶ and were not within the purview of § 4986; except as otherwise provided by statute the right to recovery must turn upon the existence of some substantial compulsion in the payment; an accompanying protest cannot dispense with that requirement. *Brahs v. Katcher*, 106 Cal.App.2d 657, 659, 235 P.2d 619; 20 Cal.Jur. § 36, p. 963; 24 Cal.Jur. § 282, p. 311. The complaint at bar makes no allegation of a practical necessity to make the payment. It alleges no threat to sell for non-payment of the tax or the assertion or existence of an intention of the county to bring an action

to collect the tax (Rev. & Tax.Code, § 3003). Payment was not necessary, for the pursuit of a declaratory relief action would effectively nullify the apparent lien. See, as to applicability of § 1060, Code Civ.Proc., *Lord v. Garland*, 27 Cal.2d 840, 852, 168 P.2d 5; 15 Cal.Jur.2d § 62, p. 211; Annotation, 11 A.L.R.2d 359. The only explanation offered by counsel in the briefs or upon oral argument is uncertainty as to the appropriate remedy to be pursued. This is not enough to make the payment involuntary. There can be no recovery of taxes paid on parcels 1, 2 and 4.

Sections 5136 and 5138, Revenue and Taxation Code, do not assist respondent. They provide: § 5136. "After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment." § 5138. "Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest." But § 5139 limits the action to one for recovery of a tax based on an "assessment claimed to be void" and § 5141 provides for recovery of the tax where the court "finds that the assessment complained of is void in whole or in part." No such claim is made here. It is conceded that the assessment was made against these lands when they were subject to county taxation and that it was and is a valid assessment. If the word assessment were construed to mean tax the result would be the same, for it is conceded by both sides that this tax was valid and created a lien which was originally good and enforceable.

[11] That mandamus would not lie to compel favorable action upon plaintiff's petition for cancellation is now established by *Vista Irr. Dist. v. Board of Supervisors*, 32 Cal.2d 477, 196 P.2d 926. The rule is reiterated in *Security-First Nat. Bank v. Board of Supervisors*, 35 Cal.2d 323, 327, 217 P.2d 948. The basis of these decisions is that an action for refund is an adequate

6. It is unnecessary to decide whether an application made after the effective date of the amendment would be sufficient if

it showed the fact of annexation but not that of acquisition after lien date.

remedy. Manifestly, failure to seek mandate could not be a bar to maintenance of the present action.

The complaint shows that the tax paid by plaintiff on account of parcel 3 was \$10,492.74. The judgment is modified by changing the sentence which begins with the words "The Court further declares" in line 3 of page 2 thereof (page 30 of clerk's transcript on appeal) to read as follows: "The Court further declares that when there was filed with the defendants, by the plaintiff, the applications for cancellation of taxes, attached to plaintiff's complaint herein and marked as Exhibits 'A', 'B', 'C' and 'D', it became the duty of said defendants to cancel all taxes on parcel 3 of such property; that the defendants should have granted the application which is Exhibit 'C' and should have cancelled all of such taxes upon said parcel; that defendants were not obligated to grant any of the other applications."

The amount of the judgment is reduced to \$10,492.74, with interest thereon at the rate of five per cent per annum from October 28, 1955 to November 20, 1956, plus costs in the superior court.

As thus modified the judgment is affirmed. Each party to bear its own costs on appeal.

FOX, Acting P. J., concurs.



155 Cal.App.2d 829

N. Meyer BAKER, Plaintiff, Cross-Defendant and Respondent,

v.

Alfred L. LITTMAN, Defendant, Cross-Complainant and Appellant.

Civ. 22270.

District Court of Appeal, Second District,
Division 3, California.

Dec. 9, 1957.

Rehearing Denied Jan. 3, 1958.

Hearing Denied Feb. 5, 1958.

Action was brought to recover reasonable value of legal services, and one of the defendants filed second amended cross com-

plaint. The Superior Court of Los Angeles County, Leon T. David, J., entered judgment of dismissal on order sustaining demurrer to second amended cross complaint without leave to amend, and that defendant appealed. The District Court of Appeal, Vallée, J., held that second amended cross-complaint, which contained no averment showing relation between alleged fraud of plaintiff and alleged damage sustained by defendant, was insufficient to allege a cause of action for conspiracy.

Affirmed.

1. Conspiracy ⚡18

Complaint which contains nothing more than bare allegations that defendants entered into conspiracy to defraud plaintiff and committed certain acts in furtherance thereof does not state a cause of action unless those acts are connected with a showing of facts which, if true, would support charge that they were wrongful, and inferences, generalities, presumptions and conclusions are insufficient.

2. Conspiracy ⚡6

Damages cannot flow from mere conspiracy on part of individuals unless they do some unlawful act or injure plaintiff by unlawful means, and, in absence of allegation of such unlawful act or injury, conspiracy charge fails to state a cause of action.

3. Conspiracy ⚡18

Second amended cross-complaint, which contained no averment showing relation between alleged fraud of plaintiff and alleged damage sustained by defendant, was insufficient to allege a cause of action for conspiracy.

4. Pleading ⚡225(2)

Where special demurrer was sustained to original cross-complaint and judgment of dismissal was entered, and on appeal judgment was affirmed as to first and third counts of cross-complaint and reversed as to second and fourth counts with directions to permit amendment thereof, and thereafter defendant filed first amended cross-complaint which was insufficient, and he was given opportunity to correct de-

ficiencies, and he then filed second amended cross-complaint and still failed to correct deficiencies, trial court did not abuse its discretion in sustaining demurrer to second amended cross-complaint without leave to amend.

Bertram S. Harris, Los Angeles, for appellant.

F. J. Finucane, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by cross-complainant Alfred Littman, referred to as Alfred or Littman, from a judgment of dismissal entered on an order sustaining cross-defendant Baker's demurrer to the second amended cross-complaint without leave to amend. The demurrer was general and special. A special demurrer had previously been sustained to the original cross-complaint and judgment of dismissal entered. On appeal the judgment was affirmed as to Counts I and III and reversed as to Counts II and IV with directions to permit an amendment thereof. *Baker v. Littman*, 138 Cal.App.2d 510, 292 P.2d 595, 598.

After the reversal Littman filed a first amended cross-complaint to which a demurrer was sustained with leave to amend. He then filed the second amended cross-complaint, to which Baker's demurrer was sustained without leave to amend. The question is: Does any count of the second amended cross-complaint state facts sufficient to constitute a cause of action?

The facts alleged in the original cross-complaint and the comments of the court with respect thereto are stated in the opinion on the former appeal authored by Mr. Justice Fox: "The material allegations of Alfred Littman's cross-complaint, previously set out in detail, may be epitomized as follows: Alfred and his brothers and sisters are beneficiaries of the Horn trust estate. Respondent represented to him that he was the attorney for all his brothers and sisters with authority to file an action for them against the life tenant and trustees of

the Horn trust. Relying on this representation, Alfred authorized respondent to add his name as plaintiff in the suit respondent prepared. Subsequently discovering that respondent was not attorney for all his brothers and sisters, Alfred ordered him not to sue in his behalf and respondent never instituted any legal proceeding for the trust estate. Further, Alfred alleged respondent knew he would never be obliged to pay for any legal services respondent might render. * * * His second and fourth counts sound in deceit. The second count alleges that as the result of respondent's conduct he was damaged in the sum of \$3,500 which he was compelled to expend in protecting his equity in the trust estate. The fourth count alleges that respondent's conduct caused a diminution of the value of Littman's share of the trust estate in an amount as yet unascertained. * * *

"It is of course true that a fraudulent representation which is not the cause of damage is not actionable. *Maynes v. Angeles Mesa Land Co.*, 10 Cal.2d 587, 590, 76 P.2d 109; *Tsang v. Kan*, 78 Cal.App.2d 275, 281, 177 P.2d 630; 12 Cal.Jur., sec. 69, p. 813. 'It is fundamental, of course, that, no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action. Therefore it is but a truism to say that if one party by fraud has been induced to enter into a contract executory as to both parties and nothing whatsoever is done under that contract, he has ordinarily suffered no injury therefrom.' *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 571, 126 P. 351, 355, 42 L.R.A., N.S., 125. In the instant pleading, Littman alleges that he discovered that respondent was not attorney for his brothers and sisters, as falsely represented, that he therefore withdrew his consent to be joined in the lawsuit prepared by respondent, and that the lawsuit was never filed. With only these facts to guide us, it is difficult to perceive how Littman's reliance on the false representation caused him the damage alleged. 'It must be shown in the pleading that the damage claimed

was sustained by reason of fraud and should show the relation between the fraud and the damage alleged; that is, it must appear that the fraud and the damage sustain to each other the relation of cause and effect.' *Woodson v. Winchester*, 16 Cal.App. 472, 476, 117 P. 565, 567; *Swasey v. L'Etanche*, 17 Cal.App.2d 713, 719, 62 P.2d 753." As previously noted, the judgment was reversed as to Counts II and IV.

The second amended cross-complaint alleges substantially the same facts as were alleged in the original cross-complaint. It is in three counts: the first and second sound in deceit; the third realleges the averments of the first count and alleges Baker perpetrated the alleged fraud maliciously. So far as we are able to discover, the only difference between the second amended cross-complaint and the original cross-complaint is an allegation that Littman has been informed and believes that Baker conspired with others to institute the proceedings referred to in the former opinion in behalf of Littman and his brothers and sisters for the sole purpose of keeping the trustees in possession and control of the Horn estate with the cooperation of Baker, and the further allegation that Baker perpetrated the fraud maliciously.

[1-3] Littman says the first count spells out a conspiracy between Baker and others; the purpose of the conspiracy; the act played by Baker in the conspiracy; that he carried it to fruition, prevented Littman from protecting his interest in the estate; and the damages suffered as a result. A complaint "which contains nothing more than bare allegations that the defendants entered into a conspiracy to defraud plaintiff and committed certain acts in furtherance thereof does not state a cause of action, unless those acts are connected with a showing of facts which, if true, would support the charge that they were wrongful [citation], inferences, generalities, presumptions, and conclusions, being insufficient." *Kinney v. Postal Telegraph-Cable Co.*, 123 Cal.App. 70, 75, 10 P.2d 1043, 1045. "Damages cannot flow from a mere conspiracy on the part of individuals unless the

conspirators do some unlawful act or injure the plaintiff by unlawful means. In the absence of an allegation of such unlawful act or injury, the conspiracy charge fails to state a cause of action." *Williams v. Smith*, 127 Cal.App.2d 607, 613, 274 P.2d 204, 208. The averments with respect to a conspiracy are manifestly insufficient. *Orloff v. Metropolitan Trust Co.*, 17 Cal.2d 484, 487-488, 110 P.2d 396.

The most the present pleading alleges is that Littman by fraud was induced to enter into a contract, executory as to both parties. As in the original cross-complaint, Littman alleges "that he discovered that respondent was not attorney for his brothers and sisters, as falsely represented, that he therefore withdrew his consent to be joined in the lawsuit prepared by respondent, and that the lawsuit was never filed." *Baker v. Littman*, 138 Cal.App.2d 510, 516, 292 P.2d 595, 599. He also alleges he made "timely investigation and discovery of the fraud," and that he immediately thereafter retained competent counsel to protect his interests and those of his brothers and sisters.

The holding on the former appeal was that no facts were alleged showing how Littman's reliance on the false representation caused him the damage, and the judgments as to Counts II and IV were reversed to give him an opportunity to amend in that respect. There is nothing in the present pleading showing the relation between the fraud and the damage alleged. It is not made to appear that the fraud and the damage sustain to each other the relation of cause and effect. The present cross-complaint contains the same allegations with respect to damage as were found faulty on the former appeal—that as a result of Baker's conduct Littman was compelled to pay money in protecting his interest in the trust estate, and that Baker's conduct caused a diminution of the value of Littman's share therein. The pleading fails to show how Baker's conduct compelled Littman to spend money in protecting his interest in the trust estate or caused a diminution of the value of his share there-

in Due to the absence of any averment showing the relation between the fraud and the damage, no count of the second amended cross-complaint states facts sufficient to constitute a cause of action. *Maynes v. Angeles Mesa Land Co.*, 10 Cal.2d 587, 589-590, 76 P.2d 109.

[4] Littman says the demurrer should not have been sustained without leave to amend, that he should have been given an opportunity to amend again. Mr. Justice Fox in his opinion on the former appeal specifically told Littman what he had to do to state a cause of action. After the reversal, Littman filed a first amended cross-complaint which was insufficient. A demurrer was sustained to it and again he was given an opportunity to correct the deficiencies. He then filed the second amended cross-complaint and still failed to take advantage of what he had been told in the opinion on the former appeal. Apparently he could not. The court did not abuse its discretion in sustaining the demurrer to the second amended cross-complaint without leave to amend.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James A. WEISS, Fred Lee Johnson, Addie Estelle Simmons, Gerald Lee Hubbard and Vivian Hubbard, Defendants.

James A. Weiss, Fred Lee Johnson, Gerald Lee Hubbard and Vivian Hubbard,
Appellants.*

Cr. 5799.

District Court of Appeal, Second District,
Division 1, California.

Nov. 26, 1957.

Rehearing Denied Dec. 19, 1957.

Hearing Granted Jan. 23, 1958.

Prosecution for conspiracy to commit abortion, and for abortion. The Superior

* Opinion vacated 327 P.2d 527.

Court, Los Angeles County, Joseph M. Maltby, J., entered judgments of conviction and defendants, with one exception, appealed from such judgments, and orders denying motions for new trial. The District Court of Appeal, Fourn, J., held that where arrests of defendants was the result of well-planned police work based upon reliable information, police had sufficient reason to believe felonies were occurring at certain establishments, and therefore, evidence seized as result of searches and seizures of premises, without a warrant, following defendants' arrest therein was not inadmissible on theory that police did not have sufficient reason to believe that felony had been committed at places searched.

Judgments affirmed.

1. Criminal Law §395

In abortion prosecution, where arrests of defendants was the result of well-planned police work based upon reliable information, police had sufficient reason to believe felonies were occurring at certain establishments, and therefore, evidence seized as result of searches and seizures of premises, without a warrant, following defendants' arrest therein was not inadmissible on theory that police did not have sufficient reason to believe that felony had been committed at places searched.

2. Criminal Law §677

In prosecution for abortion, trial court did not commit prejudicial error by allowing prosecution to take two exhibits which were in court's possession prior to trial in order to subject them to further examination, in view of fact that at time of such withdrawal exhibits had not been marked for identification, nor introduced into evidence, and in view of fact that after they were introduced, defendants had the right to have their own expert examine them but made no request therefor.

3. Criminal Law §386

In prosecution for conspiracy to commit abortion, trial court did not err in al-

lowing a witness to testify as to a telephone conversation she had with an unidentified person who represented himself to be an attorney of one of the defendants in view of fact such testimony was not introduced to prove truth of matter asserted, but merely to prove fact witness had been contacted and impliedly intimidated, and in view of fact it was proper to show that an agent of defendants contacted the witness in an effort to find out whether she had contacted the police following her abortion.

4. Witnesses Ⓒ269(1)

In a criminal prosecution, the court has a wide discretion over cross-examination which should be confined to matters elicited from the witness on direct examination. West's Ann.Code Civ.Proc. § 2048.

5. Criminal Law Ⓒ1171(3)

In prosecution for conspiracy to commit abortion, and for abortion, district attorney was not guilty of prejudicial error in his argument that defendants were operating an abortion mill, that women who submitted to such abortions were in danger of suffering great physical injury, and that showing of more abortions would have no effect upon evidence actually introduced.

6. Criminal Law Ⓒ728(2)

Where no objection was made to argument of district attorney, failure to object constituted a waiver.

7. Criminal Law Ⓒ1035(1)

Where defendants in abortion prosecution showed that they expressly waived any right which they might have had to a speedy trial, they could not successfully contend on appeal that they were denied such right.

8. Criminal Law Ⓒ1170(1)

In abortion prosecution, trial court did not prejudicially err in preventing defendants' counsel from questioning defense witness whose testimony would allegedly have proved an alibi for one of the defendants, in view of fact record was read into evidence, after witness repeatedly stated that such record would not refresh

his recollection in regard to persons on duty on date in question.

9. Criminal Law Ⓒ692

When no objection was raised when defendant in a criminal prosecution was asked to write various words, but an objection was made only when such samples were offered in evidence, defendant, under such circumstances, would be deemed to have waived the objection.

10. Criminal Law Ⓒ404(5)

In abortion prosecution, where a defendant-witness denied that he talked with a certain party about a woman desiring an abortion, under such circumstances, it was proper to introduce into evidence examples of such defendant's handwriting so that jury could compare such writing with writing on a note found in his home which showed he had received telephone call from party in question.

11. Abortion Ⓒ11

Conspiracy Ⓒ47

Evidence sustained conviction for conspiracy to commit abortion, and for abortion. West's Ann.Pen.Code, §§ 182, subds. (1, 5), 274.

12. Criminal Law Ⓒ1172(1)

In prosecution for conspiracy to commit abortion, and for abortion, instruction that a defendant would be responsible for crimes committed prior to time he entered into conspiracy with other defendants to commit abortions, was not prejudicial error on any theory that a conspirator is not liable for substantive offenses committed in furtherance of the conspiracy if those crimes were committed before entry into the conspiracy. West's Ann.Pen.Code, §§ 182, subds. (1, 5), 274.

Harold J. Ackerman, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond Momboisse and John S. McInerny, Deputy Attys. Gen., for respondent.

FOURT, Justice.

This is an appeal from certain judgments and the orders denying motions for new trials in a number of causes having to do with the crime of abortion.

In an information filed in Los Angeles county, the defendants were charged jointly with the following crimes:

Count I—conspiracy to commit abortion (Penal Code, section 182, subdivisions (1) and (5));

Count II—an abortion on Evelyn Rogers on July 2, 1955 (Penal Code, section 274);

Count III—an abortion on Mrs Eugene Jaderquist on November 23, 1955;

Count IV—an abortion on Nancy Cliff on January 18, 1956;

Count V—an abortion on Dorothy Robinson on January 23, 1956;

Count VI—an abortion on Mary Yoho on January 23, 1956;

Count VII—an abortion on Marion Powell on January 23, 1956.

Each of the defendants entered a plea of not guilty to each count. The case was tried before a jury and the following verdicts were returned:

James A. Weiss was found guilty on counts I, IV, V, VI, and VII, and not guilty as to counts II and III;

Fred Lee Johnson was found guilty on all counts;

Gerald Lee Hubbard and Vivian Hubbard were found guilty on counts I, III, IV, V, VI and VII, and not guilty as to count II;

Addie E. Simmons was found guilty on counts I, III, IV, V, VI, and VII, and not guilty as to count II.

Motions for a new trial for each of the defendants were made, and each such motion was denied, excepting in the case of Addie Simmons, who withdrew her motion for a new trial and later filed an abandonment of her appeal. All defendants were sentenced to the state prison. All defendants excepting Simmons have appealed.

In 1953, Lieutenant Zander of the Los Angeles police department was in the course of conducting an investigation of Vivian Hubbard and her brother, James Weiss, and her son, Fred Johnson, on abortion charges. They were operating from an address on Gault Street, Hollywood, and the officer saw large numbers of girls being taken there. He saw Gerald Hubbard, with his wife Vivian, transporting various women in an automobile to the place where abortions were being committed. Officer Zander knew the relationships which existed between the parties. In conversations with the various women who had been aborted, officer Zander learned that the general method of operating was for the woman seeking an abortion to make a call to "Vivian" at the telephone numbered "Albany 2309"; that she would then be directed by the woman who answered the telephone to go to a drive-in restaurant in the area, where she would be met by a woman who would drive her to the location where the abortion would be performed. Zander also learned that at the abortion establishment on Gault Street, in Hollywood, the operations were performed by a man dressed in a white gown and wearing a white cap and mask; also that the woman to be operated on administered anesthetic to herself by the use of a face mask and contraption strapped to her arm. Zander also learned that Fred Johnson and his wife Patty had been seen at the Gault Street house. Further, the officer found that some women were taken to a house in Malibu by Vivian Hubbard for the purpose of being aborted, and that later some women were taken to the home of appellant Johnson and his wife at 7414 Penfield, where they were given further care and treatment. One of the aborted women identified Weiss, by a picture, as being the man who had operated upon her. Arrests were made in May, 1954 as a result of the investigation and Vivian Hubbard, her brother Weiss and her son Johnson were charged with performing illegal abortions. The officers did not have a search warrant

on that occasion. Those cases were concluded.

In December of 1954, Zander learned of a suspected abortion ring operating in Long Beach. He found in that case that a woman desiring an abortion would call the telephone numbered "Albany 2309", and would then be referred to another number, where a woman by the name of "Vivian" was contacted concerning arrangements for the performance of the illegal abortion. In January of 1955, Lieutenant Zander heard that Vivian Hubbard was performing abortions at an address on Ocean Avenue in Seal Beach. Acting upon the information he conducted another investigation. He checked with the telephone company and learned that the telephone at the address was listed to James Alexander, which he found was an alias of appellant Weiss.

The investigation in the present case began in June, 1955. In July, 1955, Zander was contacted by an investigator for the State Medical Board, Mr. Meade, who told him that he was investigating a report concerning Evelyn Rogers, who was confined in a local hospital as a result of complications arising from an illegal abortion performed upon her. The investigator told Zander that Mrs. Rogers had reported to him that she had arranged for the abortion after having been contacted by telephone by a woman named "Vivian" from a telephone number with a Diamond prefix. She had also told the investigator that she had been instructed to go to the Clock Drive-in restaurant in Long Beach; that when she had gone there she had been driven from the drive-in by a young man in a green Mercury automobile to a house in the Naples area of Long Beach, where the abortion was performed. She further had told the investigator how the operation had been performed, namely by a man dressed in a white surgical gown wearing a white cap and mask, assisted by a man who had instructed her on the use of the anesthetic to be administered to her by way of a facial mask strapped to her wrist. Later, the investigator learned from Mrs. Rogers the

number of the automobile which had been used to transport her, and the investigator gave Zander this information. Zander also learned through Mrs. Rogers that the house where the abortion was committed was located at 159 Syracuse Walk, Long Beach. A check at the telephone company disclosed that the telephone located at that address was listed to Frank Johnson. Based on the description of one of the men furnished by Mrs. Rogers, and his own prior knowledge, Zander suspected that Frank Johnson was in reality the appellant Fred Johnson. The house at the address on Syracuse Walk was rented to Johnson on June 6, 1955.

Officer Zander checked out the information supplied by Mrs. Rogers and discovered that the Albany telephone number she had given him was an answering service. Zander called the Albany number and asked how he could locate Gerald Hubbard and the person at the answering service referred him to Hubbard's home at 6701 Sunnybrae Avenue, Canoga Park, and gave him a telephone number with a Diamond prefix to call. The officer was then referred to another number, Diamond 7-0583, and this number was listed to Hubbard at the Sunnybrae address. There was an extension of that telephone to the Johnson home at 7414 Penfield.

About November 21, 1955, Zander learned that Eugene Jaderquist had contacted officer Bates of the police department and had told the officer that his wife had made arrangements to have an abortion performed; that she had talked with a woman named "Vivian" on the telephone at a number with a Diamond prefix. Jaderquist said his wife had been told to go to the Long Beach Airport, where she would be met by a woman who would take her to the doctor. Later Jaderquist called officer Bates and Zander heard him tell Bates that his wife had been picked up by a woman in a black Mercury car and driven to a house in Belmont Shore with the number 5460, where the abortion was performed. A search of the area by Zander led to the discovery of the house located at 5460 The

Toledo, where most of the abortions in the present case were performed. When Zander located the house, he saw a black 1950 Cadillac automobile parked in front of the place, and by checking found it was registered to Harry Umann, whom he knew to be the attorney for Weiss, Johnson and Hubbard. He also ascertained that the house had been rented by Vivian Hubbard on July 9, 1955, and that the telephone in the place was listed to Gerald Hubbard.

On January 16, 1956, Zander placed the house at 5460 The Toledo under surveillance and a watch was placed and maintained at the airport. At the house the police saw the frequent arrivals and departures of Addie Simmons in the black Cadillac above mentioned, with large numbers of girls who would enter for a while and then be driven away in the same vehicle. They also saw Addie Simmons pick up and later return the girls to the airport. The officers saw Weiss and Johnson entering and leaving 5460 The Toledo.

On February 1, 1956, officer Zander called the telephone numbered Diamond 7-0583 and he recognized the voice of the person answering the telephone as being appellant Gerald Hubbard. Zander represented himself as being a Frank LaPeer and made arrangements for an abortion to be performed on a woman he identified as Clara Martel, and whom he supposedly had gotten pregnant. Hubbard told the officer the price for the abortion would be \$350, and told him to bring the girl to a restaurant in Long Beach. Hubbard assured Zander the operation would be performed by a "real fine doctor and an M.D." and that "this was no fly-by-night operation."

On February 3, 1956, at about 8:00 o'clock p. m., Zander and a group of other officers entered the house at 5460 The Toledo and arrested Addie Simmons, Weiss and Johnson. Upon entering the house, the officers first met Simmons and arrested her and then ran to the upstairs bedroom. While going up the stairs they met Johnson, who, upon seeing them, tried to warn

Weiss. Zander and a photographer entered the bedroom and took a picture of the scene and of Weiss dressed in a white surgical gown with a white mask over his face. Weiss and Johnson were arrested, the house was searched and a large amount of various types of surgical equipment and paraphernalia commonly used in abortions was taken into possession.

After the arrests just mentioned, those defendants were placed in custody. Officers Wahlke and Galindo were directed to go to the Hubbard home at 6701 Sunnybrae in Canoga Park and arrest Gerald Hubbard. After about a forty-five minute wait Hubbard appeared and entered the house. The officers then knocked on the door and when Hubbard answered the knock he asked them in. Galindo was known to Hubbard. Galindo told Hubbard that he was under arrest on an abortion charge and told him of the arrests at the The Toledo address, and further told Hubbard that he (Hubbard) was "in on it." Hubbard asked, "Well, how deep am I in on it?" The house was searched and some papers and notes were recovered which indicated that Hubbard had taken some telephone calls from various women who had called the telephone numbered Diamond 7-0583 to arrange for an abortion. Exemplars of handwriting indicated that Gerald Hubbard and Vivian Hubbard had written the notes found in the house. One of the notes reflected the call Zander had made when he had arranged for the abortion to be performed on the fictitious "Clara Martel." While Hubbard was talking to the two officers, he said, "I knew that was Sergeant Zander on the phone I talked to the other day," and then indicated that he didn't want to talk about it any further. At the police station on the night of the arrests, Zander saw Hubbard and after an exchange of greetings Hubbard said to Zander, "I thought I recognized your voice the other day. It is nice to talk to you again."

Count I charged a conspiracy to commit abortions, and that in furtherance of the conspiracy the defendants committed some ten overt acts such as the renting of the

houses, the installation of the telephones, the meeting and transporting of the women to the house at 5460 The Toledo for the performing of the abortions, Zander's talk with Hubbard over the telephone and various other acts which it appears unnecessary to mention.

Count II charged the abortion on Evelyn Rogers in July, 1955. Mrs. Rogers was pregnant and desired the abortion. Without going into all of the details, suffice it to say that Mrs. Rogers had a call from a woman who said she was "Vivian," and that she, Vivian, could help her; that the cost would be \$350, and the operation would be performed in Long Beach; that Mrs. Rogers should go to the Clock Drive-in restaurant the following Saturday about 1:00 o'clock p. m., where she would be met by a man in a green car. Mrs. Rogers went to the drive-in as directed, met a young man, was taken to the house at 159 Syracuse Walk in the Naples area of Long Beach, where she was met by Johnson and a man in a white mask and gown. She gave one of them \$350, and was then advised of the anesthetic device and how to use it, she was then aborted, and then was driven back to the drive-in. She later became ill and called her family doctor who had her hospitalized. While in the hospital she talked to investigator Meade, as heretofore set forth.

Count III charged the abortion of Margaret Jaderquist. She wanted to terminate a pregnancy, and consulted with a doctor who referred her to a woman known as "Vivian" and a telephone number with a Diamond prefix. She called the telephone number and spoke with a woman who identified herself as Vivian and who quoted her the price of \$350 for the abortion. She was directed to the airport and upon going there with her husband was met by Addie Simmons. Simmons told her husband he could pick up his wife at a named bar and then left with Mrs. Jaderquist and another woman to drive to 5460 The Toledo. When Mrs. Jaderquist entered the house she was met by Johnson who escorted her upstairs, where she saw a man in a

white mask. She gave \$350 to Johnson and was instructed in the use of the anesthetic and was aborted.

Count IV charged the abortion of Nancy Cliff. She placed a telephone call and talked with a woman named Vivian about an abortion, the price of \$350 was quoted, and she was instructed to be at the airport. Addie Simmons picked her up there and drove her with another young girl to 5460 The Toledo. At the house the same course was followed as is set forth in counts II and III. She was told that if there were any difficulties to call Vivian at Diamond 7-0583, and was then returned to the airport.

Count V charged the abortion of Dorothy Robinson. She was given the Diamond telephone number by a friend and she called and talked with a "Vivian." Later she was directed to a place where she would be picked up. She was picked up by Addie Simmons and was taken to a house where substantially the same procedure took place as heretofore related in the other instances.

Count VI charged the abortion of Mary Yoho. She desired to terminate a pregnancy and a doctor gave her the telephone number Diamond 7-0583 and told her to call and to ask for "Vivian." She did as directed. She arranged for the money and was told to go to the airport where she and a girl she later learned to be Marion Powell were picked up by Addie Simmons and taken to 5460 The Toledo. Substantially the same course was followed in her case as in the others already related. She had trouble thereafter and called the name and number which had been given to her, namely Vivian, at Diamond 7-0583, and was told by Vivian to return for further care. She did so return and was treated.

Count VII charged the abortion of Marion Powell. She was referred to Vivian and called her by telephone and made the usual arrangements as heretofore set forth. She was picked up at the airport, taken to the The Toledo house, met by the same people, aborted and returned to the airport.

[1] Appellants' first contention is that the searches of the premises at 5460 The Toledo and 6701 Sunnybrae were illegal because the officers did not have sufficient reason to believe that a felony had been committed at either place, and that the evidence seized therefrom was therefore inadmissible at the trial. The facts as heretofore set forth clearly show that there is no merit to such contention. The arrests came about after careful, painstaking and well-planned police work based upon reliable information. Knowing what they did from their own observation and from what they had learned from those who had been aborted, it would have been difficult for the police to imagine that the defendants were doing anything other than operating an illegal abortion establishment. The fact that the police, in 1954, prior to the decision in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513, may have secured some evidence and information which may have assisted them in ferreting out the alliance in 1956, does not alter the situation. Certainly the police are not required to ignore all that they have learned in the past. The *Cahan* case merely changed a rule of evidence in this state. See, *People v. Moore*, 140 Cal.App.2d 870, 295 P.2d 969; *People v. Wickliff*, 144 Cal.App.2d 207, 212, 300 P.2d 749; *People v. Jaurequi*, 142 Cal.App.2d 555, 298 P.2d 896.

[2] The second contention of appellants is that the trial court committed prejudicial error by allowing the prosecution to take two exhibits, which were in the court's possession, prior to trial in order to subject them to further examination. After the jury had been selected the district attorney requested permission to withdraw two exemplars of the handwriting of Vivian Hubbard and Gerald Hubbard which had been introduced at the preliminary hearing as exhibits. Appellants objected and argued that they had a right to be present at any examination and that it should be conducted in open court. At the time of the withdrawal, the exhibits had not been marked for identification nor introduced into evidence in the trial court. Later on,

over objection, the two exhibits were introduced into evidence and a police handwriting expert testified in relation to them. Appellants rely upon what was said in the case of *People v. Ramirez*, 113 Cal.App.2d 842, at pages 849 to 852, 249 P.2d 307. However, in the *Ramirez* case the exhibits had been introduced into evidence prior to the time they were withdrawn. Further, the withdrawal was done without the knowledge of the defendant, and too, there were comments by the judge which were uncalled for. As we view it, none of the circumstances of the *Ramirez* case is present here. The appellants had the right to have their own expert examine the exhibits after the police expert had concluded his examination, but no request therefor was made. (See, *People ex rel. Knight v. Eames, Co. Ct.*, 115 N.Y.S.2d 248, on the problem of orders of withdrawal generally.) We find no prejudicial error in the course which was followed by the trial court.

[3] The third contention made by appellants is that it was prejudicial error to allow the witness Rogers to testify as to a telephone conversation she had with an unidentified person who represented himself to be an attorney of one of the people who had performed the abortion on her. Mrs. Rogers had, with the police, visited the general scene and neighborhood where she had been aborted. She later received a telephone call from a person who inquired about her physical difficulties and whether she was in a hospital, and in the conversation she was asked in substance if she had been down to where the abortion was committed and she stated "No." In the course of the questioning, while she was a witness, she was asked if the caller had identified himself, and without objection she answered, "I believe he may have said that he was Vivian's attorney * * *." She was then asked to relate, and over objection did relate, the conversation between them. She said that she was asked by the caller if she knew Mr. Meade and if she had gone to Long Beach to point out the house. The evidence was not introduced to prove the truth of the matter as-

sented, but merely to prove the fact that the witness had been contacted and impliedly intimidated. See, *People v. Cunha*, 107 Cal. App.2d 382, 386, 237 P.2d 12. Surely, it was proper to show that an agent of the defendant contacted the witness. See, *People v. Burke*, 18 Cal.App. 72, 91, 122 P. 435; *People v. Kendall*, 111 Cal.App.2d 204, 213, 244 P.2d 418. Who would have known of Vivian, of the abortion, of the state medical board investigator—who would be particularly interested in the health of Mrs. Rogers following the abortion, and whether she had pointed out the house where the abortion had been committed? Certainly the appellants were vitally interested in knowing whether Mrs. Rogers had contacted the police. Under the circumstances of this case, there was no prejudicial error in allowing the witness to testify as to the conversation.

[4] The fourth contention of appellants is that the court unduly and improperly restricted the cross-examination of the witness Eugene Jaderquist regarding his conversation with the police prior to the time the appellants committed the abortion on his wife. We have read the record carefully and we find no errors in the rulings of the court. The trial court has a wide discretion over cross-examination. *People v. Morlock*, 46 Cal.2d 141, 149, 292 P.2d 897; *People v. Winston*, 46 Cal.2d 151, 157, 293 P.2d 40. Cross-examination should be confined to matters which have been elicited from the witness on direct examination. Code Civ.Proc. § 2048; *People v. Watson*, 46 Cal.2d 818, 826, 299 P.2d 243.

[5, 6] Appellants' fifth contention is that the district attorney was guilty of prejudicial error in his argument to the jury. The district attorney argued that (1) the appellants were operating an abortion mill; (2) the women who submitted to such abortions were in danger of suffering great physical injury and (3) the showing of more abortions would have no effect upon the evidence actually introduced. In most of the instances which are now claimed to be erroneous there was no objection made and in such instances the failure to object constitutes a waiver. *People v. Hampton*,

47 Cal.2d 239, 241, 302 P.2d 300; *People v. Sutic*, 41 Cal.2d 483, 496, 261 P.2d 241; *People v. Eggers*, 30 Cal.2d 676, 185 P.2d 1; *People v. Codina*, 30 Cal.2d 356, 362, 181 P.2d 881. In any event, we believe the argument made was well within the permissible limits of argument. See, *People v. Planagan*, 65 Cal.App.2d 371, 407, 150 P. 2d 927; *People v. Eggers*, supra, 30 Cal.2d at page 693, 185 P.2d 1.

[7] The sixth contention of appellants is that they were denied the right to a speedy trial. The record shows that they expressly waived any right which they might have had in such regard. See, *Stewart v. Superior Court*, 132 Cal.App.2d 536, 537, 282 P.2d 582; *In re Lopez*, 39 Cal.2d 118, 119, 245 P.2d 1; *People v. Hocking*, 140 Cal.App.2d 778, 780, 296 P.2d 59.

[8] The seventh contention of appellants is that the court committed prejudicial error by improperly preventing appellants' counsel from questioning a defense witness which questioning would supposedly have proved an alibi for Gerald Lee Hubbard, and also would have impeached officer Zander. Gerald Lee Hubbard was a member of the Los Angeles Fire Department, and appellants called as their witness a person from the Fire Department to show that Hubbard was on duty on a certain date. The witness repeatedly said that the record he kept would not refresh his recollection in regard to who was on duty on the date in question. The record was read into evidence, which we believe was proper under the circumstances. As is said in *Anderson v. Souza*, 38 Cal.2d 825, at page 832, 243 P.2d 497, at page 502:

"As to his reading the memoranda into the record, that is permitted when the code says: 'So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts.' Where proper foundation has been laid the fact that the writing does not refresh the recollection of the witness does not prevent him from testifying from the writing and if his recollection is not refreshed there would be

no other way to testify "from the writing" save to read from it verbatim." See, also, *People v. Keelin*, 136 Cal. App.2d 860, 877, 289 P.2d 520.

[9, 10] Appellants' eighth contention is that the court committed prejudicial error by permitting the introduction into evidence of a sample of the handwriting of Gerald Lee Hubbard taken from him while testifying in his own defense. There was no objection raised when the defendant was asked to write various words, only when they were offered into evidence was there any objection. The defendant waived the objection. *People v. Wissenfeld*, 36 Cal. 2d 758, 766, 227 P.2d 833; *People v. Simeone*, 26 Cal.2d 795, 806, 161 P.2d 369. There was a writing found in the home of the witness which reflected that he had talked to "Frank LaPeer" about "Clara Martel." The witness denied that he had talked with Zander (using the name of Frank LaPeer) about a Clara Martel. In what more logical way could his credibility be tested than to ask him for a sample of his handwriting and thereby let the jury determine whether he wrote the note found in his house? (See, *People v. Zerillo*, 36 Cal.2d 222, 227, 223 P.2d 223, with reference to the scope of cross-examination of a defendant who testified in his own defense.) We believe it was proper under the circumstances to ask for, and to introduce into evidence the exemplars of the witness' handwriting to the end that the jury could compare the writing with the writing on the note found in his home, which showed that he had received the telephone calls he claimed he did not receive. *People v. Klopfer*, 61 Cal. App. 291, 299, 214 P. 878; *United States v. Mullaney, C.C.*, 32 F. 370; *Long v. State*, 120 Tex.Cr.R. 373, 48 S.W.2d 632, 634; *State v. Vroman*, 45 S.D. 465, 188 N.W. 746, 748.

[11] The appellant Gerald Lee Hubbard contends that the evidence against him is insufficient to sustain his conviction. In our opinion the evidence was ample to sus-

tain the jury's determination. A reading of the record discloses without question that he was an integral part of the whole conspiracy. He and his wife Vivian were undoubtedly the main moving parties—it was they who made the arrangements for the abortions, distributed the proceeds and secured the necessary establishments where the operations were performed. The telephone at 5460 The Toledo was listed to Gerald Hubbard and the bills were sent to him at that address. Some of the women aborted were transported to and from the various houses in an automobile registered to him. Further, his statements at the time of his arrest showed his knowledge of the abortions. See, *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Daugherty*, 40 Cal.2d 876, 256 P.2d 911.

[12] Gerald Lee Hubbard lastly contends that the trial court committed prejudicial error by incorrectly instructing the jury that Hubbard would be responsible for crimes committed prior to the time he entered into the conspiracy with the other appellants to commit abortions. The court gave CALJIC instruction No. 932. Appellant's argument, simply stated, is that a conspirator is not liable for substantive offenses committed in the furtherance of the conspiracy if those crimes were committed before his entry into the conspiracy. There is no merit in the contention. See, *People v. Griffin*, 98 Cal.App.2d 1, 44, 219 P.2d 519; *People v. Sherman*, 127 Cal.App.2d 230, 239–240, 273 P.2d 611; *People v. Sears*, 138 Cal.App.2d 773, 791, 292 P.2d 663; *People v. Goldstein*, 136 Cal.App.2d 778, 787, 289 P.2d 581; *People v. Brumback*, 152 Cal. App.2d 386, 314 P.2d 98.

We find no prejudicial error in the record.

The judgments against each of the appellants on the counts heretofore set forth, and the orders denying motions for new trial are, and each of them is affirmed.

WHITE, P. J., and DRAPEAU, Justice pro tem., concur.

**Prentiss MOORE, Plaintiff, Cross-Defendant,
Respondent and Cross-Appellant,**

v.

**Leopold FELLNER and Clara M. Fellner,
Defendants, Cross-Complainants, Appel-
lants and Cross-Respondents. ***

Civ. 22204.

**District Court of Appeal, Second District,
Division 3, California.**

Dec. 2, 1957.

Hearing Granted Jan. 28, 1958.

Suit for \$51,720 claimed as attorney's fees. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment for plaintiff in amount of \$12,825 and plaintiff and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where plaintiff and defendant had contingent fee contract whereby plaintiff who was to receive percentage of amount collected from third party was obligated to handle appeal if defendant so elected, plaintiff who refused to handle appeal from adverse judgment unless he was paid \$2,000 breached contract and could not recover for value of services rendered up to time of breach.

Reversed with instructions.

Parker Wood, J., dissented.

1. Attorney and Client ☞149

Where attorney and client had contingent fee contract whereby attorney was to receive for his legal services a percentage of amount collected from third party, and attorney was obligated to handle appeal if client so elected, attorney who proceeded to handle appeal from adverse judgment without objection from client fully understood that client had no thought of changing attorneys and client was not required to notify attorney that his services on appeal were desired.

2. Attorney and Client ☞166(4)

In suit for attorney's fees on contingent fee contract whereby attorney, who was to receive for his legal services a percentage of amount collected from third

* Opinion vacated 325 P.2d 857.

party, was obligated to handle appeal if client so elected, evidence was sufficient to sustain trial court's finding that attorney had demanded payment of an additional fee of \$2,000 for appeal services and refused to render any further services on appeal unless he was paid that sum.

3. Attorney and Client ☞149

Where attorney and client had contingent fee contract whereby attorney who was to receive for his legal services a percentage of amount collected from third party was obligated to handle appeal if client so elected, attorney who refused to handle appeal unless he was paid additional sum of \$2,000 breached contract and attorney could not recover for value of legal services rendered up to time of breach.

4. Contracts ☞318

There is no concept of law or fair dealing that permits one contracting party to repudiate his obligation to render personal service and hold another party to his reciprocal obligations under the contract.

Sidney Dorfman, Beverly Hills, for appellants and cross-respondents.

George Bouchard, Los Angeles, for respondent and cross-appellant.

SHINN, Presiding Justice.

The plaintiff in this action, an attorney at law, recovered judgment against Leopold Fellner and Clara M. Fellner (hereafter referred to as Fellner, or defendant), for \$12,825 as attorney's fees. He had sued for \$51,720 and he appeals from the judgment, claiming that he should have been awarded the full amount of his claim. Fellner appeals, contending that judgment should have been in his favor. Incidental to these issues was a cross-complaint of Fellner seeking a declaration of his rights as against Moore under the employment contract.

The evidence consists of writings passing between the parties. These are set forth in the margin. The first is the contract of

the employment of Moore.¹ By this agreement Moore was employed to prosecute an action against one Steinbaum for damages for breach of an agreement. Included in the services of the attorney was the defense of an action by one Gerzon for a broker's commission. Moore was given \$500 on account of costs in the first action and the same amount as a retainer in the second action. He was to receive 20 per cent of the amount collected from Steinbaum in a settlement without suit and 25 per cent if the case went to trial or was settled on the eve of trial after full prepa-

ration had been made. The Steinbaum case was tried and resulted in a judgment in favor of Fellner of \$104,500. Gerzon recovered judgment for \$20,000, which was settled for \$17,500. Steinbaum appealed. [132 Cal.App.2d 509, 282 P.2d 584]. Moore, with the consent of Fellner, rendered certain services in connection with the appeal, as hereafter stated.

On March 2, 1954 Moore addressed a letter to Fellner stating that if Fellner wished him to handle the appeal his fee would be \$2,000 plus the necessary costs.²

1.

"May 29, 1951

"Mr. Prentiss Moore
"Attorney at Law
"453 South Spring Street
"Los Angeles 13, California.

"Dear Mr. Moore:

"This will confirm our oral understanding that you are to represent myself and my wife in the prosecution of a claim against Morris Steinbaum arising from a breach of contract dated the fourteenth day of April 1951 and also that you are to defend an action against us filed by Irvin D. Berzon in the Superior Court, being Action No. 585893.

"As compensation for your services in these matters we agree to pay you 20% of any amount recovered from Morris Steinbaum before trial and 25% if the action proceeds to trial, including three days before the start of the trial. We agree to advance all necessary costs, including court costs, depositions or any other costs incurred incident to the preparation of the case such as appraisers' fees and expert witness' fees, but not any fees to any other attorneys you may employ in these matters. We are depositing at this time with you \$500.00 on account of such costs and agree to make available any additional amounts necessary for these purposes upon notice from you. However, all these advances will be deducted from the amount to be recovered and the compensation of 20% and 25% resp. will be based on the net amount.

"In addition to this we are depositing another \$500.00 as an advance payment which will be a retainer. However, this amount will be deducted from your compensation of 20% or 25% resp.

"It is understood that this agreement covers our understanding to the conclu-

sion of these two cases in the Superior Court and, at our option, in any of the higher courts.

"Yours very truly
"Leopold Fellner
"Clara M. Fellner

"Approved:
"Prentiss Moore"

2.

"March 2, 1954

"Mr. and Mrs. Leopold Fellner
"9970 West Pico Blvd.
"Los Angeles, California

"Dear Mr. and Mrs. Fellner:

"The deposit of \$110,000.00 of Treasury Certificates has been made by the defendant Steinbaum and we have received notification that the Clerk's Transcript has been prepared and the appeal is proceeding.

"The reason for writing you at this time is to advise you that in our opinion the respondents' briefs and the costs on appeal will approximate \$500.00, of course, depending upon the length of our reply to the appellant's brief. We should like to have you advise as soon as possible as to whether you desire this office to handle the appeal and if so, our fee will be \$2,000.00, plus the necessary costs above outlined. Should you desire any other firm to handle the appeal, kindly notify us as soon as possible and I am enclosing the only current obligation which is now due, the cost of the balance of the Reporter's Transcript in the amount of \$16.00.

"Respectfully,

"Moore, Webster, Lindelof & Hughes
"Prentiss Moore

"J

"Prentiss Moore"

On March 3rd Fellner replied.³ The reference was to the provision of the employment contract reading as follows: "It is understood that this agreement covers our understanding to the conclusion of these two cases in the Superior Court and, at our

option, in any of the higher courts." Moore replied under date of March 10th.⁴

On March 13th Fellner wrote Moore again calling attention to the provision of the agreement we have just quoted.⁵ To

3.

"March 3, 1954

"Mr. Prentiss Moore
"417 South Hill Street
"Los Angeles 13, Calif.

"Dear Mr. Moore:

"I have received your letter of March 2nd and I have paid the bill of \$16.00 to the Reporter.

"I assume that you overlooked that part of our agreement which specifically stipulates that the agreed fees cover and include all the appeals. I would appreciate it if you would let me know your considered opinion about this matter.

"Whatever the court costs will be we will make payments upon receipt of the bills to the court Reporter as in the past.

"Cordially yours,

"Leopold Fellner"

4.

"March 10, 1954

"Mr. Leopold Fellner
"9970 West Pico Blvd.
"Los Angeles, California

"Dear Mr. Fellner:

"I am at a loss to understand the position taken in your letter of March 3rd inasmuch as during the negotiations which we had leading to the making of our agreement with respect to the fees of this office, it was clearly understood to be through proceedings in the Superior Court.

"As you may recall, you pointed out at the time you corrected the letter which we had prepared for your signature on May 25, 1951, (altered by your letter of May 29, 1951) that what you wanted clearly understood was, regardless of the outcome of the proceedings in the Superior Court, you wanted to have the opportunity of choosing other counsel if you saw fit after the termination of the litigation in the Superior Court.

"As you well know, we at no time ever made any agreement that presupposed the carrying of your litigation beyond the Superior Court under the contingent fee arrangement of twenty-five per cent of the recovery from Morris Steinbaum any more than it would be assumed that we would carry an appeal in the event the litigation was lost in the trial court,

through the state appellate courts and possibly the Supreme Court of the United States, without any compensation. Your only request was that you be allowed the opportunity of changing counsel after the determination of the proceedings in the trial court.

"In accordance with that understanding we wrote you on the 2nd, due to the imminence of the appeal, to advise you that it was still satisfactory with this office for you to choose any counsel for the purpose of defending your rights on appeal; that should you care to have this office represent you in the appeal, that our fee would be \$2,000.00 in addition to any costs on appeal.

"As you may recall, you asked for and were given the balance of costs that had been deposited in connection with the trial litigation after the judgment had been entered. We received notice that the next amount due is \$25.80, payable to the County Clerk for preparation of the Clerk's Transcript on Appeal, which must be paid by March 14th.

"Moore, Webster, Lindelof & Hughes

"Respectfully,

"Prentiss Moore"

5.

"March 13, 1954

"Messrs. Moore, Webster, Lindelof
& Hughes

"417 South Hill Street
"Los Angeles 13, California

"Dear Mr. Moore:

"I have received your letter of March 10th. The reading of it was quite a shocking experience to us. As I outlined in my letter of March 3rd we were confident that you overlooked the terms of our agreement and that your considered opinion, based on the terms of the contract, would not differ from ours.

"Your statements and implications are false and designed to distort the issues. We never considered and negotiated about anything else but a contingency fee which would cover the litigation to the final satisfaction of our claim, and if necessary, at our option, any litigation to the highest court. The purpose of a contingency arrangement had no other purpose for us but to assure ourselves against payments of attorneys' fees which would

this letter Moore replied on March 19th.⁶ Moore declined to sign a substitution of attorneys and Fellner obtained an order in the District Court of Appeal for the substitution of other counsel on the appeal.

Thereafter on June 30th Moore addressed another letter to Fellner.⁷

From these writings the court made its findings and conclusions. In brief, the find-

be difficult for us to handle. We emphasized this in our agreement by saying: 'of any amount recovered from Morris Steinbaum.' As if this would not be enough, we emphasized it again: 'it is understood that this agreement covers our understanding to the conclusion of these two cases in the Superior Court and, at our option, in any of the highest courts.'

"I do not understand what bearing our right to change counsel would have on this matter, still I wish to state the facts as they are. When I asked you during our negotiations what the purpose of a retainer fee was, when there is a contingency fee arrangement, you explained that this was just something like earnest money in case I would change counsel and there was never any suggestion on my part that I would consider this possibility.

"You used the fact that I picked up the balance of our deposit with you to distort the issues. You know well what happened. When we had to pay, without prior notice from you, over \$1,500 to the Court Recorder and Appraiser, I told you that it was very difficult for us to raise this money on such a short notice. Then I suggested that, as we were paying the bills direct to the Court Reporter, and other expenses, it would not serve any purpose to have a deposit lying around in your office.

"We cannot see any possibility of a misunderstanding on your part. We cannot look at it in any other way but that you tried to take advantage of our position. This, of course, has disrupted and destroyed any relationship of confidence between us. We must consider that you have deliberately breached our agreement of May 29th 1951. For that reason 1) we consider your relationship as our attorney terminated by your conduct and we will seek other counsel to represent us in this litigation. 2) The agreement of May 29th, 1951, between us has been terminated by you and we must accept the termination of the contract and act accordingly.

"Our new counsel will contact you as soon as possible. He will conduct any necessary negotiations with you in our behalf.

"Yours very truly,
"Leopold Fellner"

6.

"March 19, 1954

"Mr. Leopold Fellner
"9970 West Pico Blvd.
"Los Angeles, California

"Dear Mr. Fellner:

"I have your letter of March 13th. Of course, most of the statements you make in your letter as to facts are unfounded. There is no attempt by me to breach our agreement of May 29th as you state. In writing you I was merely endeavoring to clarify my position so far as the appeal of your case was concerned.

"From your correspondence, I can only conclude that you are exercising your option to employ other counsel for the appeal, and that the fee arrangement is still in effect. According, I will expect payment of twenty-five per cent of all funds received from Morris Steinbaum.

"Respectfully,
"Prentiss Moore"

7.

"June 30, 1954

"Mr. and Mrs. Leopold Fellner
"9970 West Pico Blvd.
"Los Angeles, California

"Dear Mr. and Mrs. Fellner:

"By your action in securing an order of court June 22, 1954, substituting Sidney Dorfman as your attorney in place of myself in the case of Fellner v. Steinbaum, you have made it impossible for me to complete the performance of my part of any agreement that we had regarding your representation in that case. Your discharge of me was without cause and was wrongful. I hereby elect to treat the contract of my employment as your attorney in that matter as rescinded and will shortly commence an action for the determination of the reasonable value of my services to date. In this action you will receive credit for the \$500.00 retainer that you gave me at the time the representation first arose.

"I am sending a copy of this letter to Mr. Sidney Dorfman for his information.

"Yours truly,
"Prentiss Moore

"CC: Mr. Sidney Dorfman
"10332 La Grange Avenue
"Los Angeles 25
"California"

ings were the following: (1) Plaintiff demanded of Fellner \$2,000 as additional compensation for handling the appeal and refused, after demand by Fellner, to handle the appeal unless he was paid \$2,000; he was discharged by the Fellners and refused to sign a substitution of attorneys and, (2) "that it is not true that the defendants discharged plaintiff without cause or justification"; (3) On June 30, 1954 plaintiff rescinded his agreement with defendants; (4) At the time of his discharge plaintiff had "substantially performed his part of the agreement with defendants, and the services rendered by him were of value to defendants" and, (5) the services of plaintiff were of the value of \$13,325, that the same would be a fair and reasonable compensation to plaintiff, and that plaintiff had been paid on account the sum of \$500. As conclusions of law the court found: (1) Moore was required to represent Fellner on the appeal without further charge; (2) His demand for an additional fee was wrongful and a breach of his contract. But the court nevertheless concluded that Moore was entitled to judgment for the reasonable value of his services.

We shall discuss the questions involved in the following order: (1) Was Moore required to represent Fellner on the appeal without compensation other than the contingent fee. (2) Did he demand payment of an additional fee of \$2,000 and refuse to render any further services on the appeal unless he was paid that sum. (3) If Moore breached his contract was he discharged for cause and, (4) if he was discharged for cause was he entitled to recover for the value of his services to the date of his discharge.

[1,2] It is conceded by Moore that he was required to represent Fellner on the appeal if Fellner elected to avail himself of his services. His contention is that he was never notified that Fellner desired his services on the appeal. This is a specious contention. He had done everything there was to do up to the time he made his demand for an additional fee. He

had arranged for the deposit of \$110,000 in U. S. Treasury Certificates to stay execution of the judgment; he had arranged for clerk's and reporter's transcripts, and notified Fellner of the charges; Fellner had paid the charges and advised Moore that any additional costs would be paid. Nothing remained to be done by Moore except to write a respondent's brief. The rendition of these services, with the consent of Fellner, proved beyond question that Fellner expected to be represented on the appeal by Moore and by no one else. And it is equally clear that up to the time he conceived the idea of charging an additional fee Moore fully understood that Fellner had no thought of changing attorneys. Notice to Moore that his services on the appeal were desired was unnecessary and would have been an idle act. The demand for additional compensation was an ultimatum. It left Fellner no choice between continuing with Moore under the contingent fee agreement and employing other counsel, but only a choice between paying an additional \$2,000 to Moore and obtaining other counsel. The argument that Moore would have rendered services on the appeal under the contingent fee agreement if he had been requested to do so is but a shallow pretense, since it is clear from the correspondence that he had no such intention. The finding to that effect was correct and is conclusive on the appeals.

Moore contends that he did not demand payment of an additional fee and did not refuse to handle the appeal if it was not paid. The express findings of the court were to the contrary and are likewise conclusive. There is nothing in the correspondence we have quoted that tends in the slightest degree to support the contention presently made, and there was no other evidence on that subject.

[3,4] The findings just mentioned established a breach of contract by Moore. It is true that Fellner notified him that he was discharged, but that was a mere formality. When Moore refused to handle the appeal without additional compensation

and gave Fellner a choice between paying it and obtaining other counsel, he discharged himself. Fellner merely acquiesced in his retirement from the case.

This is not merely a case where an attorney has been discharged for cause, even if we assume that Moore was discharged, and did not withdraw himself from the case. It is a simple case of breach of contract by the attorney.

The question is whether an attorney who undertakes to render an entire service may quit when an important part of the work remains undone and deserve to be paid for partial performance. As well might a surgeon claim compensation when he had quit in the middle of an operation, or a barber when he had shaved half of a customer's face. The answer is that there is no concept of law or fair dealing that permits one contracting party to repudiate his obligation to render personal service and hold another party to his reciprocal obligations under the contract. If this were permitted one who had contracted to render an entire service for an agreed price could avoid loss under a bad bargain by merely stopping work at any stage and demanding compensation for partial performance. Contracts for personal services would be worthless.

The judgment in favor of Moore cannot be sustained unless there is some special rule of the law of contracts that is applicable only to lawyers. But this could not be. The law is the same for lawyers as for anyone else who undertakes to render personal service.

It is evident that the California case law on the subject has been misunderstood. The only case cited by plaintiff as authority for his contention that he was entitled to recover for partial performance, even if he was discharged for good cause, is *Sal-*

pek v. Schoemann, 20 Cal.2d 150, 124 P.2d 21. It is said by Moore that this case established the rule that an attorney employed on a contingent fee basis and who is discharged for good cause may recover the value of his services to the date of his discharge. This is the rule where the attorney has rendered part performance and stands able and willing to fulfill his contract. That was the situation in the cited case. The attorney had not breached his contract and breach of contract is the controlling fact in our case.

Plaintiff has cited cases which hold that an attorney who is wrongfully discharged may recover the value of his services to the date of his discharge, but these, obviously, are not in point.

The finding that Moore rescinded the contract of employment on June 30, 1954 is without support in the evidence. There was no contract in existence at that time. And since Fellner had given Moore no cause for rescinding the contract, Moore's notice of rescission was ineffective for any purpose.

The views we have expressed on Fellner's appeal also dispose of Moore's appeal and his claim that he was entitled to recover not \$12,825 but \$51,750.

Upon the facts found judgment should have been rendered in favor of the defendants.

The judgment is reversed with instructions to the trial court to vacate the present judgment, make new conclusions of law, and enter judgment on the findings and conclusions in favor of defendants Fellner.

VALLEE, J., concurs.

PARKER WOOD, J., dissents.

155 Cal.App.2d 496

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles L. ARENDS and Andrew P. Stiller,
Defendants,

Charles L. Arends, Defendant and Appellant.
Cr. 5730.

District Court of Appeal, Second District,
Division 1, California.

Nov. 26, 1957.

Hearing Denied Jan. 23, 1958.

Defendant was convicted on seven counts of grand theft of money. The Superior Court of Los Angeles County, H. Burton Noble, J., entered judgment of conviction and an order denying defendant's motion for new trial, and the defendant appealed from the judgment, the order, and "imposition of sentence." The District Court of Appeal, White, P. J., held that where Deputy District Attorney, who had prepared to try case, but who was called as witness for prosecution and did not try case, testified on direct examination concerning offer by defendant to plead guilty, and, on cross-examination by defendant's counsel, he was asked if he did not determine, without hearing any evidence, that defendant was guilty beyond reasonable doubt, testimony of Deputy District Attorney on cross-examination and on redirect that he had studied the case and was prepared to try it and that he was convinced that defendant was guilty constituted prejudicial error.

Judgment and order reversed, cause remanded for new trial, and attempted appeal from "imposition of sentence" dismissed.

1. Criminal Law §1037(1, 2)

Generally, assignment of misconduct and request that court admonish jury to disregard objectionable argument or conduct of prosecuting officer is a necessary prerequisite for complaint in appellate tribunal, but where examination of entire record fairly shows that acts complained of are

of such character as to have produced effect which, as reasonable probability, could not have been obviated by any instructions to jury, then absence of such assignment and request will not preclude defendant from raising point in appellate tribunal.

2. Criminal Law §1037(1, 2)

Where Deputy District Attorney, who had prepared to try case, but who was called as witness for prosecution and did not try case, testified on cross-examination and on redirect that he had studied case and was prepared to try it and that he was convinced that defendant was guilty, his allegedly improper statements could be considered by District Court of Appeal on appeal by defendant from judgment of conviction though there was no assignment by defendant of misconduct on part of Deputy District Attorney or a request that jury be admonished to disregard statements, since no admonition could have removed prejudice engendered by statements.

3. Witnesses §269(2), 288(2)

Where Deputy District Attorney, who had prepared to try case, but who was called as witness for prosecution and did not try case, testified on direct examination concerning offer by defendant to plead guilty, and, on cross-examination by defendant's counsel, he was asked if he did not determine, without hearing any evidence, that defendant was guilty beyond a reasonable doubt, and he testified on cross-examination and on redirect that he had studied case and was prepared to try it and that he was convinced that defendant was guilty, his statements could not be excused on ground that defendant's counsel "opened the gates" by his cross-examination.

4. Witnesses §288(1)

Prosecution may not, on redirect examination of witness for prosecution, introduce evidence that was not competent on direct examination, even though testimony relative thereto was elicited by defendant on cross-examination.

5. Criminal Law §700

Prosecuting officer may use every legitimate means to bring about a just conviction.

tion, but he has duty to refrain from improper methods calculated to produce a wrongful conviction.

6. Criminal Law §719(3), 1171(1)

Where Deputy District Attorney, who had prepared to try case, but who was called as witness for prosecution and did not try case, testified on direct examination concerning offer by defendant to plead guilty, and, on cross-examination by defendant's counsel, he was asked if he did not determine, without hearing any evidence, that defendant was guilty on reasonable doubt, testimony of Deputy District Attorney on cross-examination and on redirect that he had studied the case and was prepared to try it and that he was convinced that defendant was guilty constituted prejudicial error.

7. Criminal Law §1186(4)

Saving grace of section of the constitution providing that judgment should not be reversed unless error results in miscarriage of justice did not prevent reversal of conviction because of improper statements by Deputy District Attorney, who testified as a witness, on cross-examination and on redirect that he had studied case and was prepared to try it and that he was convinced that defendant was guilty. West's Ann.Const. art. 6, § 4½.

8. Criminal Law §1186(4)

Section of the constitution providing for reversal of judgment only if error results in miscarriage of justice does not mean that judgment will not be set aside merely because evidence may be able to stand up under weight of the judgment and may be convincing proof of defendant's guilt. West's Ann.Const. art. 6, § 4½.

9. Criminal Law §780(1)

Where both defendant and his codefendant were charged with grand theft of money, and neither was called as a witness for or against the other, and codefendant testified solely on his own behalf, trial court did not err in refusing defendant's requested instruction regarding the testimony of an accomplice.

D. LaVelle Nickerson, Inglewood, and Ann Ruth Grant, Bell Gardens, by D. LaVelle Nickerson, Inglewood, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County containing seven counts, defendants were accused in each count of the crime of grand theft of money from California Rubber Products, Inc., a corporation. Defendants pleaded not guilty as to each count. Defendant Arends' motion to dismiss under Penal Code Section 1382 was denied, as was his motion for a severance of his trial from that of his codefendant. Trial by jury resulted in verdicts finding defendant Stiller not guilty on each count, and defendant Arends guilty on all counts. The latter's motion for a new trial was denied, as was his application for probation, and he was sentenced to State Prison on each count, the sentences to run concurrently. From the judgment of conviction, the order denying his motion for a new trial, and from the "imposition of sentence", defendant Arends prosecutes this appeal.

With regard to the factual background surrounding this prosecution the record reveals that California Rubber Products, Inc. was a corporation engaged in the manufacture of rubber products from various raw materials, including crude rubber and other synthetics, but not a product called GNA Neoprene, a synthetic rubber substance manufactured by E. I. duPont de Nemours & Co. (hereinafter referred to as duPont Company). This latter product was purchased from purveyors thereof.

William E. Shawger was President and General Manager of California Rubber Products, Inc., in 1954 and 1955. Miss Viola Burger was Secretary and Treasurer of the corporation, worked in the office thereof and handled the purchase orders. Appellant Arends was the factory Superintendent of the rubber shop and in complete charge of the rubber manufacturing. Ordinarily, in handling the purchase orders,

Miss Burger would receive information from the shop superintendent (appellant) on a requisition sheet, that certain crude materials were needed. From the information on the requisition she would prepare a purchase order, each of which was numbered, and put the number of the purchase order on the requisition. Then she would telephone to the purveyors of the crude material and give them the purchase order number, send them the confirming order, and put a copy of the order on Mr. Shawger's desk. After the material had been picked up or shipped, along with a bill of lading, the purveyors would send a bill to California Rubber Products. The bills were checked with the bills of lading which had accompanied the materials, and when the amounts were verified, the bills would be put aside to be paid. At the time they were paid, Miss Burger would make out a check on a California Rubber Products form, and sign it. The checks, along with the bills for which they were payment, would be put on Mr. Shawger's desk for his signature. After he signed them, always without looking at the invoices, Miss Burger would send them to the appropriate purveyor. Mr. Shawger had no recollection of having seen a purchase order for GNA Neoprene go across his desk during the six years preceding February 27, 1956, and he used none during that period. There were times when the appellant would call Miss Burger and ask her for a purchase order number, saying that he had the supplier on the telephone and wanted to give him the order number. In those instances Miss Burger would give him a number, put aside the purchase order form carrying that number, and when the requisition came to her she would type up the purchase order and mail a confirming order. She would not make out a pick-up slip for the California Rubber Products truck driver to get the material in those cases, as she usually did.

Mr. Shawger was acquainted with defendant Stiller, and saw him at California Rubber Products occasionally when he came to visit with the appellant. Mr. Shawger

never gave Stiller permission to take any raw material or any products of the California Rubber Products for his own use, or to buy or receive any crude material from the suppliers to the California Rubber Products Company and have the materials charged to the California Rubber Products Company. Specifically, he did not give Stiller permission on or about December 15, 1954, January 19, 1955, February 21, 1955, March 15, 1955, April 6, 1955, May 27, 1955, or August 5, 1955, the dates charged in the information, or any time at all, to receive from the duPont Company 3,000 pounds of GNA Neoprene and charge it to the California Rubber Products Company. He never gave one Albus, hereinafter referred to, permission to go to any of his suppliers of material and receive from them any material and have that material charged to the California Rubber Products Company. Mr. Shawger did not on or about December 15, 1954, January 19, 1955, February 21, 1955, March 15, 1955, April 6, 1955, May 27, 1955 or August 5, 1955, give the appellant permission or authority to order, charge to California Rubber Products Company, or receive, 3,000 pounds of GNA Neoprene from duPont for his own personal use.

Illustrative of the methods used by appellant in the transactions upon which the charges contained in the seven counts were grounded is the following résumé of the evidentiary features of Count I of the information. On December 15, 1954, Miss Burger received from the appellant a requisition calling for 3,000 pounds of "GNA NeoP". It had the signature of the appellant in the space marked "Approved", "duPont" in the corner, and "7849" in the appellant's writing in the space for the "P.O. No.". Miss Burger made up a purchase order No. 7849, referred to on the requisition, dated it December 20, 1954, signed it, and put "confirmed" on it, indicating that the order had been telephoned to duPont.

DuPont issued a bill of lading, which would accompany the delivery of the product which had been purchased from duPont,

addressed to California Rubber Products Company, on which appeared "Customer Order No. 7849", the purchase order of California Rubber Products Company. An invoice was received by the California Rubber Products Company from duPont, and it included on it the notation that it was for "Customer Order No. 7849", for Neoprene type GNA, for \$1299.60. The amount of this invoice was included in a check to duPont from the California Rubber Products Company dated January 31, 1955.

Paul Albus, who worked for the Montebello Rubber Company, and worked sometimes for Custom Rubber Products, which was owned by Stiller and the appellant, was given a purchase order number by Stiller, who said that it covered 3,000 pounds of GNA billed to California, and was told by him to go to duPont, pick up the Neoprene, and deliver it not to California, but to Custom. Albus got a truck which was available and went to duPont, where he gave them the purchase order number which he had been given, and got the GNA Neoprene and a bill of lading. He then took it to Custom and unloaded it. It stayed there for a few days.

In December of 1954, Mr. Snow, secretary of the Fullerton Manufacturing Corporation, manufacturers of molded rubber products primarily for the oil fields, received a telephone call from defendant Stiller, who had been connected with that company, in which Stiller asked him if he was using Neoprene. Mr. Snow said that he was, and Stiller said that he had some on hand, and asked if Mr. Snow could take it off his hands. Mr. Snow told him that he could if it was fresh. Stiller told him to send the driver up and he would give him a sample bag. Mr. Snow did, and found the material to be good, so he bought it. The company had theretofore bought GNA Neoprene from duPont for 44 cents a pound, and defendant Stiller sold it for 40 cents a pound. One or two days after the conversation, Mr. Snow sent his truck driver, Roy Todd, along with a check for \$1,230 made payable to Stiller, to pick up

the GNA Neoprene. Todd went to Custom Rubber, gave the check to Albus, who had been told by Stiller that Fullerton Manufacturing would pick up the Neoprene and leave a check, and took the Neoprene back to the Fullerton Manufacturing Company. Albus gave the check to Stiller.

Markings on the check showed that it was endorsed with the name of A. P. Stiller and cashed on December 21st, by the same person at the Eastern-Sheila Branch of the Citizens National Bank. The records of the Hawthorne Branch of the Bank of America showed that on December 23, 1954, a deposit of \$500 in fifty dollar bills was deposited in that bank to the account of C. L. Arends, appellant herein.

Except for dates and amounts of money involved, the foregoing may be regarded as a fair epitome of the factual situation prevailing as to Counts II, III, IV, V and VI.

Since the facts upon which Count VII was based led to the apprehension of both defendants, we shall here narrate them in detail. Mr. Jordan, an employee of duPont, and Mr. Shawger, President and General Manager of California Rubber Products met at a social gathering on July 19, 1955. Mr. Shawger mentioned that Miss Burger, his purchasing agent, was no longer with him because of irregularities that were found. Mr. Jordan asked Mr. Shawger what he was doing with all of the GNA Neoprene. Mr. Shawger told him that they didn't use any. Mr. Jordan then said that Mr. Shawger had used 18,000 pounds in the last six months. The next morning Mr. Shawger started to check into it at California Rubber, and thereafter notified the District Attorney's office. He spoke to Mr. Drebin, Mr. Hawkins and Mr. Terry from that office. About two weeks later the appellant told Mr. Shawger that they had a large order for Neoprene and he would have to get some right away. Mr. Shawger told him to put in his requisition and order it. A requisition, in the appellant's handwriting, was prepared. A California Rubber Products Company purchase order was prepared from the requisition. The order was

telephoned in. Mr. Shawger got in touch with duPont and the District Attorney's office.

Stiller instructed Albus to go to duPont and pick up 3,000 pounds of GNA under a certain California purchase order number, which he wrote on a piece of paper. Albus got a truck and went to duPont, where he told the shipping and receiving clerk that he would like to pick up 3,000 pounds of GNA under the California purchase order number. He got it, along with a bill of lading. After it was loaded on the truck, he took the Neoprene to Custom Rubber and unloaded it. He returned the truck, and was stopped by Mr. Hawkins and Mr. Terry from the District Attorney's office.

Appellant did not testify as a witness in his own behalf, resting his defense on the testimony of character witnesses who attested to his good reputation for truth, honesty and integrity, and witnesses who testified that the general reputation of Mr. Shawger, President and General Manager of California Rubber Products Company for the same qualities "around California Rubber" was bad.

Defendant Stiller called as a witness in his own behalf, testified that Custom Rubber was a partnership and that he and appellant were partners therein. That he was also a part owner of Custom Rubber Products. That he was acquainted with appellant for some 22 years, and that he relied, depended upon, and trusted appellant.

That in the early part of December, 1954, appellant telephoned the witness and told him that he could buy some Neoprene at an attractive price, which was 28 cents a pound in 3,000 pound lots. Stiller said that he didn't think they could afford to buy it. The appellant told him to think it over. Three or four days later Stiller telephoned to the appellant and asked him if he had any of a certain stock which he needed. The appellant said that they had it, and Stiller ordered a small batch. The appellant said he could fix him up with it in the next day or two, and then asked Stiller if he had given the Neoprene GNA any further

thought. Stiller said that they didn't have the money and didn't need it at Custom at that time. A day or two later the appellant called Stiller and said that he had the stock he wanted, and Stiller said that he would arrange to have Paul Albus, who worked for Custom, pick it up. The appellant said that the man, "Bill", who had contacted him about the Neoprene had offered it to him at 28 cents a pound, and was "on his neck" to get it off his hands. Stiller said he didn't know what to do with it. The appellant said that he would go down and see Stiller. About 5:30 that evening the appellant went to Custom Rubber. He told Stiller that he thought they ought to buy the Neoprene at the attractive price. Stiller said that they had no money to buy it with, and that they had a job coming up, but it might not break for a month or six months. He said that he didn't think it was feasible to invest any money in the Neoprene and put it aside, because it might age on them and give them trouble later on.

The appellant then said that he would tell Stiller the whole story on how he was going to buy the Neoprene at 28 cents a pound. He said a man delivered some rubber to him at California Rubber Products, and asked the appellant if he could use some Neoprene at an attractive price; and that they had a large surplus at duPont which was not carried on inventory, and the only way it could be moved would be on a bona fide purchase order from some company. Stiller said that they didn't have any credit established with duPont, so their purchases would have to be C.O.D. The appellant said that he could supply the purchase order number from California Rubber Products and would pay the man 28 cents a pound cash, and that California would never be billed. Stiller said that they still could not buy it because they had no means of paying cash for it. The appellant asked him why he didn't call Mr. Snow at Fullerton, as there was a possibility that they could sell it to him for 38 cents a pound C.O.D., pay for the Neoprene immediately, and each have a nickel a pound profit. Stiller telephoned to Mr. Snow at Fullerton

and told him that he had 3,000 pounds of GNA on hand, referring to the 3,000 pounds of Neoprene which the appellant had told him about, although he did not have it at that time. He told Mr. Snow that he had a big job coming up but didn't know how soon it would break, and that he didn't want to keep it on hand too long. He asked Mr. Snow if he would be interested in buying it at 41 cents. Mr. Snow said that he had just bought some, but that if Stiller had it at the end of the week he might be interested. He suggested that Stiller give him a call at the end of the week.

Stiller telephoned to Mr. Snow at the end of the week and told him that he still had the Neoprene. Mr. Snow said that he could use it and would make arrangements to pick it up on Monday. Stiller told him to make it Tuesday at noon, and to send a check. Stiller then called the appellant and told him that Mr. Snow had said that he would send a truck on Tuesday to pick up the Neoprene, and that he should arrange to have the Neoprene delivered to Custom Rubber Products on Monday. The appellant said that he would. Monday morning the appellant telephoned to Stiller and said that California's truck was all loaded up, and asked Stiller to have Albus rent a truck and go to duPont to pick up the Neoprene on a California purchase order. The appellant gave Stiller a purchase order number over the telephone. Stiller spoke to Albus and relayed the conversation he had had with the appellant, gave him the purchase order number over the telephone, and told him to pick up the Neoprene on the California Rubber Products purchase order. Later that day Stiller saw Albus and the latter gave him two copies of a bill of lading and a check for \$1,230 from Fullerton Manufacturing Company. Stiller went to the bank and cashed it. He then telephoned to the appellant and told him that the Neoprene was picked up, the check was delivered and cashed, and that he had his \$840 to pay for the Neoprene along with his share of the profits, which all totalled \$1,030. The appellant said that he was going to meet Stiller at Custom after work-

ing hours so that he would have the money to pay for the Neoprene the next day. That evening Stiller gave to the appellant \$1,030, which was \$840 to pay for the 3,000 pounds of Neoprene at 28 cents a pound, and the balance of \$190 as his share of the profits. Stiller kept for himself \$190 profit plus \$10 for the truck expense.

A month or five weeks later Stiller heard again from the appellant about Neoprene, and there was a second transaction carried out substantially as the first one had been; Stiller got a sum of money from the resale of the Neoprene to Fullerton and split it up, giving \$1,030 to the appellant. The same thing was done on a third, fourth and fifth occasion.

As to the sixth transaction, defendant Stiller testified that in late July he had made arrangements with Mr. Shawger, President and General Manager of California Rubber Products, for the witness to come to the latter's plant to "mix" some stock. Accompanied by Albus, the witness arrived about 6:30 p. m. and appellant opened the door. The latter pointed to some Neoprene near the rear door and stated that it belonged to Custom Rubber. After the witness and Albus finished mixing the rubber, they loaded it on the truck, and then they loaded about three-quarters of the Neoprene on the truck; the next day appellant brought the balance of the Neoprene to Montebello; it was then sold to Fullerton, and the witness got a check from Fullerton, cashed it and gave appellant \$840 for the Neoprene and \$190 as his share of the profit.

On the seventh occasion, according to the testimony of defendant Stiller, appellant told him during the latter part of July, 1955 that, "this fellow Bill had another 3,000 pounds of Neoprene", and the witness told appellant that maybe they could buy that load for Custom as they had some job pending, but he did not contact Fullerton on this load. He testified further that the first knowledge that he had that California Rubber was being charged for this Neoprene was during the interrogation at

the district attorney's office; he believed appellant—that a bill would not be received by California Rubber; he understood appellant was going to pay for it; he relied completely upon appellant. The witness further testified that he honestly believed when he gave appellant the \$840 on each of the six transactions when the GNA was sold to Fullerton that he was paying for the purchase of the GNA Neoprene.

We shall first give consideration to appellant's contention that Deputy District Attorney Ritzi was guilty of prejudicial misconduct while testifying as a witness for the People. In this regard it appears that Mr. Ritzi was first assigned to try the case against appellant and was prepared so to do on the morning the case was called for trial. That he and Mr. Carr, the deputy district attorney who actually tried the case, had examined the same and "had many discussions on this case". However, Mr. Ritzi did not actually participate in the trial, but during the progress thereof was called by Mr. Carr as a witness in behalf of the People and testified concerning an offer made by appellant to plead guilty. On cross-examination Deputy District Attorney Ritzi was asked by appellant's counsel about the former's conversation with appellant, and in that connection was interrogated as follows:

"Q. (By Mr. Gershenson, appellant's counsel): In other words, that morning (the date of the conversation) you had determined, without hearing any evidence, that Mr. Arends (appellant) was guilty beyond a reasonable doubt? A. Counsel, I had read the file, and I concluded in my own mind that it was a proper case, certainly to take to trial. A preliminary hearing had already been had in this matter, and the evidence was heard in the Municipal Court, and the defendant was there held to answer; and it was brought up to the master calendar and it was examined by another deputy district attorney, and then it was examined both by Mr. Carr and myself, and we had many discussions on this case.

"Mr. Gershenson: Move the answer be stricken, your Honor, as not responsive.

"The Court: Motion is denied.

"Q. By Mr. Gershenson: Did you, without any evidence, hearing any witnesses, determine in your mind that Mr. Arends was guilty beyond a reasonable doubt?

"The Witness: Counsel, I have never taken a trial—a case to trial, in which I had not in my own mind concluded that the defendant should be tried. We have an obligation.

* * * * *

"Q. By Mr. Gershenson: Now, at the time that you talked with Mr. Arends, you knew he had no counsel, didn't you? A. Yes; I did.

"Q. And you were not aware at that time but what Mr. Arends might be able to come up with a good and substantial defense; is that correct? A. Well, I don't understand your question. (The reporter read the question.)

"Mr. Carr: I am going to—go ahead and answer it.

"The Witness: From my examination of the file, from my talks with Mr. Arends, and from my talks with the investigators, *it was my considered opinion that the defendant was guilty.*

"Q. By Mr. Gershenson: It was your considered opinion?

"The Witness: *Certainly.*" (Emphasis added.)

Following further testimony on cross-examination concerning the events of the morning when the appellant offered to plead guilty, Mr. Ritzi testified on redirect examination that the only reason he refused to permit the appellant to plead guilty was that he did not have a lawyer; also, concerning his experience and functions in the district attorney's office; and that he had been in court the day the appellant offered to plead guilty prepared to try the

case for the People. Then the following question and answer were asked and given:

"Q. (By Deputy District Attorney Carr): Is there any rule in the office that compels you to try a case if there is a reasonable doubt in your mind as to the guilt of the defendant? A. Absolutely not. Very much to the contrary. In our office—and I think the folks should understand and know—we are interested as much in protecting the rights of the defendant as we are in protecting the rights of the public. *And unless we are convinced in our own mind that an individual is guilty of the offense, we dismiss it.* There is absolutely no obligation to try the case. Very much to the contrary, we are not supposed to try it." (Emphasis added.)

No objection was made to the foregoing question, no motion was made to strike the answer, and no request was made that the jury be instructed to disregard the answer.

With commendable fairness, the attorney general does not contend that the answer was not prejudicial, but insists that because appellant failed to move to strike any of the foregoing answers given on cross-examination, or the one now complained of on redirect examination, appellant waived any right he might have had to complain of them on appeal.

[1] We are not unmindful of the general rule in this state that an assignment of misconduct and a request that the court admonish the jury to disregard the objectionable argument or conduct of the prosecuting officer is a necessary prerequisite for complaint in an appellate tribunal. As stated in *People v. Simon*, 80 Cal.App. 675, 679, 252 P. 758, 760, " * * * The reason for this rule being as stated in a number of these cases, that the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury". But, as stated in the case just cited, "There is, however, a well-recognized exception to this general rule, and the exception is simply this:

Where an examination of the entire record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of such assignment and request will not preclude the defendant from raising the point in this court."

[2] We are satisfied that the present case comes within the foregoing exception to the rule. We do not feel that any admonition the court could have given to the jury could have effectively removed the prejudice engendered by the testimony of the deputy district attorney that he had "studied" the case, "was prepared to try it", and was "convinced" that appellant was guilty. We are here again confronted with a situation wherein the prosecution attempted to do by indirection what it could not have done directly.

[3-5] Respondent contends that the answer of Deputy District Attorney Ritzi that appellant was guilty was elicited by questions asked of him on cross-examination by appellant's counsel. This argument lacks substance here. We think the trial judge should have stopped the discourse of Deputy District Attorney Ritzi when he was under cross-examination without waiting for an objection or motion to strike. That such testimony was immaterial and highly prejudicial is manifest. Therefore, the argument that appellant's counsel "opened the gates" is unavailing. As was said by this court in *People v. McDaniel*, 59 Cal.App.2d 672, 677, 140 P.2d 88, 90, "An error that is prejudicial is no less so because it results from a lack of knowledge on the part of either counsel or both. Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called 'open the gates' argument is a popular fallacy. 'Questions designed to elicit testimony which is irre-

evant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject.' 27 Cal.Jur. p. 74. 'It is a settled rule that cross-examination as to matters irrelevant to the issue may and should be excluded—even though, in some cases, testimony relative thereto was elicited upon direct examination—and that a party may not, under the guise of cross-examination, introduce evidence that is not competent within the meaning of the established rules.' 27 Cal.Jur. p. 106." The same rule applies to incompetent evidence elicited "under the guise" of redirect examination. While a prosecuting officer may use every legitimate means to bring about a just conviction, it is just as much his duty to refrain from improper methods calculated to produce a wrongful conviction. *Viereck v. U. S.*, 318 U.S. 236, 247-248, 63 S.Ct. 561, 87 L.Ed. 734, 741.

[6] True, we are not here concerned with statements by the deputy district attorney who actually tried the case, but in our opinion the foregoing conduct of the trial deputy district attorney who had prepared, and was to try the case and withdrew therefrom on the morning of the trial, and appeared as a witness, aggravated the prejudice already created by the witness when on cross-examination he stated, "* * * it was my considered opinion that the defendant was guilty." This we say because the deputy who appeared as a witness was under oath, and when the trial deputy asked him, as above set forth, concerning the existence of any rule in the office of the district attorney, "that compels you to try a case if there is a reasonable doubt in your mind as to the guilt of the defendant", and which permitted the witness to testify under oath as heretofore narrated in detail, that "* * * unless we are convinced in our own mind that an individual is guilty of the offense, we dismiss. There is absolutely no obligation to try the case. Very much to the contrary, we are not supposed to try it." When we view the situation here confronting us with the views expressed by our

Supreme Court in *People v. Kirkes*, 39 Cal.2d 719, 721-727, 249 P.2d 1, we are persuaded that the conduct here complained of militated against appellant having that fair and impartial trial which the law requires for every person charged with a crime. As was said in the case just cited, 39 Cal.2d at pages 723-724, 249 P.2d at page 4, "When the district attorney declared that he would not prosecute any man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion, formed from deductions made from the evidence adduced at the trial that the defendant was guilty of the crime charged, *People v. Rogers*, 163 Cal. 476, 126 P. 143; but his declaration to the jury that he would not prosecute any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear, and which perhaps could not have been shown in evidence.'" This is exactly what occurred in the case now engaging our attention, wherein Deputy District Attorney Ritz, as a witness, testified that, "From my examination of the file * * * and from my talks with the investigators, it was my considered opinion that the defendant was guilty."

[7,8] It would be an impeachment of the legal learning of both deputies district attorney to intimate that they did not know that the aforesaid questions asked by the trial deputy, and the answers given on both cross-examination and redirect examination by the deputy who prepared the case for trial, were highly improper and peculiarly calculated to prejudice the substantial rights of the appellant. To entertain a contrary view is to ignore human experience and the dictates of common sense.

We are also persuaded that the saving grace of Section 4½ of Article VI of our State Constitution should not come to the rescue of this conviction. As was stated by this court in *People v. Duvernay*, 43 Cal. App.2d 823, 829, 111 P.2d 659, 662, "We do not understand section 4½ of article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. *People v. Davis*, 210 Cal. 540, 556, 293 P. 32.' There is creditable authority for the statement that the phrase 'miscarriage of justice', as used in the constitutional provision, 'does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to the defendant shall be respected."' *People v. Wilson*, 23 Cal.App. 513, 138 P. 971, 975. In the instant case we do not regard the evidence as sufficient to put into operation the provisions of section 4½ of article VI of the Constitution, because even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances, that there has been no miscarriage of justice. *People v. Mahoney*, 201 Cal. 618, 258 P. 607; *People v. Patubo*, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527." See, also,

People v. Gilliland, 39 Cal.App.2d 250, 265, 103 P.2d 179.

Appellant also contends that the trial deputy district attorney was guilty of prejudicial misconduct in arguing to the jury the fact that the former did not testify in his own behalf, and in implying that he was guilty of other offenses, including evasion of income taxes, and prior acts of grand theft. Since we have determined that the convictions must be reversed for the reasons above stated, it would serve no useful purpose, and unduly extend this already lengthy opinion, to consider in detail the contentions of appellant in this regard. The pertinent rule is contained in Article I, Section 13 of the California Constitution and in Penal Code Section 1323. In *People v. Adamson*, 27 Cal.2d 478, 488, 489, 165 P.2d 3, 8, our Supreme Court stated: "It is clear from the terms of the constitutional provision that the consideration and comment authorized relates, not to the defendant's failure to take the stand, but to 'his failure to explain or deny by his testimony any evidence or facts in the case against him' whether he testifies or not. The constitutional provision thus makes applicable to criminal cases in which the defendant does not testify, the established rule that the failure to produce evidence that is within the power of a party to produce does not affect in some indefinite manner the ultimate issues raised by the pleadings, but relates specifically to the unproduced evidence in question by indicating that this evidence would be adverse. * * * Therefore the failure of the defendant to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. * * *

In the instant case, without detailing the assailed language, it will suffice to say that the remarks were in the main statements of the evidence or reasonable inferences drawn therefrom and they did not transcend

the bounds of permissible argument. The border line of permissible argument however was approached by the prosecutor when, in the course of his argument, he said:

"Now, we come to another matter which I touched upon lightly yesterday and which is worthy of your consideration, and that is the refusal of the defendant Charles Arends to take the witness stand here and tell you what he knows about it. He wants you, ladies and gentlemen, to tell him that he participated honestly in this transaction—in these transactions, but he won't tell you that. He won't tell you that. He wants to tell you that he honestly came by these purchase orders, but he won't tell you that. He won't tell you why he conceived in his mind the plan to use the purchase orders of California Rubber Products—".

An objection to this line of argument was interposed and overruled.

While it is true that this statement might be construed as a declaration that the jury should infer guilt solely from appellant's silence, however, when construed in the light of the prosecutor's argument in its entirety, it appears improbable that the jury was misled. When taken in connection with the prosecutor's review of the evidence, the challenged statement might well be regarded in connection therewith, as a conclusion that although the evidence established guilt, the accused failed to explain or deny it.

Appellant also contends that the refusal to grant a severance of the trial of appellant and his co-defendant constituted an abuse of discretion. Since the co-defendant was acquitted this issue will not arise on a retrial.

[9] We are persuaded that the court did not err in refusing to instruct the jury regarding the testimony of an accomplice because appellant and his co-defendant were both charged with the same offenses. Neither was called as a witness for or

against the other and the co-defendant Stiller testified solely on his own behalf. In this situation it would have been highly improper and prejudicial to him had the court in any way indicated he was an accomplice and that his testimony should be viewed with caution. *People v. Brunette*, 39 Cal.App.2d 215, 231, 102 P.2d 799; *People v. O'Brien*, 96 Cal. 171, 180-181, 31 P. 45. Such a situation will not be again presented.

The attempted appeal from the "imposition of sentence" is dismissed. For the foregoing reasons the judgment and the order denying defendant's motion for a new trial are, and each is reversed, and the cause remanded for a new trial.

FOURT, J., and DRAPEAU, J. pro tem., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.



155 Cal.App.2d 644

COUNTY OF SAN DIEGO, Petitioner,

v.

J. C. PERRIGO, Auditor and Controller of
the County of San Diego, Respondent.

Civ. 5854.

District Court of Appeal, Fourth District,
California.

Nov. 27, 1957.

Petition for writ of mandate to compel auditor and controller of county to transfer from general fund of county sum of \$1,000,000. The District Court of Appeal, Stone, J. pro tem., held that where qualified voters of county had approved proposition to incur a bonded indebtedness of \$8,400,000 for purposes of constructing, furnishing, and equipping buildings to provide quarters for Superior and Municipal Courts, county jail and county departments and officials, court would not impose limitation on Board of County Supervisors for that amount and

therefore resolution by Board, which in effect authorized expenditure of additional sums to be paid out of general fund for purposes of redesigning courthouse and jail buildings to provide for additional needs of Superior and Municipal Courts, county jail and quarters for district attorney and veterans officer was proper and auditor and controller could be compelled to transfer general funds.

Writ of mandate issued.

1. Counties ⇨178

Where more than two-thirds of qualified voters of county approved a proposition to incur a bonded indebtedness in the principal sum of \$8,400,000 for purpose of constructing, furnishing and equipping buildings to provide quarters for Superior and Municipal Courts, the county jail, and county departments and officials, a contractual relation between electors and board of supervisors was created.

2. Counties ⇨178

Where voters of county approved proposition to incur a bonded indebtedness in principal sum of \$8,400,000 for purpose of constructing, furnishing and equipping buildings to provide quarters for Superior and Municipal Courts, county jail, and county departments and officials to be located on site of present courthouse and county jail and on land adjacent thereto, resolution by Board of Supervisors to redesign courthouse and jail buildings to provide for additional needs of Superior and Municipal Courts including one additional Traffic Court, one additional Arraignment Court, a separate Juvenile Court, and quarters for Grand Jury as well as other offices did not violate terms of proposition which voters had approved.

3. Counties ⇨122(1), 137

Courts ⇨72

Board of Supervisors of a county is required by law to provide adequate quarters for Superior and Municipal Courts; and a provision in any contract designed to prevent Board of Supervisors from performing

Cal.Rep. 317-318 P.2d-43

that duty would be contrary to law and unenforceable.

4. Counties ⇨150(2)

An obligation imposed upon county by law to provide quarters for courts is not an "indebtedness" or "liability" within debt limitation of constitution. West's Ann. Const. art. 11, § 18.

See publication Words and Phrases, for other judicial constructions and definitions of "Indebtedness" and "Liability".

5. Counties ⇨178

Where voters of county had approved proposition to incur a bonded indebtedness of \$8,400,000 for purpose of constructing, furnishing and equipping buildings to provide quarters for Superior and Municipal Courts, and thereafter Board of Supervisors of county adopted resolution to redesign courthouse to provide for additional needs of Superior and Municipal Courts, including one additional Traffic Court, one additional Arraignment Court, a separate Juvenile Court and quarters for Grand Jury, court could not imply a restriction limiting board to amount of money voted in bond election for providing necessary quarters for Superior and Municipal Courts. West's Ann.Const. art. 11, § 18.

6. Counties ⇨133

Although Board of Supervisors of county does not have an obligation expressly imposed by law with reference to providing quarters for district attorney's office, Veterans Office and a jail, Board of Supervisors has general administrative duty to provide such facilities.

7. Contracts ⇨167

Where people have anticipated a need to regulate a legislative or administrative body for protection of public and have enacted a law to achieve that purpose, the courts will not, in absence of an express agreement, imply a more restrictive interpretation of a contract coming within purview of such constitutional enactment. West's Ann.Const. art. 11, § 18.

8. Counties ⇨133, 137, 178

Where voters approved proposition to incur a bonded indebtedness of \$8,400,000

for purpose of constructing, furnishing and equipping building to provide quarters for Superior and Municipal Courts, the county jail and county departments and officials, restriction would not be implied by courts limiting the amount to be expended for such purposes and therefore, Board of Supervisors of county was justified in adopting resolution providing an additional \$3,517,680 to be obtained from general funds in addition to bond issue for purposes as set forth in bond issue.

9. Counties ⇨ 150(2), 178

Where voters approved proposition to incur a bonded indebtedness of \$8,400,000 for purpose of constructing, furnishing and equipping buildings to provide quarters for Superior and Municipal Courts, the county jail and county departments and officials, resolution by Board of Supervisors of county to obtain additional funds from general fund for purposes of such construction did not breach contractual relation between Board of Supervisors and electors created by election and did not violate constitutional limitation with respect to indebtedness. West's Ann.Const. art. 11, § 18.

10. Mandamus ⇨ 172

Where electors approved proposition to incur indebtedness of \$8,400,000 for purpose of constructing, furnishing and equipping buildings to provide quarters for courts, county jail and county departments and officials, and thereafter county board of supervisors adopted resolution authorizing use of additional general funds for purposes set forth in proposition, court would not speculate as to whether voters would or would not have voted for proposition had they known that construction would require additional money from general fund, for purposes of determining whether auditor and controller could be compelled to transfer funds from general fund pursuant to resolution.

Deputy Dist. Atty., of San Diego County, San Diego, for respondent.

STONE, Justice pro tem.

At a special election held November 2, 1954, more than two-thirds of the qualified voters of the County of San Diego approved a proposition to incur a bonded indebtedness in the principal sum of \$8,400,000 for the purpose of constructing, furnishing and equipping buildings to provide quarters for Superior and Municipal Courts, the county jail and county departments and officials. The project was delayed by the usual architectural and engineering work. During the period of delay the need for additional facilities arose by reason of the increased population and volume of official business in the County of San Diego. At the time of the election there were eight departments of the Superior Court and six departments of the Municipal Court, but by September 30, 1957, the State Legislature had increased the number of departments of the Superior Court to thirteen, and of the Municipal Courts to nine. On that date the Board of Supervisors of the County of San Diego adopted a resolution to redesign the courthouse and jail buildings to provide for the additional needs of the Superior and Municipal Courts, including one additional Traffic Court, one additional Arraignment Court, a separate Juvenile Court, and quarters for the Grand Jury. It also provided for an enlarged county jail, quarters for the District Attorney and Veterans Officer, and a redesign of the basement for future expansion. The resolution sets forth that the additional facilities will cost \$3,517,680 in addition to the bond issue of \$8,400,000; that the additional funds can be supplied from the general fund of the County of San Diego; that the amount required from the general fund for the current fiscal year is one million dollars. As part of the resolution the respondent herein, as auditor and controller of the County of San Diego, was ordered to transfer from the general fund of the County of San Diego to the San Diego Courthouse-Con-

John M. Cranston and John W. McInnis, San Diego, for petitioner.

James Don Keller, Dist. Atty., of San Diego County, and Bertram McLees, Jr.,

struction Fund the sum of one million dollars. Respondent served a written refusal to comply with the order upon the Board of Supervisors. This proceeding in mandate followed the refusal of the Auditor-Controller to act.

Respondent does not deny that there are ample funds available in the general fund to permit the transfer of one million dollars to the San Diego Courthouse-Construction Fund. There is no contention that Article XI, Section 18 of the State Constitution limiting the obligation which a Board of Supervisors may incur is being violated, nor is it charged that the board acted in bad faith. Respondent further concedes that had the Board of Supervisors proceeded with construction in 1954, using the \$8,400,000 authorized by the bond election, the County could at this time build an addition or annex to such courthouse to meet present needs and use the money in the general fund for that purpose. Respondent contends, however, that the bond issue constituted a contract between the Board and the electors, and therefore the Board must build the type of buildings specified on the ballot proposition.

[1, 2] Without question the election created a contractual relation between the electors and the supervisors. *O'Farrell v. County of Sonoma*, 189 Cal. 343, 348, 208 P. 117; *City of San Diego v. Millan*, 127 Cal.App. 521, 534, 16 P.2d 357. The terms of the contract are contained in the ballot proposal approved by the electors which reads as follows:

"San Diego County Bond Proposition. Shall the County of San Diego incur a bonded indebtedness in the principal sum of \$8,400,000 for the purpose of the construction, furnishing and equipping of buildings (including clearing of the site for the proposed buildings) to constitute a county courthouse and county jail, said buildings to provide quarters for the Superior and Municipal Courts, the county jail, and county departments and officials, and to be located on the site of the

present courthouse and county jail and on land adjacent thereto?"

The description of the buildings to be constructed is broad and general and contains no fixed plan or building program. The proposed changes specified in the resolution of the Board of Supervisors dated September 30, 1957, do not violate the terms of the contract in that respect. *El Dorado Irrigation District v. Browne*, 216 Cal. 269, 13 P.2d 921; *County of Alameda v. Garrison*, 108 Cal.App. 122, 127, 291 P. 464.

[3-5] Respondent also urges that the Board's proposal to spend more than the \$8,400,000 voted at the bond election violates the terms of the contract. The proposition as it appeared on the ballot contained no statement or condition limiting the expenditure for the proposed county buildings to the amount of the bond issue. Respondent recognizes this fact as he asks the court to imply such a term or condition as a logical interpretation of the ballot proposition. He argues that such an interpretation of the contract is necessary to protect the taxpayers from a burden they did not voluntarily agree to assume. The Supreme Court of California has held that the Board of Supervisors of a county is required by law to provide adequate quarters for Superior and Municipal Courts (*Simpson v. Hite*, 36 Cal.2d 125, 129, 222 P.2d 225; *County of Los Angeles v. Byram*, 36 Cal.2d 694, 698, 227 P.2d 4.) This duty is mandatory, explicit and imposed by law. A provision in a contract designed to prevent the Board of Supervisors from performing that duty would be contrary to law and unenforceable. For the same reason a court may not imply a restriction limiting the Board to the amount of money voted in the bond election in providing necessary quarters for Superior and Municipal Courts, Traffic Court, Arraignment Court, Juvenile Court and the Grand Jury. The Supreme Court has even held that an obligation imposed upon the County by law to provide quarters for the Courts is not an indebtedness or liability within the meaning of the debt limitation provisions of Constitution

Article XI, Section 18. *County of Los Angeles v. Byram*, supra, 36 Cal.2d at page 698, 227 P.2d at page 7.

[6-8] With respect to the jail, the District Attorney's office, the Veterans Office and the change of basement design to provide for future needs, these facilities were included in the proposition submitted to the voters. While they are not obligations expressly imposed by law, they are provided by the Board of Supervisors as a part of its general administrative duties. The distinction between the general duties of a board of supervisors and those expressly imposed by law is recognized by the Supreme Court in *County of Los Angeles v. Byram*, supra, 36 Cal.2d at page 700, 227 P.2d at page 8. The question, therefore, is whether or not such a restrictive limitation should be implied by the courts for the protection of the taxpayers as to the quarters for offices other than those which are an integral part of the Superior and Municipal Courts. The people of the State of California, by Article XI, Section 18 of the California Constitution, have regulated, or limited the indebtedness which the Board of Supervisors of any county may incur. That provision was enacted to protect the public in the very respect respondent now asks protection by an implied condition in the contract. Article XI, Section 18 reads in part as follows:

"No county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof * * *."

There is no contention that the Board of Supervisors in the instant case is exceeding this constitutional limitation. Where the people have anticipated a need to regulate a legislative or administrative body for the protection of the public and have enacted a law to achieve that purpose, the courts will not, in the absence of an

express agreement, imply a more restrictive interpretation of a contract coming within the purview of such constitutional enactment.

[9] In this case the narrow construction urged by respondent would work to the detriment of the people sought to be protected. The need presently exists, and to build an inadequate building for the amount of the original bond issue would simply mean that immediately after completion of the building, or perhaps while still in the course of construction, an addition or annex would have to be commenced. The use of funds which are currently available and legally expendable to build adequate and functionally efficient buildings as proposed by the Board of Supervisors would not breach the contractual relation between the Board of Supervisors and the electors, nor would it violate the constitutional limitation imposed by law.

[10] Respondent argues that had the electors known it would cost more than the amount of the bond issue to construct the facilities, they would not have voted in favor of the proposition, or at least the election would not have carried by a two-thirds majority. Respondent is assuming that even though the voters had known in 1954 the facts of which the Board of Supervisors is acutely aware in 1957, they nonetheless would have refused to vote for the \$8,400,000 bond issue. No one knows how the voters would have reacted under such circumstances. Whether the election would have carried in the light of the facts which could be known only by events which developed subsequent to the election is a question upon which the courts will not speculate. Such conjecture may not be made the basis for implying a condition which was not expressed in the contract.

Let a writ of mandate issue as prayed for.

BARNARD, P. J., and GRIFFIN, J., concur.

155 Cal.App.2d 623

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Lester Farrel JACKSON and Howard Allen,
Defendants and Appellants.

Cr. 2777.

District Court of Appeal, Third District,
 California.

Nov. 27, 1957.

Prosecutions for burglary. The Superior Court, Stanislaus County, Ben V. Curler, J., entered judgments upon jury's verdicts of guilty, and defendants appealed. The District Court of Appeal, Schottky, J., held that comment of district attorney in closing argument that jurors should ask themselves why one defendant did not take the witness stand in his own behalf was not prejudicial to defendants even though such defendant was not given an opportunity to reply or explain in as much as trial judge was authorized to comment upon failure of such defendant to testify and could include such comment in his instructions to the jury after both sides had concluded all their arguments.

Affirmed.

1. Criminal Law ⇨1171(5)

In prosecutions for burglary, comment of district attorney in closing argument that jurors should ask themselves why one defendant did not take the witness stand and testify in his own behalf was not prejudicial to defendants even though such defendant had no opportunity to reply or explain, inasmuch as trial judge is authorized to comment upon failure of a defendant to testify and may include comment in his instructions to jury after both sides have concluded all of their arguments. West's Ann.Pen.Code, §§ 1127, 1323; West's Ann. Const. art. 1, § 13.

2. Criminal Law ⇨656(7), 787(1)

A trial judge who comments upon the failure of defendant to testify in a criminal prosecution and instructs the jury that they may take such matter into consideration

does not violate any right of the defendant. West's Ann.Pen.Code, § 1127; West's Ann. Const. art. 1, § 13.

Nathan B. McVay and E. Paul Fulfer,
 Modesto, for appellants.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Lester Farrel Jackson and Howard Allen were charged by information with the crime of burglary. The Superior Court granted their motion to set aside the information upon the ground that they had been committed for trial without reasonable or probable cause. Upon appeal this court reversed the order of the trial court (146 Cal.App.2d 553, 303 P.2d 767) and the said defendants were tried and found guilty. They have appealed from the judgments pronounced upon the jury verdicts.

Appellants do not challenge the sufficiency of the evidence to support the convictions, but their sole contention is that "the conduct of the district attorney in commenting to the jury in his rebuttal argument concerning the failure of defendant Allen to testify in this case amounted to prejudicial misconduct, inasmuch as it was made at a time when the defendant did not have another opportunity to explain why he failed to testify or to defend himself." Before discussing this contention we shall give a brief summary of the evidence.

Mrs. Monica Ney, a resident of Alameda, California, owned a frame two-story dwelling on the old Sonora Road and Twenty-Six Mile Road in Stanislaus County which was unoccupied at the time of the commission of the offense charged. When Mrs. Ney visited the premises on March 3, 1956, she discovered the front dining room door and the back door open, the contents of the house disheveled, and numerous items missing.

Various items which had been taken from the premises were consigned by defendants Jackson and Allen to a used furniture auctioneer in Hayward on March 2, 1956.

Those items not sold were picked up by Jackson and Allen and were sold by them to another antique shop operator in Stockton.

In his negotiations with Mr. McCoy, the dealer in Hayward, defendant Jackson signed his name "Lee Jakson," the latter part of the signature being almost illegible. In his dealings with Mrs. Sasselli, the dealer in Stockton, he gave his name as H. Johnson.

In a conversation with Mr. Bates, a member of the Stanislaus County Sheriff's office, Jackson made numerous inconsistent statements. He first denied ever having sold any furniture to Mr. McCoy, but upon further questioning admitted that he had made such a sale. He said he had purchased them from a man known as H. Green. Jackson and Bates went to the defendant's home where he produced a bill of sale purported to be signed by one H. Green.

The appellant Howard Allen also made inconsistent statements to Mr. Bates, at first denying that he had sold any articles to Mr. McCoy, but then admitting the sale.

An examination of the grounds and premises burglarized indicated that three persons probably participated in the burglary as shown by three different sets of footprints. Mr. Bates made an intensive investigation to discover anyone by the name of H. Green, but was unable to find such person.

As to the asserted prejudicial misconduct, the record shows that the following occurred during the district attorney's closing argument to the jury:

"One further comment, I will not dwell on it long, one defendant didn't take the stand, Howard Allen. Ask yourself this: why didn't Howard Allen take the stand.

"Mr. McVay: I will object to that being brought out, it is not proper rebuttal argument.

"The Court: Objection sustained. This is supposed to be in rebuttal of their argument.

"Mr. Wolfe: All right."

Appellants do not question the right of a district attorney to comment on the fact that

a defendant fails to testify. They concede that the former rule was changed by an amendment to our state Constitution in 1934 which provides in part that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Const. art. 1, § 13. They concede, also, that section 1323 of the Penal Code, as amended following the adoption of the constitutional amendment, provides in part: "The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

The burden of the argument of appellants is that the comment of the district attorney was highly prejudicial because it was made at a time when the defendant Allen had no opportunity to reply or explain. They argue that even if they had made a motion to strike, or had made a request that the jury be instructed to disregard the statement of the district attorney, the harmful effect of the comment would not have been cured.

[1, 2] In view of the constitutional provision and of section 1323 of the Penal Code there is of course no doubt as to the right of the district attorney and the court to comment on the failure of the defendant to testify. The usual time for the district attorney to make such comment would be in his opening argument, but we do not believe that it is necessarily misconduct for him to comment upon it in his closing argument. If he does so comment and counsel for defendant desires to reply to it he should, and undoubtedly would, be permitted by the court to do so. However, it is difficult to understand how the comment can reasonably be held to have been prejudicial in the instant case. The jury was of course aware that defendant Allen did not testify, and the question that the district attorney asked the jury to ask themselves was a question that every juror asks when a defendant does not take the stand in his own defense. Furthermore, under the constitu-

tional provision hereinbefore quoted and Penal Code section 1127 the judge is authorized to comment upon the failure of a defendant to testify and may include such comment in his instructions to the jury after both sides have concluded all of their arguments. It has been held that the court's comment upon such fact and its instructions to the jury that they may take such matter into consideration do not violate any right of a defendant. *People v. Cowan*, 44 Cal. App.2d 155, 112 P.2d 62; *People v. Adamson*, 27 Cal.2d 478, 165 P.2d 3, affirmed 332 U.S. 784, 68 S.Ct. 27, 92 L.Ed. 367. See also *People v. King*, 103 Cal.App.2d 122, 229 P.2d 20; *People v. Owen*, 68 Cal.App.2d 617, 157 P.2d 432; *People v. Weatherford*, 78 Cal.App.2d 669, 178 P.2d 816.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



155 Cal.App.2d 823

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Donald CURRY-ALLEN, Defendant and
Appellant.
Cr. 5897.

District Court of Appeal, Second District,
Division 1, California.

Dec. 9, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, Allen T. Lynch, J., for procuring abortions, and he appealed. The District Court of Appeal, Fourth, J., held that alleged abortees' testimony was sufficiently corroborated to sustain convictions.

Affirmed.

Abortion ¶11

In prosecution for procuring abortions, alleged abortees' testimony was sufficiently corroborated to sustain convictions. West's Ann.Pen.Code, § 1108.

Donald Curry-Allen, in pro. per.

Edmund G. Brown, Atty. Gen., Herschel T. Elkins, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction and from a denial of a motion for a new trial in a case involving abortions.

In an information filed in Los Angeles county, the appellant, an osteopathic physician and surgeon, was charged with four counts of abortion as follows:

Count I—an abortion on Jean Cluxton on June 6, 1955;

Count II—an abortion on Mary Scalice on August 19, 1955;

Count III—an abortion on Mrs. R. W. Cavanaugh on August 27, 1955;

Count IV—an abortion on Connie Stamps on October 24, 1955.

The appellant pleaded not guilty to all counts and then withdrew such plea as to count II, and pleaded guilty thereto. Afterwards, he withdrew his guilty plea to count II, and once more pleaded not guilty. It was stipulated that the case might be submitted on the evidence received at the preliminary hearing, both parties preserving the right to produce additional evidence.

The judge found the appellant guilty as charged as to counts I, III and IV, and not guilty as to count II. A motion for a new trial was denied. The proceedings were then suspended and appellant was granted probation for five years as to each count, the probationary terms to run concurrently, and the appellant to pay a \$1,500 fine.

As to count I, Jean Cluxton had sexual intercourse sometime in April, 1955, and in

the latter part of May she went to the appellant's office. Appellant asked her the nature of her business and she told him that she had a problem which she had heard he might be able to solve for her. Appellant then inquired about her menstrual period and asked her other questions. He then directed her to remove her underclothing and to get on an examination table. She complied, put her feet into stirrups, and a large metal object was inserted into her vagina, and she felt the pressure of appellant's hands upon her stomach. He told her that her problem could be taken care of for \$400, which should be paid in cash and small bills. On June 6th, she went to appellant's office thinking she was pregnant. Other than the pregnancy, she was of the opinion that she was in good health. She placed \$400 in twenty-dollar bills on his desk. He gave her a small tablet and a glass of water and said it was for her nerves. She then complied with his request and took off her clothes, put on a hospital gown, and got onto the examination table. Appellant was sorting out various instruments, and when he started his procedure with her she felt a small pain and a probing inside of her. He told her that he had placed a pack inside of her and that it was to be removed in twenty-four hours; also, he gave her some pills for pain, and his card indicating where he could be reached in case she needed him. Further, he wrote on the back of his card "Citrate of Magnesia, take the whole bottle." On the face of the card there was contained his name and designation as a physician-surgeon osteopath, with his address and telephone number. She later removed the pack as directed and noticed a color thereon similar to mercurochrome. On Wednesday she returned to the appellant who gave her some medication to induce cramping. On Friday she felt something pass from her body. The appellant was called but he told her to come to his office. She went to his office, where he treated her. Barbara Whitten was with her at the time and talked to the appellant. He gave Mrs. Whitten some pills for Jean

which he said were to prevent infection, and also a prescription for some medicine which "he said was to prevent the milk coming in." Mrs. Whitten identified a picture of the office with the name of the appellant on one window as the office she and Jean Cluxton visited.

As to count III, Mrs. Ralph Cavanaugh was the mother of four children and contacted the appellant in late July or early August. Her husband took her to the office, but she went into the examination room alone. She told the appellant she wanted an abortion and he examined her. Thereafter, she was told by the appellant that she was pregnant and that the fee for the abortion would be \$350. On August 15 she returned to the appellant's office with her husband, who spoke to the appellant. Mr. Cavanaugh asked if that type of operation, referring to an abortion, was dangerous, and appellant answered, "Not if it was handled right." On August 27, Mrs. Cavanaugh went to appellant's office, accompanied by her husband, and she gave appellant \$350 in small bills, which her husband had given her for the purpose of paying the appellant. The abortion was then performed and other things were done similar to the procedures as set forth in count I hereof, and on August 29th, she returned for some further corrective treatment which appellant provided. Mr. Cavanaugh asked appellant if there was any possibility of getting back some part of the money paid from his group insurance and appellant then filled out certain forms, putting down the cause of his treatment as hemorrhoids. The papers were then mailed to an insurance group and Mr. Cavanaugh received \$75 therefrom.

As to count IV having to do with Nancy Connie Stamps, she stated that a friend, Mrs. Pauly, called appellant's office and made an appointment for her. On October 22, 1955, about 1:00 o'clock p. m., she and her brother, John McGuire, and Mrs. Pauly drove to the appellant's office. Mrs. Pauly knew the appellant and when she saw him at the office he said to her, "Hello there, how have you been?" Nancy told the doc-

tor she was pregnant and that she had a little boy and had to work for a living to support the child and herself. She was examined by the appellant and told that the price would be \$350. On October 24th, she returned to the office with Mr. Pauly. He stayed in the automobile and she went into the office and gave appellant \$350. She was then aborted as described in count I hereof. She was also given a card identical to the one mentioned in count I. On the following Sunday the appellant examined her again and said that she was then in good condition.

Appellant's contention is that the testimony of the abortee in each count was not sufficiently corroborated.

Penal Code, section 1108, provides in part as follows:

"Upon a trial for procuring * * * an abortion, * * * the defendant cannot be convicted upon the testimony of the woman upon * * * whom the offense was committed, unless she is corroborated by other evidence."

In *People v. MacEwing*, 45 Cal.2d 218, at page 224, 288 P.2d 257, at page 260, the court said:

"The most recent decisions have in substance phrased the rule as follows: The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth. (Citing cases.)"

In *People v. Griffin*, 98 Cal.App.2d 1, 24-27, 219 P.2d 519, 553, cited with approval in the *MacEwing* case, it is said:

"It is not necessary that the corroborative evidence prove independently either that the defendant is guilty of the offense or that he is guilty beyond a reasonable doubt. (Citing cases.) If this were not true and if it were required that a complete case for the prosecution be established without reference to the testimony of the accomplice, there would then be no occa-

sion to offer the accomplice as a witness.

* * * * *

"If the corroboration is inculpatory it is not essential that it extend to all of the elements of the offense, nor to every fact and detail included in the testimony of the accomplices. (Citing cases.)

"Conversely, such evidence is sufficient if it tends in some slight degree, at least, to implicate the defendant. It need not be strong. (Citing cases.)

"The testimony of an accomplice need not be corroborated by direct evidence, or, stated in another way: Circumstantial evidence suffices for the purpose of corroboration. (Citing cases.)

"It is sufficient, even though circumstantial and slight, if the connection of the defendant with the alleged crime may be reasonably inferred from the corroborative evidence. (Citing cases.)

"The corroborating evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the fact-finding body that the accomplice is telling the truth. *People v. Trujillo*, 32 Cal.2d 105, 194 P.2d 681; *People v. Henderson*, 34 Cal.2d 340, 209 P.2d 785. In the *Trujillo* case, supra, our Supreme Court said, 32 Cal.2d at page 110, 194 P.2d at page 684: 'Such corroboration must create more than a suspicion of guilt, but is sufficient even though it "be slight and, when standing by itself, entitled to but little consideration." (Citing cases.) * * *' See other abortion cases, *People v. Malone*, 82 Cal.App.2d 54, 61, 185 P.2d 870; *People v. Smitherman*, 58 Cal.App.2d 121, 123, 135 P.2d 674; *People v. Morris*, 110 Cal.App.2d 469, 476-477, 243 P.2d 66; *People v. Allen*, 104 Cal.App.2d 402, 411, 231 P.2d 896.

A reading of the facts, as heretofore set forth, demonstrates that the abortee in each

instance was corroborated sufficiently. Furthermore, there was additional corroboration of Nancy Connie Stamps' testimony in the common plan used by appellant when he committed the abortions. There was a noticeable similarity of procedure in the transactions which involved the abortees. Each told the appellant she was pregnant and in substance wanted help. Each was examined in substantially the same fashion. Jean Cluxton was told the fee would be \$400, however, the others were told the fee would be \$350. Each one paid in bills of small denominations. Each was given a small tablet before the operation was performed, and each was told to take a laxative thereafter and to contact the appellant if they needed any additional help.

In the recent case of *People v. Ames*, 151 Cal.App.2d 714, at page 720, 312 P.2d 1111, at page 1114, the court set forth:

"The testimony of each of the ten women is mutually corroborative of the others in that it shows that each abortion was committed in a similar manner and the procedure followed in each instance was the same. [Citing cases.]"

And in 151 Cal.App.2d at page 726, 312 P.2d at page 1118 of the same case, it was said:

"In addition to the overwhelming physical evidence connecting appellants with the crimes in such a manner as to indicate the abortees were telling the truth, it is now well settled 'that there is sufficient corroboration if the independent testimony of the women shows that each abortion was committed in a similar manner.' *People v. Gallardo*, 41 Cal.2d 57, 64, 257 P.2d 29 * * * and cases cited therein. Such is the situation in the matter at bar." See, also, *People v. Bowlby*, 135 Cal.App.2d 519, 527, 287 P.2d 547, 53 A.L.R.2d 1147.

The judgment and order are, and each is, affirmed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.

155 Cal.App.2d 585

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Nolan PRUITT, Jr., Lawrence I. Perry,
Milton George Scandrett, Defendants,

Lawrence I. Perry, Defendant and
Appellant.

Cr. 5890.

District Court of Appeal, Second District,
Division 1, California.

Nov. 27, 1957.

Prosecution for robbery. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and one of the defendants appealed. District Court of Appeal, White, P. J., held that trial court did not err in failing to instruct jury on reasonable doubt during certain alleged conflicts in testimony presented by witnesses for the prosecution, but properly gave such instruction at conclusion of the arguments in accordance with statute providing for order of proceedings at trial.

Judgment affirmed.

1. Criminal Law 801

In robbery prosecution, trial court did not err in failing to instruct jury on reasonable doubt during certain alleged conflicts in testimony presented by witnesses for the prosecution, but properly gave such instruction at conclusion of the arguments in accordance with statute providing for order of proceedings at trial. West's Ann. Pen.Code, § 1093.

2. Criminal Law 1144(14)

In prosecution for robbery, where no objection was made at trial during which defendant was represented by counsel, that court read instructions "in such a nonconformed and nonchalant manner that it would take some understanding of law to realize the meanings of his instructions and what he was attempting to say", it would be presumed on appeal that official duty of judge was regularly performed in such regard. West's Ann.Code Civ.Proc. § 1963, subd. 15.

3. Criminal Law Ⓒ656(2)

In robbery prosecution, trial judge did not show prejudice against defendant by assisting or attempting to assist prosecuting attorney in questions and cross-examination of defendant, in view of fact that record revealed that trial judge, in asking defendant a question, was simply attempting to clarify the testimony, which not only was his right but his duty.

4. Criminal Law Ⓒ385

In robbery prosecution, trial court did not err in admitting alleged conflicting testimony of two victims of the robbery as to number of persons involved in the offense, in view of fact no inherent improbability appeared in the testimony of either witness as to what he observed, and alleged conflict in the testimony, if any, amounted to only a challenge to credibility of the witnesses, credibility being a question for the jury to determine.

5. Criminal Law Ⓒ1171(1)

In robbery prosecution, prosecuting attorney did not commit prejudicial error in questioning a witness for the state by insinuating there were three men involved although witness stated there were only two, in view of fact questions, including one in which prosecuting attorney stated there were three men, were not intended to bring out number of men involved, but only to develop true circumstances with regard to what witness observed and his capacity for such observation.

6. Witnesses Ⓒ372(2)

In robbery prosecution, question on cross-examination asked a codefendant as to whether or not he was presently afraid of defendant, was proper and relevant as affecting credibility of the witness and to ascertain what might be actuating the testimony given by the witness as to retraction of his confession.

7. Criminal Law Ⓒ532(2)

Where, in robbery prosecution, a police officer testified that a codefendant's statements were made freely and voluntarily, and defendant contended that such statements were not so given, admissibility of alleged

confession of such codefendant rested in sound discretion of the court.

8. Criminal Law Ⓒ673(4)

In robbery prosecution, where court admonished jury that statements made by codefendant in certain conversations elicited in response to questions by the prosecuting attorney, were to be considered only in connection with case of codefendant, and court was not asked to reiterate the admonition, trial court would not be deemed to have erred in admitting such codefendant's confession as against defendant.

9. Robbery Ⓒ24(1)

Evidence, not including a confession of a codefendant, which was not used against defendant, was sufficient to sustain conviction for robbery.

10. Criminal Law Ⓒ1036(1)

Where defendant in robbery prosecution made no objection to introduction of People's exhibits on ground they were obtained through an illegal search and seizure, defendant was in no position to complain of admission of such exhibits for the first time on appeal.

11. Criminal Law Ⓒ1144(1)

Where record in robbery prosecution did not reflect that defendant made any prima facie showing in trial court of an alleged illegal search or seizure, on appeal, it would be presumed that officers acted within their authority in making search and seizure complained of.

12. Arrest Ⓒ63(4), 71

Criminal Law Ⓒ394

Where, under the circumstances, there could be no substantial doubt that a police officer had reasonable cause for believing defendant whom he arrested had committed a felony, such arrest was valid under statute, and trial court was authorized to conclude that a search and seizure of evidence in defendant's premises was incident to and properly within scope of such arrest, and, therefore, evidence obtained pursuant thereto was admissible, even if arresting officer did not have a search warrant. West's Ann. Pen.Code, § 836(3).

Lawrence I. Perry, in pro per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, the above named defendants were accused of the crime of robbery allegedly committed on or about June 8, 1956, in that by means of force and fear they took from Ronald Tray certain personal property valued at \$600. It was further alleged that at the time of the robbery defendants were armed with deadly weapons. Defendants pleaded not guilty and were tried before a jury which found them guilty of robbery of the first degree. The jury also found as true, the allegation that defendants were armed as aforesaid. Appellant Perry was sentenced to State Prison. From the judgment of conviction he prosecutes this appeal.

We regard the following as a fair epitome of the factual background surrounding this prosecution. Ronald Tray was employed at the "Simpson & Dennis Poultry" located at 2075 W. 29th Place in Los Angeles County. He also resided there. The place was conducted by a Mrs. Simpson and a Mr. Dennis as an outlet for selling and distributing eggs. It served as well as a residence. On June 18, 1956, around 1:00 or 2:00 a. m. Mr. Tray and Mr. Dennis were inside the premises when the doorbell rang. Mr. Tray looked through the peephole of the door. Defendant Pruitt was there. Mr. Tray had never seen him before. Mr. Tray asked what he wanted. Defendant Pruitt said that Mrs. Simpson's daughter had sent him for some records. Mr. Tray opened the door. Defendant Pruitt stepped in and two other men jumped up on the porch. Mr. Pruitt said that this was a "stick-up" and displayed a revolver. The other two men rushed in behind him and they also had revolvers. They roused Mr. Dennis who was half asleep on the couch. Defendant Pruitt held Mr. Tray and Mr. Dennis at bay while the other two men looked in the other room. These two men had stocking caps over their

faces, that is, ladies' stockings cut up a certain distance then tied in a knot at the top and pulled over the face.

All three men asked questions as to what was in the room. Mrs. Simpson's bedroom door was locked and one of the men who was wearing a stocking cap kicked it down with his foot. The three men ordered Mr. Tray and Mr. Dennis into this room. The guns were still displayed. The men kicked down Mrs. Simpson's closet door and searched the room thoroughly. They were there perhaps twenty minutes. Two of the men left together after first tying up Mr. Tray and Mr. Dennis with adhesive tape. One of the masked men lingered, then in about ten seconds Mr. Tray heard the door slam. Mr. Tray and Mr. Dennis extricated themselves and Mrs. Simpson was summoned. She arrived in five or ten minutes.

When the three men came in Mr. Tray was in a state of fear because of the guns exhibited. He noted the masked men were colored. When asked, "Did you notice anything unusual about anything concerning either of these two men?" Mr. Tray testified, "Yes. One thing in particular, they didn't seem to want to speak or talk too loudly in front of me, you see, that's one thing that buried in my mind." According to Mr. Tray, both men had hats on—one had a blue hat with a light band and was wearing a sport coat. One of the men was a little stockier than the other. Mr. Tray did hear one of the masked men say something in a low voice. At the time, the voice sounded familiar but Mr. Tray could not place it. Mr. Tray believed he had met appellant Perry prior to this occasion, at dice games. Appellant Perry and defendant Scandrett appeared similar in appearance to the two masked men.

Prior to the preliminary hearing, Mr. Tray saw appellant Perry at the University Police Station and heard him speak. Mr. Tray noticed that the voice was similar to the voice above mentioned of one of the persons wearing a mask. Mr. Tray associated the similarity of voice with the man who kicked in the door.

LeRoy Dennis, Mrs. Simpson's brother, generally corroborated Mr. Tray's narrative as to what happened on the occasion in question. Mr. Dennis had been semidozing and only actually saw two men, who roused him up. They were wearing masks which could have been stocking caps, and had guns. As to whether he observed a man without a mask, he did not get a clear look. Prior to the episode in question, Mr. Dennis had consumed some alcoholic beverages and was "feeling the effect slightly". He was, however, sure that the men he saw were colored.

When Mrs. Hazel Simpson, co-owner of the poultry establishment, arrived there in the early morning hours of June 18, 1956, in response to a call, she observed that the premises were not in the same condition as when she was last there. The last time she had been there was the prior afternoon, at which time there was nothing unusual in connection with the premises. When Mrs. Simpson arrived the early morning of June 18, she noted that her bedroom door had been kicked down, and her bathroom and closet doors kicked in; that all the contents of the drawers, cabinets and bedroom were "slung" around and that money was missing. She had approximately between \$585 and \$600 in her bedroom closet. Part of this money was in a money bag and part of it was in a picture frame. The picture represented a gift from the Shriners to Mrs. Simpson's husband on their 25th anniversary and some two to three hundred dollars in silver dollars were placed around the picture. The glass of the picture had been broken out, and the money removed.

Mrs. Simpson had a revolver (People's Exhibit No. 1), which had been in the top drawer of a chest of drawers in her bedroom. This revolver was there when Mrs. Simpson had been at the premises the afternoon prior to the events here in question. When she arrived at the premises the early morning of June 18, she found that the revolver was not there. She did not again see it until the preliminary hearing. Mrs. Simpson had purchased this revolver in Arizona and she kept the bill of sale in her

wallet. The bill of sale (People's Exhibit No. 3) contained the number 18605.

John Frink, a police officer of the City of Los Angeles, attached to the Harbor Division, had occasion to investigate an automobile in which appellant Perry and defendant Scandrett were riding on August 21st at about 9:00 p. m. at 28th and Pacific Streets. Officer Frink had received a call to the effect that a man was holding a theft suspect and upon arriving at the scene the officer was met by the victim of the theft who had the automobile in question stopped. Appellant Perry and defendant Scandrett were standing alongside of the car. As the officer recalled, the car was registered to appellant Perry. The officer found the .38 caliber Smith and Wesson Chief's Special two-inch revolver, (People's Exhibit No. 1), under the righthand portion of the front seat of the car. It bore the serial number 18605. The officer asked appellant Perry who owned the gun. The latter replied that he did. Later, at the police station, the officer asked appellant Perry where he had purchased the gun. Appellant Perry said he bought it from a friend but would not state who the friend was.

Loren Waggoner, police officer for the City of Los Angeles, attached to the University Division, arrested defendant Pruitt on October 6th at about 5:30 p. m. in the safety zone on the southwest corner of Jefferson and Arlington Boulevard. Prior to going to this location the officer had received a call to go there. On arriving there he met Mr. Tray. Mr. Tray directed the officer's attention to defendant Pruitt.

T. E. Nordin, police officer for the City of Los Angeles, attached to the University Division arrested appellant Perry at the latter's residence, 2632½ South Budlong, on October 4 at about 8:00 p. m. Officer Nordin and his partner, Officer Boller, went to that location for the purpose of making this arrest. On arrival, Officer Nordin observed appellant Perry standing in the doorway talking to some other people. The officers arrested him at that time, then entered the premises. Officer Nordin found the

stocking (People's Exhibit No. 2) in a drawer in the closet of the front room of the apartment. This stocking was similar in appearance to one which Mr. Tray observed worn over the faces of the two masked men.

Officer Nordin determined that defendant Scandrett lived at this same address as well as appellant Perry. The officer saw defendant Scandrett later, at the University Division Police Station. The latter was arrested when he came in there.

Following the arrest of appellant Perry, Officer Nordin had a conversation with appellant both in the living room of the apartment and also at the police station concerning the gun which had previously been recovered from him (i. e., People's Exhibit No. 1). Appellant said he had bought it from a person on 5th Street. Officer Nordin asked the name of this person. Appellant said he did not know, that he was in a crap game.

Robert Wright, police officer for the City of Los Angeles, was one of the investigating officers in the case at bar. He had a conversation with the three defendants at the Police Administration Building on October 9th. Besides Officer Wright and the three defendants, another officer and a jailer were present. The three defendants were sitting around a table about five feet apart from one another. At first Officer Wright talked to all three of the defendants, then directed his questions to defendant Pruitt. In talking to the entire group, Officer Wright told them he had talked to each of them individually, that they had told him certain things and he wanted to clarify just what took place, and that he would talk to them one at a time, then they could have a chance to talk. The officer started with defendant Pruitt. He told defendant Pruitt that he wanted him to tell about the robbery that occurred on 29th Place several months ago. Defendant Pruitt hesitated, and looked at the other two defendants. Officer Wright said that defendant Pruitt had told the officer all about it, and the officer asked defendant Pruitt if he was masked on that

job. The latter said no. The officer asked if the other two were masked. Defendant Pruitt said yes. The officer told defendant Pruitt to start from the first and tell the officer about it. Defendant Pruitt stated that he went to their house one night and they were talking about the robbery.

According to the testimony of Officer Wright, "About that time Perry (appellant) jumped out of his seat and told him to shut up and not say anything to me, that he was just putting their heads in a noose and that he hadn't told us anything, and that tell me it was a big lie. So then I told Perry if he didn't be still I would have to ask him to leave and he kept yelling at him and threatening him to keep still, he didn't want him to talk. So I asked Perry to come with me out of the room and we went down the hall into another interrogation room about 6 feet away from that room and he wouldn't get in the room. He just kept yelling for him to shut up. And so then he immediately started in the room and he picked up a chair, raised it about halfway and Officer Haggerty and myself had to use force to take the chair away from him and we had to handcuff him. And all the time he kept yelling back at Pruitt to shut up." The officer further testified that he used no force on appellant in an effort to induce him to confess to the robbery. That he "fought with him (appellant) to put handcuffs on him after he became combative".

The three defendants were sworn as witnesses in their own behalf and each denied committing the offense charged.

Appellant Perry could not remember exactly where he was at the time of the robbery, but denied any knowledge of it. He testified that the conversation he had with Officer Frink on the occasion when he was stopped in his automobile, was more than that related by the officer. Appellant's version of the conversation was, "Well, he asked me where did I get the pistol, and I told him I bought the pistol in a crap game and he said, well, he made a statement something like this, he said, well, anyway he said he didn't believe I got the gun in a

crap game. He told me, say a snub nosed .38, you know you can't go hunting with that, don't you? I said yes."

With regard to his arrest on October 4, 1956, appellant testified that he received information that some police officers were looking for him; that he called several police stations and finally called University Police Station; that he talked with someone there and asked if they had a warrant for him; that the person he talked with said he did not know of anything off-hand and if they did have one they would come out the following morning; that about twenty minutes later someone knocked at appellant's house door and that it was two women inquiring about an apartment for rent; that while he was talking to them, two officers came up and told him to go back into the house; that appellant sat on the couch and that one of the officers talked to him while the other searched through the house; that he was then taken to the station; that he had no conversation with the officers other than to ask what the warrant out for him was and that the officers did not say; that the stocking (People's Exhibit No. 2) was at the premises but that it did not belong to him; that he was almost positive it belonged to another person living there with appellant and defendant Scandrett; that this person wore a stocking cap at night.

With reference to the conversation at which all three defendants were present at the police building, appellant testified that Officer Wright told defendant Pruitt to tell them all about the matter; that the officer told defendant Pruitt to tell what he (Pruitt) had told the officer; that defendant Pruitt started to say something and that appellant "cut in"; that defendant Pruitt could not have implicated appellant in the robbery but that appellant wanted to know what defendant Pruitt had to say; that appellant asked defendant Pruitt what he could have said about appellant; that the officer became angry and took appellant from the room and used violence on him, along with another officer and that then appellant was handcuffed; that he

knew defendant Pruitt casually. On cross-examination appellant testified that defendant Pruitt did not implicate him in the room when all the defendants were present with the officers.

On rebuttal, the prosecution presented expert testimony showing that a comparison was made between fingerprints appearing on pieces of glass from the picture frame which contained the silver coins at the premises of the robbery and defendant Pruitt's fingerprints; and that defendant Pruitt's right thumb print corresponded with a print found on the glass which came from the frame.

[1,2] As ground for reversal of the judgment, appellant first complains that the court "erred by not explaining to the jury during the course of the trial or during the conflicts of testimony presented by D. A. witnesses, the doctrine of reasonable doubt". Although the instructions were not brought here on this appeal since no application therefor was made (Rule 33(b), Rules on Appeal), appellant concedes that the instructions were given the jury at the close of evidence and argument of counsel, but urges that the instruction on reasonable doubt should have been given to the jury, "during the conflicts of testimony" that was presented by the witness for the prosecution. Penal Code, section 1093, provides for the order of proceedings at the trial, and it is therein stated that at the conclusion of the arguments, "The judge may then charge the jury * * *". That is the procedure followed in the instant case. Appellant further urges that when the instructions were given, the court "read them in such a non-conformed and nonchalant manner that it would take some understanding of law to realize the meanings of his instructions and what he was attempting to say". No such objection was made at the trial (where appellant was represented by counsel) and it must now be presumed that official duty was regularly performed (Code Civ.Proc. sec. 1963, subd. 15).

[3] Appellant's next contention is that the trial judge "showed prejudice against

the defendant by assisting or attempting to assist the district attorney in the questions and cross-examination of appellant". This complaint is predicated upon the following incident which occurred during the direct examination of appellant:

"The Court: Mr. Perry, a while ago, you said you were surprised at the statements that Pruitt made. What statements do you mean?

"Mr. Carter (Appellant's counsel): Just a second—

"A. I didn't actually hear any statement.

"Mr. Carter: If your Honor please, I didn't hear him say I was surprised at the statement.

"The Court: I may be mistaken. Let's go back about 4 questions. (Record read by the reporter.)

"The Court: I guess I did understand.

"Mr. Carter: I apologize. You did understand."

When the record was read by the reporter it reflected that appellant had testified he was surprised at the statements defendant Pruitt made. The record clearly reveals that the trial judge was simply attempting to clarify the testimony. This was not only his right but his duty (*People v. Sanders*, 98 Cal.App.2d 703, 708, 220 P.2d 761).

[4] Equally without merit is appellant's next contention that the court erred in admitting conflicting testimony by Mr. Tray and Mr. Dennis (victims of the robbery) as to the number of persons involved in the offense. Mr. Tray testified there were three men, two of whom were masked. Mr. Dennis testified that he had been semidozing and only actually saw two men, who roused him up; that they were masked; that as to whether he observed a man without a mask, he did not get a clear look; that prior to the episode he had some alcoholic beverages to drink and was feeling the effect slightly. No objection was interposed to the testimony on the ground now urged and appellant's complaint at this time could on that

account be held unavailing. However, an objection at the trial would have been equally unavailing because appellant's objection amounts only to a challenge of the credibility of the witnesses. Since no inherent improbability appears in the testimony of either witness as to what he observed (*People v. Braun*, 14 Cal.2d 1, 5, 92 P.2d 402), appellant's challenge lacks substance. The credibility of witnesses is for the jury to determine (*People v. Boyce*, 99 Cal.App.2d 439, 443, 444, 221 P.2d 1011).

[5] Appellant next asserts that the district attorney committed prejudicial error in questioning Mr. Dennis, a witness for the prosecution, in that the prosecutor "kept insinuating and insisting throughout the examination of this witness that there were three (3) men involved while the witness stated there were two", and further that the deputy district attorney "went on to insinuate that this witness Mr. LeRoy Dennis was drunk during the time of the robbery". After the witness testified that he saw only two men, the following occurred:

"Q. (by Deputy District Attorney): Tell us, if you can remember, Mr. Dennis, about how many drinks of what type you had there before these 3 men came in on that evening? A. Well, I don't know exactly. I had been drinking, not too much, but I had been drinking.

"Q. Were you feeling the effect of the drinks you had had? A. Yes, slightly."

It is at once apparent that the questions propounded to the witness sought only to develop the true circumstances with regard to what he observed and his capacity for such observation.

[6] What we have just said is also applicable to appellant's contention that the prosecutor improperly "insinuated" that defendant Pruitt withdrew his confession because he was afraid of appellant. The witness was asked if he was not presently afraid of appellant. The interrogatory was proper and relevant as affecting the credibility of the witness and to ascertain what

might be actuating the testimony given by the witness as to retracting his confession (People v. Krug, 10 Cal.App.2d 172, 176, 51 P.2d 445).

[7, 8] Appellant next claims error in the admission into evidence "against all three (3) defendants", a recording of defendant Pruitt's confession, in that it was involuntarily made. Officer Wright testified that defendant Pruitt's statements were made freely and voluntarily. Appellant refers to contrary testimony by defendant Pruitt. In such a situation the admissibility of an alleged confession rests in the sound discretion of the court. It does not appear that the court abused this discretion in the case at bar. Furthermore, appellant is in no position to complain. The court admonished the jury clearly and explicitly that any statements made by defendant Pruitt in the conversations being called for by the questions were to be considered only in connection with the case of defendant Pruitt. When the aforementioned recording of one of these conversations was offered, the prosecuting attorney specified that it was offered solely against defendant Pruitt, as with the last conversation. The court was not asked to reiterate the admonition. It is presumed that the jury heeds the admonitions of the court. Appellant's rights were amply protected and no prejudice to him is demonstrated, nor can it reasonably be inferred.

[9] Appellant's further claim that assuming defendant Pruitt's confession was free and voluntary, "* * * it did not tend to corroborate with other evidence offered against the defendant and appellant and that this confession was not sufficient to convict the appellant alone", is untenable. The answer to this contention is twofold. In the first place, such evidence was not relied upon to convict appellant. As heretofore noted, it was offered by the prosecution as against defendant Pruitt, and the court so instructed the jury. Secondly, the verdict of the jury is sufficiently supported by other testimony such as similarity in appearance and voice between appellant and one of the participants in the robbery, and

by testimony of appellant's possession of a gun taken from the scene of the robbery, coupled with the explanation offered by him regarding his possession thereof (People v. Mora, 139 Cal.App.2d 266, 271, 272, 293 P.2d 522; People v. Castro, 68 Cal.App.2d 491, 494, 157 P.2d 25).

Appellant challenges the validity of the search of his home at the time of his arrest by Officer Nordin, upon which occasion a stocking cap, heretofore referred to in the evidentiary narrative, was taken by the officer. Appellant contends the search was made without a warrant, was not incidental to arrest or by consent.

[10-12] At his trial, appellant made no objection to the introduction of the People's Exhibits on the ground they were obtained through an illegal search and seizure. Therefore, appellant is in no position to complain for the first time on appeal (People v. Kitchens, 46 Cal.2d 260, 262, 294 P.2d 17; People v. Millum, 42 Cal.2d 524, 526, 267 P.2d 1039). Furthermore, the record does not reflect that appellant made any *prima facie* showing in the trial court of an alleged illegal search or seizure. The presumption therefore is that the officers acted within their authority (People v. Holguin, 145 Cal.App.2d 520, 522, 302 P.2d 635). Without here repeating the pertinent testimony as to Officer Nordin's visit to appellant's home, it will suffice to say that the former went to the home of the latter to arrest him. According to the officer's testimony he did just that. He questioned appellant concerning the gun taken from the scene of the robbery with which we are here concerned, and which weapon had previously been taken from appellant. There can be no substantial doubt that the officer had reasonable cause for believing the person arrested (appellant) had committed a felony. The arrest was valid under Penal Code section 836(3) (People v. Holguin, supra, 145 Cal.App.2d at page 522, 302 P.2d 635). And, we are also satisfied that the trial court was authorized to reasonably conclude that the search was incident to and properly within the scope of the arrest (People v. Winston, 46 Cal.2d 151, 162, 293

P.2d 40). No prejudice or violation of appellant's constitutional rights appears.

The judgment is affirmed.

FOURT, J., and DRAPEAU, J. pro tem.,
concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Dennis John DOYLE, Defendant and
Appellant.*
Cr. 5973.

District Court of Appeal, Second District,
Division 3, California.

Dec. 4, 1957.

Hearing Ordered Jan. 28, 1958.

Defendant was convicted of forgery, and from a judgment of the Superior Court, Los Angeles County, Louis H. Burke, J., the defendant appeals. The District Court of Appeal held that defendant was not entitled to rescind his plea of guilty.

Judgment affirmed.

Criminal Law 274

Defendant was not entitled to rescission of his plea of guilty to forgery on the ground that he allegedly had been told by his attorney that the charge was a misdemeanor.

Dennis John Doyle, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

PER CURIAM.

Dennis John Doyle was accused by information of four offenses of forgery of a fictitious name (Penal Code § 470).

The information alleged that he had suffered a previous felony conviction of violation of the Dyer Act, 18 U.S.C.A. §§ 2311-2313, under the name of William T. Heiser, another conviction of issuing a check without sufficient funds and had served terms of imprisonment therefor in a federal prison and a state prison.

Upon the trial defendant was represented by a deputy public defender. To the first count of the information he pleaded guilty; he denied the former conviction, and waived trial by jury. The matter of probation and disposition of the remaining counts was continued for future disposition. Defendant filed an application for probation, which was denied. The three remaining counts of the information were dismissed, the allegations of the former convictions were stricken, and defendant was sentenced to state prison.

The judgment was rendered March 29, 1957; defendant's notice of appeal signed by himself, addressed to the trial judge, was dated April 8th; it was mailed April 9th and filed with the clerk April 10th.

Upon the request of defendant for the appointment of counsel on the appeal the matter was referred to the Committee on Criminal Appeals of the Los Angeles Bar Association. A report was made to the court by a member of the committee that the record had been examined and that it disclosed no meritorious ground for an appeal; defendant's request for appointment of counsel was denied; defendant was so notified and given 30 days for the filing of a brief. No brief has been filed.

After probation was denied, defendant asked that his plea of guilty be rescinded. The court stated: "If you feel that you have pled guilty to something that you are not guilty of—" when defendant interrupted, saying, "Well, I am guilty of the one charge I admit it but I want to stand a court trial. I think I can get out of it by gosh, the way I've been treated." Defendant also stated that he had been told by his attorney, whom we know as an able and experienced lawyer, that the

* Opinion vacated 331 P.2d 45.

charge to which he was pleading guilty was a misdemeanor which the attorney designated, and the court believed to be, a misstatement. Defendant is 80 years of age, and this fact was no doubt taken into consideration by the court in ordering dismissal of three counts of the information and striking the allegations of the former convictions.

The judgment is affirmed.



155 Cal.App.2d 631

Mike KELBER, Plaintiff and Respondent,

v.

The CITY OF UPLAND, California, a municipal corporation, Eugene G. Nisbett, E. Tweed Stone, Donald C. Carr, Abner B. Haldeman, Robert A. Thrall and Elwin Alder, Defendants and Appellants.

B. F. HUNGERFORD, J. T. Harris, and J. Shewell, Plaintiffs and Respondents,

v.

The CITY OF UPLAND, California, a municipal corporation, Eugene G. Nisbett, E. Tweed Stone, Donald C. Carr, Abner B. Haldeman, Robert A. Thrall and Elwin Alder, Defendants and Appellants.

Civ. 5578, 5579.

District Court of Appeal, Fourth District, California.

Nov. 27, 1957.

Hearing Denied Jan. 23, 1958.

Consolidated actions to recover refunds of certain subdivision fees paid to city by plaintiffs as condition for approval of plaintiffs' subdivision maps. The Superior Court, San Bernardino County, Martin J. Coughlin, J., entered judgments for plaintiffs and defendants appealed. The District Court of Appeal, Barnard, P. J., held that ordinances adopted by city requiring subdivider, as condition of approval of subdivision map, to pay \$30 per lot to be placed in park and school site fund and

\$99.07 per acre to be placed into subdivision drainage fund in lieu of specified drainage structures both inside and outside subdivision were not local ordinances regulating the design and improvement of a subdivision as defined in the Subdivision Map Act and fees collected by the city under such ordinances were illegally imposed.

Affirmed.

1. Municipal Corporations 43

A municipality may adopt local ordinances as defined in the Subdivision Map Act when such local ordinances are supplemental to the Act and bear a reasonable relation to the purposes and requirements of the Act. West's Ann.Bus. & Prof.Code, § 11500 et seq.

2. Municipal Corporations 43

Although the Subdivision Map Act specifically and impliedly permits the adoption of some local ordinances, relating to design and improvement, a municipal corporation does not have an unlimited permission to adopt local ordinances relating to design and improvement but is restricted to such local ordinances as come within the limitations contained in the act. West's Ann.Bus. & Prof.Code, § 11500 et seq.

3. Municipal Corporations 43

The word "local ordinance" as used in Subdivision Map Act providing that governing body shall approve subdivision map if it conforms to all requirements of act and of any "local ordinance" which is applicable, refers to an ordinance regulating design and improvement of subdivision insofar as such regulations are consistent with and not in conflict with the Act. West's Ann.Bus. & Prof.Code, §§ 11506, 11611.

See publication Words and Phrases, for other judicial constructions and definitions of "Local Ordinance".

4. Municipal Corporations 43

The word "design", as used in Subdivision Map Act providing that, if there is local ordinance regulating "design" and improvement of subdivision, subdivider

shall comply with its provisions before map may be approved refers only to grades, alignment and widths of streets and of easements and rights of way for drainage and sanitary sewers, and to minimum lot area and width. West's Ann.Bus. & Prof. Code, §§ 11510, 11551.

See publication Words and Phrases, for other judicial constructions and definitions of "Design".

5. Municipal Corporations ⇨43

The word "improvement", as used in Subdivision Map Act providing that, if there is a local ordinance regulating design and "improvement" of subdivisions, subdivider shall comply with its provision before map may be approved, refers only to streetwork and utilities. West's Ann.Bus. & Prof.Code, §§ 11511, 11551.

See publication Words and Phrases, for other judicial constructions and definitions of "Improvement".

6. Municipal Corporations ⇨43

Ordinances requiring subdivider, as condition of approval of subdivision map, to pay \$30 per lot to be placed in park and school site fund and \$99.07 per acre to be placed into subdivision drainage fund in lieu of specified drainage structures both inside and outside subdivision were not local ordinances regulating the design and improvement of a subdivision as authorized by Subdivision Map Act and fees collected by the city under such ordinances were illegally imposed. West's Ann.Bus. & Prof. Code, §§ 11506, 11510, 11511, 11525, 11526, 11551.

7. Municipal Corporations ⇨43

The purpose of the Subdivision Map Act is to provide for the regulation and control of the design and improvement of a subdivision with a proper consideration of its relation to adjoining areas. West's Ann.Bus. & Prof.Code, § 11500 et seq.

Henry M. Busch, City Atty., Upland, for appellants.

Kelber & Kelber, Ontario, for respondents.

BARNARD, Presiding Justice.

These are actions to recover a refund of certain subdivision fees required of the plaintiffs by the defendant city as a condition for its approval of final subdivision maps. The defendant city is a city of the sixth class and the other defendants are the city manager and members of the city council. The actions, consolidated at the trial and on appeal, involve similar facts and identical principles of law.

These appeals involve the validity of two amendments to the city's Subdivision Control Ordinance. One of these, adopted in May, 1952, provides as follows:

"That at the time of the approval of the final map of any subdivision or record of survey there shall be paid to the City of Upland, as a fee for such approval, the sum of Thirty and no/100 dollars (\$30.00) per lot for each lot in said subdivision or record of survey. Said fee shall be placed in a fund with the City Treasurer of the City of Upland to be known and designated as 'Park and School Site Fund'. Funds derived from said fees and deposited in said fund shall thereafter be used and expended solely for the purpose of acquiring park and school sites in the City of Upland."

The other, adopted in January, 1954, after requiring drainage structures both inside and outside the subdivision "necessary to the proper use and public safety", further provides "In lieu of the construction of drainage structures outside the subdivision or record of survey the subdivider shall pay into a fund to be designated 'Subdivision Drainage Fund', the following fees for acreage contained within the subdivision". It then fixes a fee of \$99.07 per acre for such residence property as is here involved.

The facts are undisputed. Briefly stated, the material facts in the first of these cases are as follows. The plaintiff owned about 15 acres within this city in an area zoned for residential development. In October, 1954, the plaintiff started proceed-

ings to subdivide this land and, in due course filed with the city an application for approval of the subdivision map. As a condition precedent to the granting of this application, and the approval of said map, the defendants required the plaintiff to pay as a fee for such approval the sum of \$1,440 for the "Park and School Site Fund" mentioned in the first of these articles, and the further sum of \$1,500 for the "Subdivision Drainage Fund" mentioned in the other ordinance. These demands were made pursuant to the provisions of these two ordinances, and the defendants refused to approve said subdivision map or permit the plaintiff to subdivide his property until and unless he first paid said sums for the purposes indicated in the ordinances. By reason of the requirements and demands thus made the plaintiff paid to the City of Upland a total sum of \$2,940. These sums were paid by the plaintiff involuntarily and under protest, and under compulsion in the sense that they were paid in order that he might obtain the necessary approval of the subdivision map. The plaintiff complied with and fulfilled all conditions precedent to the granting of the application and the approval of said subdivision map as required by law or regulation. After the payment of the said \$2,940 as contributions to these two funds the plaintiff's application was granted and his subdivision map was approved. Thereafter, the plaintiff subdivided his land and improved the same pursuant to all requirements for improvement and design as made by the defendants and under the law, and each and all of these improvements and design were approved by the defendants and accepted by the city. These improvements included provisions for local traffic and surface drainage of water upon and from said land and subdivision, and the city accepted all dedications of public streets, alleys and easements provided for by said plans and map. Thereafter, the plaintiff made written demand for repayment and refund to him of the \$2,940 thus paid, which demand was refused by the city. The plaintiff is the owner of other

land in the City of Upland which he intends to subdivide and improve in the future, and the defendants intend to require him to make contributions to the two funds as provided for in these ordinances as a condition precedent to the granting of any application for approval of subdivision maps with respect to any other land owned by the plaintiff in said city.

The court found the facts above stated, among other things, and as conclusions of law found that the provisions of these two ordinances which require the payment of such sums as contributions to the "Park and School Site Fund" or the "Subdivision Drainage Fund" of said city, as a condition precedent for the approval of a subdivision map, are void and of no force and effect; that the provisions of these ordinances are in conflict with the provisions of the Subdivision Map Act of this state; that the plaintiff is entitled to judgment against the city in the sum of \$2,940; and that the plaintiff is entitled to a decree enjoining the defendants from attempting to enforce these provisions as a condition of its approving any application for subdivision maps of the property owned by the plaintiff. Judgment was entered accordingly in each of these actions and the defendants have appealed from each of said judgments.

The appellants contend that the Subdivision Map Act (Secs. 11500 et seq. of the Bus. and Prof.Code) does not fully occupy the field of subdivision control; that such a city has the authority to adopt and enforce reasonable requirements which are not specifically set forth in the Map Act as a condition precedent to the approval of a subdivision map; and that such a city has authority to require the payment of fees in lieu of a dedication or an improvement as a condition precedent to the approval of a subdivision map, where the dedication or improvement required, or the payment of fees in lieu thereof, is reasonably related to the character of local and neighborhood planning. It is

argued that the purpose of the city in requiring such contributions to funds established for the general benefit of the city, and to meet its growing needs, is in line with the modern tendency to extend the earlier concept of the police power as confined to matters of public peace, safety, morals and health so as to include the broader field of general welfare; that the ordinances here in question bear a reasonable relation to the problem sought to be solved by the requirement made; that if a city may require dedication and improvement in some cases it logically follows that it may require contributions in lieu of such dedication or improvement; that it would be impractical, unfair and arbitrary to require such small subdivisions as the ones here in question to provide areas for recreational purposes or general drainage structures, as they would be too small for any purpose and would not be in line with other plans of the city; and that the matter of subdivision of land is so closely allied with the matter of zoning and planning that the zoning and planning laws should have a controlling effect on the present problem.

The respondents contend that the State has fully occupied the field here in question; that a nonchartered city may regulate only the improvement and design of a subdivision within the city, and that only when this is done in conformity with state law and not in conflict therewith; that such a city may not enforce requirements which are more burdensome or restrictive than the state law; that the authority of the defendant city to impose conditions precedent to the approval of a subdivision map is limited to conditions reasonably related to "improvement" or "design" of the subdivision, as those terms are defined and limited in the statute and cases; and that the city's requirements for the payment of moneys into the funds here in question, as a condition to its approval of this subdivision map, are in conflict with the Subdivision Map Act and impose conditions which are invalid.

[1] The Subdivision Map Act permits the adoption of local ordinances as defined in the Act and it has accordingly been held that such local ordinances may be adopted when they are supplemental to the Act and are not in conflict therewith, and provided that they bear a reasonable relation to the purposes and requirements of the Act. *Clemons v. City of Los Angeles*, 36 Cal.2d 95, 222 P.2d 439; *McCarthy v. City of Manhattan Beach*, 41 Cal.2d 879, 264 P.2d 932; *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1, 5, 11 A.L.R.2d 503. In the *Ayres* case in considering certain conditions requiring the dedication of small areas for street purposes, after pointing out that there was no specific limitation in the Subdivision Map Act forbidding these particular conditions, the court said: "* * * it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions."

The question here is whether the ordinance amendments in question are of that nature, and whether they bear such a reasonable relation to the requirements of the act that they may properly be added as a condition precedent to the approval of such a map. In other words, the question is whether these provisions merely supplement the requirements of the statute in a reasonable way, or whether they materially change the requirements necessary for the approval of a map as fixed by the legislature.

[2-5] While the act specifically and impliedly permits the adoption of some local ordinances, relating to design and improvement, this is not an unlimited permission but is restricted to such local ordinances as come within the limitations contained in the Act. Section 11611 of the Act provides that the governing body shall approve the map if it conforms to all the requirements of this chapter and of any "local ordinance" which is applicable. Sec-

tion 11506 provides that the words "local ordinance" refer to an ordinance regulating the design and improvement of subdivisions insofar as such regulations are consistent with and not in conflict with the provisions of the Act. Section 11510 specifically states that the word "design" refers to grades, alignment and widths of streets and of easements and rights of way for drainage and sanitary sewers, and to minimum lot area and width. Section 11511 provides that the word "improvement" refers only to such street work and utilities, to be installed on the land to be used for public or private streets, highways, ways and easements, "as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to an approval and acceptance of the final map." Section 11525 provides that the control of the design and improvement of subdivisions is vested in the governing bodies of cities subject however to review as to its reasonableness by the superior court. It further provides that every city shall adopt an ordinance regulating and controlling the design and improvement of subdivisions. This is the only provision in this chapter requiring the enactment of a local ordinance. Section 11526 provides in part that the design and improvement of subdivisions, the content of final maps and the procedure to be followed in securing official approval are governed by the provisions of this chapter and by the additional provisions of local ordinances dealing with subdivisions, "the enactment of which is required by this chapter." Section 11551 provides that the subdivider shall comply with the provisions of a local ordinance if there is one before the map may be approved, and that where there is no local ordinance the governing body may, as a condition precedent to the approval of the map, "require streets and drainage ways properly located and of adequate width, but may make no other requirements." Section 11529 provides that the city engineer shall make the necessary detailed examination of final

maps to enable him to make the certificate required by the statute, and that local ordinances may provide a proper and reasonable fee for such examination to be collected from the subdivider.

[6] All of the references to local ordinances in the Subdivision Map Act relate to a local ordinance as defined in the statute, and to the design and improvement of subdivisions which are also defined in the statute. An intent rather clearly appears to limit, by these definitions, the authority of such a city to adopt local ordinances regulating subdivisions. Moreover, the only other provision in the Act as to what a local ordinance may contain, which is also the only provision in the Act permitting the imposition of a fee, is that in Section 11529 permitting a provision for a fee for the work of the city engineer. The provisions here in question are not local ordinances regulating the design and improvement of a subdivision, as those terms are defined in the Act. It rather clearly appears that these fee provisions are fund raising methods for the purpose of helping to meet the future needs of the entire city for park and school sites and drainage facilities, and that they are not reasonable requirements for the design and improvement of the subdivision itself. It seems obvious that this fund raising method is not related to the needs of this particular subdivision or to the matter of making proper connections between this subdivision and the adjoining area; that it is not reasonably required by the type and use of the subdivision as related to the character of local and neighborhood planning and traffic conditions; and that it is inconsistent with and conflicts with the provisions of the Subdivision Map Act which set forth the conditions and requirements necessary for obtaining an approval of the map.

[7] The purpose and intent of the Subdivision Map Act is to provide for the regulation and control of the design and improvement of a subdivision with a proper consideration of its relation to adjoining areas, and not to provide funds for

the benefit of an entire city. The authority to adopt local ordinances containing requirements supplementary to the Map Act is limited by the terms of the statute. While the power of a city to adopt many regulations in connection with the matters covered by the statute may well be implied, even though not expressly stated, the power to require the payment of large fees or contributions for general city benefits as a condition of the approval of a map may not reasonably be implied, and it is entirely inconsistent with the language and apparent intent of the statute. The imposition of such fees as a condition for the approval of such a map not only bears no relation to the requirements indicated in the statute but would directly impede the realization of what appears to be the intent and meaning of the Act. It follows that the fees here in question were illegally imposed and collected.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR and SPENCE, JJ., dissenting.



155 Cal.App.2d Supp. 866

IMPERIAL THRIFT AND LOAN, etc.,
Plaintiff and Appellant,

v.

Ray FERGUSON et al., Defendants and
Respondents.

Civ. A. 9400.

Appellate Department, Superior Court,
Los Angeles County, California.

Nov. 19, 1957.

Action to recover balance due, under conditional sale contract, after repossession and sale of vehicle following buyer's default. From a judgment of the Municipal Court of the San Antonio Judicial District,

F. B. Mullendore, J., denying recovery, on the theory that credit for the time price differential should be allowed, defendant appealed. The Appellate Department held that statute, entitling buyer to refund credit for anticipation of payments, had no application.

Reversed with directions.

1. Sales ⇐188

Statute, entitling buyer "satisfying" indebtedness to refund credit for anticipation of payments, had no application to situation where buyer had defaulted under conditional sale contract and seller had repossessed and sold vehicle; and that statute did not entitle buyer to credit for time price differential. West's Ann.Civ.Code, §§ 2981, 2982(d).

See publication Words and Phrases, for other judicial constructions and definitions of "Satisfying".

2. Sales ⇐188

Civil Code section, entitling buyer to refund credit for anticipation of payments in event contract is "satisfied" before final maturity thereof, is merely an extension of the usury laws. West's Ann.Civ.Code, § 2982(d).

3. Usury ⇐61, 77

Contract must in its inception require payment of usury or it will not be held a violation of statute; and it may not be so adjudged after some default of borrower authorizing penalties or forfeitures which, if exacted in the beginning, would have been a violation of statute.

4. Usury ⇐32

No violation of usury law would result from refusing refund credit, for time price differential charges, to buyer whose default under conditional sale contract resulted in repossession and sale of vehicle. West's Ann.Civ.Code, §§ 2981, 2982(d).

Ronald C. Roeschlaub, Los Angeles, for appellant.

J. Gregg Evans, Los Angeles, for respondents.

Before BISHOP, P. J., and KAUFFMAN, J.

BY THE COURT.

The plaintiff sought to recover the balance due, under a conditional sale contract for the purchase of an automobile, after it had been repossessed and sold following the purchaser's default. Recovery was denied the plaintiff on the theory that credit for the time price differential should be allowed. We are reversing the judgment because we have reached the conclusion that this theory was unsound.

These facts were found by the trial court: On January 17, 1956, defendants purchased a car from Worthington Motors and executed a conditional sale contract therefor, in which the total cash price of the car was set forth as \$2,466.85. After defendants made a down payment which covered part of the purchase price and paid license fees and the first year's insurance premium, there remained an unpaid cash balance on the car of \$2,168. To this was added a time price differential of \$671.80. It was agreed that the resulting balance of \$2,839.80 should be discharged in thirty monthly installments of \$94.66 each, the first to be paid a month and three days after the execution of the contract. The contract provided that upon default of the purchaser, the seller might repossess the automobile, sell it, and hold the purchaser liable for any deficiency, with interest at the rate of 8% per annum. The contract further provided that the purchaser would be liable for costs and attorney's fees incurred by the seller in enforcing any rights under the contract.

Immediately upon its execution, the contract was assigned by Worthington Motors to the plaintiff. The defendants made six monthly payments to the plaintiff before defaulting on August 20, 1956. A month later, no further payments having been made, the plaintiff repossessed the car and

sold it for a net price of \$1,681. After crediting the defendants' account with \$31.38, on cancellation of insurance on the car, a balance of \$559.46 remained unpaid under the terms of the conditional sales contract.

This action was commenced to recover the unpaid balance, together with interest, attorney fees and costs. The judgment that the plaintiff take nothing is explained by these conclusions of law, appearing as paragraph 5 of the Findings of Fact: "That the defendants discharged their obligation under said contract before the final maturity thereof and are entitled to a refund credit against the time price differential charges found in said contract, which credit is found to be \$559.46."

The defendants contend that a liberal construction of subdivision (d) of section 2982, Civil Code allows them a refund credit against the time price differential. It is there provided that "the buyer may satisfy in full the indebtedness evidenced by such contract at any time before the final maturity thereof, and in so satisfying such indebtedness shall receive a refund credit thereon for such anticipation of payments."

[1] The words of the section that we have quoted are clear and unambiguous. There is no authority cited by the defendants to support their construction of the section as encompassing a situation where the buyer defaults, as is here the case. The fact is that there has been no satisfaction of the indebtedness by the buyer and no anticipation of payments. Not only has there been no satisfaction of the total indebtedness by the buyer, but the buyer has not met the indebtedness which was due and immediately payable. This voluntary default constituted a breach of contract for which plaintiff was entitled to terminate defendants' interest in the automobile and the contract and to repossess and sell the car under the terms of the contract.

Section 2981, Civil Code defines "buyer" as meaning "the person who buys or hires property under a conditional sale contract, or any legal successor in interest of such person." Under the terms of this defini-

tion as applied to section 2982(d), Civil Code, it cannot be said that the "buyer" in section 2982(d) should be read to include either the seller or the person to whom the car was sold after repossession, which is what must be done to support respondents' contention. The contract provided that upon default of the buyer, his rights under the contract may be declared to be terminated by the seller, which, in effect, was done by the repossession and subsequent resale of the car. Neither the seller nor the subsequent purchaser of the car at the resale could be considered the successor in interest of respondent buyer since by his default and the subsequent repossession of the car respondent had no rights under the contract to which another could succeed. Therefore, it appears that there is no logical or authoritative basis for an interpretation of section 2982(d), Civil Code which would include the events as here occurred.

[2-4] Respondents next argue that if a refund credit of the time price differential is not granted them, that plaintiff will be awarded a usurious rate of interest since the automobile was repossessed prior to the maturity date of the contract. It is true that section 2982, Civil Code is merely an extension of the usury laws. *Stone v. James*, 1956, 142 Cal.App.2d 738, 740, 299 P.2d 305, citing *Carter v. Seaboard Finance Co.*, 1949, 33 Cal.2d 564, 203 P.2d 758. However, it has been held that "the contract must in its inception require a payment of usury or it will not be held a violation of the statute and it may not be judged after some default of the borrower, which default alone authorizes penalties or forfeitures which, if exacted in the beginning, would have been a violation of the statute [citations]." *Sharp v. Mortgage Security Corp.*, 1932, 215 Cal. 287, 290, 9 P.2d 819, 820.

In the case of *Abbot v. Stevens*, 1955, 133 Cal.App.2d 242, 284 P.2d 159, 160, plaintiffs borrowed \$30,000 from defendant on a three-year note which provided for 10% interest per annum payable monthly.

The terms of the note provided "Privilege is hereby reserved of paying this Note in full prior to maturity by payment of principal, accrued interest, and 180 days unearned interest as a pre-payment privilege." Plaintiffs paid the note prior to maturity plus \$1,500 for the privilege as provided in the terms of the note. They then brought suit for treble damages alleging, among other things, that the note was usurious. The court, in holding that the note was not usurious, stated at page 247 of 133 Cal.App. 2d, at page 162 of 284 P.2d, "'Where the excessive interest is caused by a contingency under the lender's control, or not under the borrower's control, the transaction is usurious; otherwise when the contingency is under the borrower's control.' [citations]." Here, it appears that the provision of the contract calling for what would be an excessive rate of interest was entirely within the buyer's control since subject to his default and therefore is not usurious.

In concluding our discussion we observe that except as the legislature has imposed limitations, parties are free to contract, respecting the sale of property upon such terms as they may agree, and may provide for a greater sum for a sale with deferred payments than for a cash sale. There is nothing in subdivision (d) of section 2982, Civil Code which expressly provides for a refund credit against the time price differential upon default of the buyer. If the legislature had intended to allow a refund credit under such circumstances, it would have been a simple matter for it to have so stated. Absent such a statement, the contract of the parties governs.

As the trial court has fully found the facts, except as to attorney fees incurred in bringing this action, and the evidence amply supports the findings, we see no purpose to be served by a new trial. We therefore reverse the judgment with these directions to the trial court:

(a) Substitute for the present paragraph (5) of the Findings of Fact a finding of the

amount of reasonable attorney fees incurred by the plaintiff in taking action to collect the balance due under the contract.

(b) Substitute for the present Conclusions of Law the following: 1. That the plaintiff is entitled to judgment against the defendants for the sum of \$559.46, together with interest thereon at the rate of 8% per annum from the date of filing the com-

plaint in this action until the entry of judgment; for the reasonable attorney fees found above; and to its costs of this action.

(c) Enter judgment for the plaintiff, when the foregoing directions are carried out, in harmony with the newly made Conclusions of Law.

The appellant shall have its costs on appeal.

155 Cal.App.2d 833

Vinetta DANISAN, Plaintiff and Appellant,
v.

CARDINAL GROCERY STORES, Inc., et al.,
Defendants,

Cardinal Grocery Stores, Inc., a corporation; Mario Del Pero, Hugo Del Pero, and Gus Mondon, individually and doing business as Plumas Meat Market, Defendants and Respondents.

Civ. 9120.

District Court of Appeal, Third District,
California.

Dec. 9, 1957.

As Modified on Denial of Rehearing
Jan. 7, 1958.

Hearing Denied Feb. 5, 1958.

Action by customer for injuries sustained when she slipped and fell while shopping for groceries. From judgments based on orders of nonsuit entered by the Superior Court, Sutter County, Arthur Coats, J., the customer appealed. The District Court of Appeal, Peek, J., held that where building was leased to defendants, one of whom sold groceries, one of whom sold meats, and one of whom sold produce, and each defendant had a particular part of building but there was no visible indication of a division and patrons could move freely from one department to another, fact that customer, who had concluded her purchases of meats and groceries and had no intention of returning to those departments, slipped and fell while making purchases in produce department did not relieve other defendants of duty owed to customer while she was shopping in produce area, even though they had no right to enter that area and to clean it.

Judgment reversed.

Van Dyke, P. J., dissented.

1. Negligence ⇨32(3)

The invitation of a proprietor extends not only to all parts of premises which patron expressly is invited to use, but also to such parts as he or she is impliedly invited to enter, and the invitation also extends to those portions of the premises where the invitee, under circumstances and conditions

of his invitation, would naturally be likely to go.

2. Negligence ⇨54

Where building was leased to defendants, one of whom sold groceries, one of whom sold meats, and one of whom sold produce, and each defendant had particular part of building but there was no visible indication of a division and patrons could move freely from one department to the other, fact that a patron, who had concluded her purchases of meats and groceries and had no intention of returning to those departments, slipped and fell while making purchases in produce department did not relieve other defendants of duty owed to patron while she was shopping in produce area, even though they had no right to enter such area and to clean it.

3. Negligence ⇨48

To impose liability for injuries suffered by an invitee due to condition of premises, invitor must have either actual or constructive knowledge of dangerous condition or have been able by exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises.

4. Negligence ⇨136(22)

In action by patron for injuries sustained when she slipped and fell while shopping in produce portion of building leased to defendants, one of whom sold groceries, one of whom sold meats, and one of whom sold produce, evidence was sufficient to warrant submission of case against defendants, who sold meats and groceries, to the jury.

5. Negligence ⇨136(16)

Question of whether a dangerous condition which caused injury to patron has existed for such length of time as to have been discovered by store owner is a question for the jury.

C. Ray Robinson, Ronald G. Cameron, Merced, and James G. Changaris, Marysville, for appellant.

Rich, Fuidge & Dawson, Marysville, for respondent Cardinal Grocery Stores.

Peters & Peters, Chico, for other respondents.

PEEK, Justice.

This record presents an appeal from judgments based on orders of nonsuit for damages for injuries sustained by plaintiff when she slipped and fell while shopping in the Plumas Food Market in Marysville. The motion for nonsuit was denied as to the defendant Manuel Rose, and thereafter the action was dismissed without prejudice as to him.

The building in which the accident occurred was leased to the three defendants—Cardinal Grocery Stores, Inc., a corporation, referred to herein as “Cardinal”; Mario Del Pero, Hugo Del Pero and Gus Mondon, doing business as Del Pero-Mondon Meats, hereinafter referred to as “Del Pero-Mondon”; and Manuel Rose. The defendants sold groceries, meats, and produce respectively. Each defendant had a lease which covered a particular area of the building and provided among other things that the lessee should have “* * * the right of ingress and egress in, to, upon, through and over all parts and portion of said property as may be necessary to carry on and operate * * * [the particular department] for which this lease is given and made, and other conveniences as may be furnished and supplied in and upon said premises for the general use of all tenants hereof and/or patrons of the business conducted thereupon.”

The defendant Del Pero-Mondon occupied the northerly portion of the building. A meat display counter extended from the front to the rear of the building. Behind the counter was a meat-cutting room, as well as refrigerated storage rooms for that department. The center portion of the building was devoted to the grocery area. Storage space for this department was at the westerly side of the building and at the southeast corner thereof. The produce area was located in the northwesterly corner of the building. Immediately to the

east of the produce area was a 5-foot partition; however nothing on the north side of the produce area prevented free passage between it and the grocery area. The two customer entrances were at the west or front of the building, one opening into the grocery area and the other into the produce area.

When called as an adverse witness under section 2055 of the Code of Civil Procedure, the manager of the defendant Cardinal testified that there was parking space in front of the building which was used by the customers of all three defendants; that the only entrance for customers was through the two doorways as previously noted; that there was no line, partition or other visible indication of division of the three departments; that there was free movement from one to the other; that customers paid each department for articles purchased but that the employees at the check-out stands would carry out any article purchased from any of the three; that there was a neon sign on the building reading “Plumas Food Market”; that for the purpose of economy the three defendants usually advertised under the common heading of “Plumas Food Market” with separate boxes in the ads for each defendant, and each paid for its own space; that the cost of heating and cooling the building, as well as the maintenance of the sign, was prorated among the three lessees; that each lessee followed an imaginary line in maintaining and keeping clean the area in which its business was conducted, although the area in front of the meat department was always swept by employees of Cardinal and never by employees of Del Pero-Mondon; and that it was to their mutual benefit to have the three departments in the same building in that the more people attracted to the premises, the greater the volume of business for each department. The defendants, Hugo Del Pero and Manuel Rose, who were likewise called under section 2055, in general testified to the same effect as Mr. Arnoldy, the Cardinal manager. Rose additionally testified that his wife and son helped him in the store; that on the

day of the accident he had swept the produce area at approximately 4 p. m.; that his wife had previously left the store; that he then took over the checkout stand; and that his son was restocking shelves and helping carry out groceries and produce for the customers. He further testified that the parking lot and sidewalks were policed solely by the employees of Cardinal who also were the only persons who opened and closed the premises.

The plaintiff testified that it was her intention upon entering the store to shop in all three departments. Actually she first bought meat, then went to the Cardinal area where she made certain purchases of groceries and finally went to the produce section. While making her purchases there at approximately 4:30 p. m., she slipped on some substance, presumably an onion skin, and suffered the injuries for which she sought damages. The point where she fell was in the main aisle of the produce area and nearly opposite one of the two customer entrances to the building.

[1] As noted in Prosser on Torts (2d ed.) sec. 78, p. 458, what the author refers to as the "area of invitation" will of course vary with the circumstances of the case. He further notes that the invitation extends to the entrance of the property and to a safe exit after the purpose which has brought the invitee is concluded, and it extends to all parts of the premises to which the purpose may reasonably be expected to take him. And in Restatement of Torts, sec. 343, p. 940, it is said that in determining " * * * the area included in a business invitation, the nature of the business to be transacted is of great importance." In line with the general rule as stated, our courts have held: "The invitation of a proprietor extends not only to all parts of the premises which the patron expressly is invited to use, but also to such parts as he or she is impliedly invited to enter, and the invitation also extends to those portions of the premises where the invitee, under circumstances and conditions of his invitation, would naturally be likely to go." *Gastine v. Ewing*, 65 Cal.App.2d 131, 141, 150

P.2d 266, 270. The court therein further held that the determination of the question of " * * * whether the invitation, express or implied, included that part of the premises where the injury occurred is generally not one of law. On the contrary, it is usually a question of fact for the determination of the court or jury." 65 Cal. App.2d at page 141, 150 P.2d at page 270.

[2] The defendants argue, however, that even if it could be found that they invited the plaintiff to use the produce market as well as their own particular departments, nevertheless at the time of the accident she had concluded her purchases of meat and groceries, had no intention of returning to those departments, and that she was then acting solely for the benefit of herself and Rose. Furthermore, since they had no right to enter upon the area occupied by another and to clean the same, they owed no duty to plaintiff while she was shopping in the produce area. We cannot agree with such arguments. Although plaintiff testified that she had completed her purchases of meat and groceries and that the produce she was buying would have completed the purpose for which she entered the building, yet it could not be said as a matter of law that she had, for those reasons, ceased to be the invitee of the butcher shop and the grocery department since it is obvious that it was such a broad invitation that had been extended to her to come into the building that the jury could hold the purposes of the invitation and of her acceptance through entrance upon the premises had not been exhausted merely because in her mind at the moment she fell she did not intend to make further purchases.

From the record it would appear that here, as in the case of *Woodward v. Bank of America*, 130 Cal.App.2d 849, 279 P.2d 1018, it would be difficult to attribute to the joint operations of the defendants any purpose other than that by their concerted action they intended to and did invite the public generally to patronize the Plumas Food Market as such; that the invitation was not limited to the area occupied by any

one defendant to the exclusion of the others, but to the contrary was an invitation by all defendants and extended to all portions of the premises where plaintiff would likely shop. Such conduct was entirely consistent with the lease of each defendant which gave to him the right to use all the open space in the market in common with the other defendants. In fact such use was essential to the defendants' common overall plan of operation and hence it could be found that defendants knowingly and deliberately furthered the browsing habits of the ordinary shopper.

The second argument of defendants is equally untenable. In the case of *Biondini v. Amship Corp.*, 81 Cal.App.2d 751, 185 P.2d 94, similar contentions were made. There the plaintiff, a business invitee, brought an action against several defendants for personal injuries. The trial court granted defendants' motion for a nonsuit and plaintiff appealed. In reversing the orders of nonsuit the reviewing court held that the lack of ownership or legal right to maintain or repair property, while important, is not conclusive; that one might expressly or impliedly adopt the property of another and invite others to use it, and if they do, the invitor owes to such invitee a duty to exercise reasonable care to see that the property is safe. The court then concluded that whether or not they had done so was a question for the jury. The rule therein expressed is equally applicable to the facts in the present case.

[3-5] And lastly it is true that to impose liability for injuries suffered by an invitee due to the condition of the premises, the invitor " * * * must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it * * *." *Hatfield v. Levy Brothers*, 18 Cal.2d 798, 806, 117 P.2d 841, 845; see also

Hale v. Safeway Stores Inc., 129 Cal.App.2d 124, 128, 276 P.2d 118. But as the court there also held, " * * * the question of whether the condition which caused the injury had existed so long as to be discoverable by the store owner within a reasonable time is for the jury." 18 Cal.2d at page 807, 117 P.2d at page 846. Again, in *Louie v. Hagstrom's Food Stores, Inc.*, 81 Cal.App.2d 601, 607, 184 P.2d 708, 712, the court held: "It is generally a question of fact for the jury as to whether, under all the circumstances, the defective condition existed long enough so that a reasonable man exercising reasonable care would have discovered it * * * [and] a person operating a grocery and vegetable store in the exercise of ordinary care must exercise a more vigilant outlook than the operator of some other types of business where the danger of things falling to the floor is not so obvious." *Hale v. Safeway Stores Inc.*, *supra*.

It necessarily follows that when the evidence in the instant case is viewed in light of the well-established rule relative to nonsuits (*Blumberg v. M. & T. Incorporated*, 34 Cal.2d 226, 209 P.2d 1), and the rules heretofore set forth, there was ample evidence to warrant submission of the cause to the jury.

The judgments are reversed.

SCHOTTKY, J., concurs.

VAN DYKE, Presiding Justice.

I dissent.

I think we do not reach the question of the liability of Cardinal and Del Pero-Mondon for the condition of the floor of the produce market in so far as liability is predicated upon the leases and the business relations set up among the lessees. I think the plaintiff failed to prove a sufficient case of negligence on the part of anyone. The liability of a possessor of land—and herein I refer to Cardinal, Del Pero-Mondon and Rose—for bodily harm caused to business visitors, can be well stated by quoting from Restatement of the Law of Torts, Section 343:

"A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and * * * invites or permits them to enter or remain without exercising reasonable care to make the condition reasonably safe, or to give a warning adequate to enable them to avoid the harm * * *."

Even though it is generally a question of fact as to whether negligence has been made out in cases such as this, nevertheless there must be a factual showing by the plaintiff from which the jury can reasonably infer that the conditions of liability existed. Putting it another way, if the proof extends no further than to show slipping upon a foreign matter on the floor a prima facie case of land possessor liability to invitees has not been made out. In such a case there is nothing to go to the jury.

Under the evidence here the following was shown: Appellant, having shopped at the meat counter and in the grocery, walked into the produce area and, walking normally, went directly to the south part of that area where carrots were displayed. There she picked up a bunch of carrots; then, wanting to obtain a bag in which to carry them, she put the carrots down and walked toward the bag rack. On the way there she slipped and fell. She said that the time she had been in the produce area was a matter of a few seconds. A Doctor Riggs was in the produce area for a minute or two before he saw appellant fall. He saw nothing on the floor before the fall. The only other witness of the accident was Rose, who was called under Section 2055 and testified that he had swept the floor about 4 o'clock, some 20 or 30 minutes before the accident, and that the floor was clean after sweeping and he saw nothing on it before appellant fell. There were a number of

shoppers in the area. Rose said that it was neither a slack period nor a rush period, but he and his clerks were busy checking out purchases and carrying parcels to parked cars. All three witnesses testified that the only thing that they found on the floor after the appellant slipped was a skid mark, made apparently by her left heel, which was about 6 to 10 inches long and a quarter of an inch wide. On her heel there was a small piece of vegetable matter about the size of a quarter of a dollar.

While "the exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, because, obviously, it varies according to the circumstances" and while "a person operating a grocery and vegetable store in the exercise of ordinary care must exercise a more vigilant outlook than the operator of some other types of business where the danger of things falling to the floor is not so obvious" (Louie v. Hagstrom's Food Stores, 81 Cal. App.2d 601, 608, 184 P.2d 708, 712), nevertheless we are dealing with a lapse of time long enough to afford a reasonable inference that within that time the possessor ought to have discovered its presence. Of course, while this interval of time may be proved by circumstantial as well as by direct evidence like any other fact to be proved, nevertheless there must be some proof of a lapse of time before a jury has anything upon which to base an inference that negligence in failing to discover occurred. (There is in this case no proof of actual knowledge and nothing from which actual knowledge could be inferred.) On this question of the interval of time I think the case of Hale v. Safeway Stores, Inc., cited in the majority opinion, goes as far as it is possible to go in submitting to a jury a set of facts as legally affording basis for an inference. But there was in that case at least definite proof of an interval of time, short though it was, and further circumstances, from which it could be inferred that a longer interval of time had elapsed after the vegetable matter had been dropped on the floor.

In this case plaintiff proved nothing more than that she slipped on foreign matter and fell. On what then can a trier of fact base an inference of any considerable lapse of time at all? The last customer ahead of appellant may have dropped it. Seconds only may have passed before appellant fell. I think there is nothing affording ground for the trier of fact to embark upon the inquiry as to whether or not a sufficient time had elapsed to support an inference of negligence. I know of no case where proof such as was offered in the case has been declared sufficient to sustain a verdict.

While the briefs on appeal herein have been confined mainly to a discussion of the liability of Cardinal and Del Pero-Mondon if Rose was liable, nevertheless the motions for nonsuit were also grounded upon want of proof of negligence and therefore, of course, this court cannot reverse judgments based upon orders of nonsuit unless negligence was shown.

I think the appellant failed to make a case for the jury against any of the defendants and, therefore, I would affirm the judgment.

Hearing denied; SPENCE and McCOMB, JJ., dissenting.



155 Cal.App.2d 817

Lillian VAN DE VEER, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL and Alcoholic Beverage Control Appeals Board of the State of California, Defendants and Respondents.

Civ. 22679.

District Court of Appeal, Second District,
Division 1, California.

Dec. 9, 1957.

Proceeding on petition for writ of review of decision and order of Department of Alcoholic Beverage Control revoking petitioner's on-sale liquor license and de-

cision of Alcoholic Beverage Control Appeals Board affirming department's action. The Superior Court, Los Angeles County, John J. Ford, J., affirmed decision of department and board, and petitioner appealed. The District Court of Appeal, Fourth, J., held that forty day period within which appeal to Alcoholic Beverage Control Appeals Board from decision of Department of Alcoholic Beverage Control revoking license for sale of alcoholic beverages may be filed begins to run from time notice of decision of department is mailed, rather than when decision is delivered to licensee, and where appeal was received and filed by board forty-one days after department had mailed its decision board had no jurisdiction over it.

Affirmed.

1. Intoxicating Liquors ☞129

The Alcoholic Beverage Control Appeals Board is a constitutional administrative appellate body whose sole function is to consider appeals as part of administrative control of liquor sales. West's Ann.Const. art. 20, § 22.

2. Intoxicating Liquors ☞108(10)

The legislature has power to impose such limitations as it desires with reference to review of decision of Department of Alcoholic Beverage Control revoking any license for sale of alcoholic beverages. West's Ann.Const. art. 20, § 22.

3. Constitutional Law ☞70(3)

If statute providing for filing of appeal from decision of Department of Alcoholic Beverage Control revoking a liquor license were too severe, it would be province of legislature to change it and it would not be right of court to do so by judicial decree. West's Ann.Bus. & Prof.Code, § 23081; West's Ann.Const. art. 20, § 22.

4. Intoxicating Liquors ☞108(10)

Mailing of notice of appeal from decision of Department of Alcoholic Beverage Control, revoking license for sale of alcoholic beverages, to Alcoholic Beverage Control Appeals Board thirty-nine days after

decision was mailed to licensee was not equivalent of constructive filing and notice was not timely when received by board 41 days after decision. West's Ann.Bus. & Prof.Code, § 23081; West's Ann.Const. art. 20, § 22.

5. Intoxicating Liquors ⇌108(10)

Forty day period within which appeal to Alcoholic Beverage Control Appeals Board from decision of Department of Alcoholic Beverage Control, revoking license for sale of alcoholic beverages, may be filed, begins to run from time notice of decision of department is mailed rather than when decision is delivered to licensee, and where appeal was received and filed by board forty-one days after department had mailed its decision revoking license, board had no jurisdiction over it. West's Ann.Bus. & Prof.Code, §§ 23081, 23083.

—◆—
Carl B. Sturzenacker and Walter Monarch, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents.

FOURT, Justice.

This is an appeal from a judgment denying a petition for a writ of review and affirming a decision and order of the Department of Alcoholic Beverage Control (hereinafter referred to as the "Department"), and affirming a decision of the Alcoholic Beverage Control Appeals Board (hereinafter referred to as "Appeals Board") revoking petitioner's on-sale general liquor license.

Appellant sought by her petition to have vacated and set aside a decision and an order of the Department revoking her general on-sale liquor license, and the decision of the Appeals Board granting the motion of the Department to dismiss appellant's administrative appeal, which such motion was made upon the ground that the appeal was not filed within the statutory time.

Appellant had a general on-sale liquor license for premises known as the "La Vie

Club" in Altadena. A charge was filed with the Department to the effect that appellant permitted persons to resort to the premises for the purposes of engaging in homosexual activities, and alleging that continuance of the license would be contrary to public welfare and morals.

On January 17, 1956, a hearing was held on the charges, and on June 14, 1956, the Department, in its decision, found the charges to be true and ordered the license revoked. The decision was mailed from the Department in Sacramento to appellant in Altadena on June 14, 1956, and she thereafter filed a petition for reconsideration, which was denied by the Department on July 9, 1956.

On July 23, 1956, appellant mailed a notice to the Appeals Board which was received and filed by the Appeals Board on July 25, 1956, or forty-one days after the Department had mailed its decision to the appellant. The Department moved to dismiss the appeal upon the ground that it was filed beyond the forty-day period provided for in section 23081, Business and Professions Code, and that the Appeals Board was without jurisdiction to consider the appeal. The motion was granted and the appeal was dismissed by the Appeals Board. As heretofore indicated, the judge of the trial court agreed with the Department and the Appeals Board and denied the petition for a writ of review.

Section 22 of Article XX of the California Constitution provides in part as follows:

"* * * When any person aggrieved thereby appeals from a decision of the department * * * revoking any license for the * * * sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature."

Section 23081 of the Business and Professions Code provides:

"Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved by a final decision of the department may appeal to

the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal."

[1] The Appeals Board is a constitutional administrative appellate body whose sole function is to consider appeals as a part of the administrative control of liquor sales in California. Cal.Const., Art. XX, § 22.

This court through Justice Drapeau recently stated in *Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control*, 153 Cal.App.2d 523, 314 P.2d 1007, 1009:

"When an administrative remedy is provided by law, relief must first be sought from the administrative body, and this remedy must be exhausted before the courts will act. *Temescal Water Co. v. Department of Public Works*, 44 Cal.2d 90, 106, 280 P.2d 1, and cases cited.

"In the leading case of *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715, Mr. Chief Justice Gibson, speaking for the Supreme Court, states the above rule; also that a court violating it acts in excess of jurisdiction; and also that administrative remedies are not exhausted until an administrative appeal, if the law provides for it, is fully prosecuted."

In this case the Department mailed its revocation decision to appellant on June 14, 1956, and on July 23, 1956, thirty-nine days later, appellant deposited her notice of appeal in the mail. The notice of appeal was received and filed by the Appeals Board on July 25, 1956, the forty-first day after the decision was mailed. In other words, the appeal was filed one day after the running of the forty-day statutory period.

This court said in the *Hollywood Circle* case, *supra*, 153 Cal.App.2d at page 526, 314 P.2d at page 1009:

"But it is the policy of our law that time limits for filing notices of appeal in all legal proceedings must be complied with literally and exactly. This is generally held to be a jurisdictional prerequisite. Cf., *In re Estate of Hanley*, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250 * * *; 3 Cal. Jur.2d 653.

"Therefore, in this case, the administrative appeal was filed too late, the Appeals Board correctly held that it had no further jurisdiction over it, the Department's decision became final, and the courts have no jurisdiction to review the proceeding.

* * * * *

"Section 1013 of the Code of Civil Procedure does not affect the time specified in section 23081 of the Business and Professions Code."

Appellant contends (1) the time to file an appeal with the Appeals Board should commence to run from the date she received the decision of the Department, and (2) that her deposit of the notice of appeal in the mails constitutes a constructive filing.

[2, 3] The legislature, under the constitutional provisions heretofore related, has the power to impose such limitations as it desires. The legislature has acted and has provided (1) the appeal must be in writing; (2) the appeal must state the grounds upon which the review is sought; (3) a copy of the appeal must be mailed to each party including the Department, and (4) the appeal must be taken within forty days after the Department's decision is delivered or mailed to the parties (Bus. & Prof.Code, § 23081), and the appeal must be determined only on the record and on briefs filed by the parties, who have the right to present oral argument (Bus. & Prof.Code, § 23083). In adopting the law as now written, the legislature very properly provided that the time for filing an appeal begins to run upon the commencement of an official act by an agency of the State, namely, when the Department either *mails out its decision* or *personally serves it* on the party concerned, thereby placing it beyond the

control of some licensees to delay and delay by claiming they never received the notice, or claiming they received it later than it was actually received, and thereby placing the burden upon the Appeals Board to determine on each occasion just when, if ever, such a notice was received. If the present law is too severe, and we do not mean to imply that it is, it is the province of the legislature to change it and it is not our right to do so by judicial decree.

[4] As to the appellant's second contention, the Supreme Court has held that the mailing of a notice of appeal is not the equivalent of constructive filing. *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868; *McDonald v. Lee*, 132 Cal. 252, 64 P. 250; *Estes v. Chimes*, 40 Cal.App.2d 41, 104 P.2d 74.

An analogy may be drawn between the provisions herein considered and the provisions of the Internal Revenue Code (Int. Rev.Code [1954], 26 U.S.C.A. § 6213(a)). In part that section reads as follows:

"Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in Section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. * * *

Repeatedly the federal courts have held that unless the taxpayer officially filed his appeal to the reviewing tribunal within the statutory period the appeal must be dismissed. The depositing of a special delivery in the mail slot of the Board two hours and forty minutes after its official closing time on the last day of the statutory period was fatal to the appeal, the court holding that in general a paper is not filed within the contemplation of law until it is delivered to the proper officer to be filed by him. *Lewis-Hall Iron Works v. Blair*, 57 App.D.C. 364, 23 F.2d 972, 974. The same rulings have been applied in cases wherein the taxpayer deposited petitions for

redetermination in the mail which would have been delivered in time but for adverse weather conditions which delayed the mail. *Poynor v. Commissioner of Internal Revenue*, 5 Cir., 81 F.2d 521; see also, *Louisiana Discount Corporation v. Commissioner of Internal Revenue*, 5 Cir., 193 F.2d 495; *Di Prospero v. Commissioner of Internal Revenue*, 9 Cir., 176 F.2d 76.

[5] As we interpret the language in question in this case, the legislature meant to provide that the time would start to run, so far as the filing of an appeal was concerned, from the time the notice of *decision was mailed*. If it had intended to say that the time would start running when the decision was *mailed and delivered* to the parties, rather than when the "decision of the department is *delivered or mailed* to the parties" it would have been an easy matter to do so. (Emphasis added.) See *Dolezilek v. Commissioner of Internal Revenue*, 94 U.S.App.D.C. 97, 212 F.2d 458.

Judgment affirmed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.



155 Cal.App.2d 711

Clayton E. HEIMSTADT, Plaintiff and Respondent,
v.

TAPERED PARTS, Inc., a Corporation,
Defendant and Appellant.

Civ. 22295.

District Court of Appeal, Second District,
Division 3, California.

Dec. 4, 1957.

Proceedings for foreclosure of chattel mortgage. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment of foreclosure and mortgagor appealed from portion of judgment

which it claimed was in excess of amount due. The District Court of Appeal, Shinn, P. J., held that where note, in which mortgagor agreed to pay reasonable attorney's fee if attorney be employed to procure payment of note, was in default, mortgagor's offer to pay note and interest but not to pay attorney's fees which were part of the entire obligation was an insufficient offer of payment to stop the running of interest on obligation or to save mortgagor costs of suit.

Judgment affirmed.

1. Chattel Mortgages ⇨290

Costs ⇨42(1)

Interest ⇨50

Where note is in default, a sufficient offer of payment by mortgagor stops running of interest and relieves mortgagor of liability for attorney's fees and costs. West's Ann.Civ.Code, § 1504.

2. Tender ⇨12(1)

Where an obligation includes liability for attorney's fees, when the obligation to pay such charge accrues, it becomes a part of principal obligation and a creditor to whom payment is due has no duty to accept less than entire obligation.

3. Costs ⇨42(1)

Interest ⇨50

A tender of payment of note which does not include an offer to pay attorney's fees, which are part of entire obligation, is not sufficient offer of payment to stop running of interest on obligation and does not save debtor from costs of suit. West's Ann.Civ.Code, § 1504.

4. Chattel Mortgages ⇨239

Where note was in default and note contained provision for attorney's fees, should an attorney be employed to procure payment, and mortgagee demanded payment of entire note, mortgagor could not escape liability for payment of attorney's fees and costs of suit on theory that mortgagee should have objected to tender of payment, which excluded attorney's fees.

West's Ann.Code Civ.Proc. § 2076; West's Ann.Civ.Code, § 1501.

5. Chattel Mortgages ⇨239

Where mortgagor was in default on note, and mortgagee demanded payment including attorney's fees, fact that mortgagee may have been demanding too much in respect to attorney's fees did not relieve mortgagor of duty to pay a fair amount and offer to pay note with interest, and mortgagor's offer of payment, which excluded attorney's fees, amounted to refusal to pay anything with respect to attorney's fees, and it was too late for mortgagor to assert claim of attorney's fees was excessive after mortgagee brought suit for foreclosure. West's Ann.Code Civ.Proc. § 2076; West's Ann.Civ.Code, § 1501.

Nathan M. Dicker, Beverly Hills, for appellant.

Hanna & Morton and David A. Thomas, Los Angeles, for respondent.

SHINN, Presiding Justice.

The present action was for the foreclosure of a chattel mortgage in which judgment of foreclosure was decreed. Defendant appeals from a portion of the judgment which it is claimed was in excess of the amount due. The contention is that a tender was made of the amount due which was sufficient to stop the running of the interest obligation and to save the defendant the costs of suit.

[1] The note provided: "Should an attorney be employed to procure payment hereof by suit or otherwise, the undersigned, jointly and severally, agree to pay a reasonable sum as attorney's fees therefor." On February 18, 1955 plaintiff was in possession of defendant's check for \$2,000 which had been forwarded as partial payment with a letter which stated that that the balance unpaid was \$12,000. The check was returned by plaintiff's attorney with a letter which stated that there was an additional amount payable of \$212, that

defendant was in default, plaintiff elected to declare the entire amount of the note and interest immediately due, demanded payment including the \$212 and the sum of \$300 as attorney's fees.¹ No payment was made. On July 8th defendant made a written offer of payment.² Four days later the present action was commenced. It is not questioned that plaintiff had a right to accelerate the payment of the unpaid balance. Neither is it questioned by plaintiff that a sufficient offer of payment stops the running of interest and relieves the debtor of liability for attorney's fees and costs. Civ. Code, § 1504; *Holland v. Paddock*, 142 Cal.App.2d 534, 298 P.2d 587.

The questions of law are whether plaintiff had a right to demand the payment of \$300 as attorney's fees and whether defendant's tender of payment was sufficient to stop the running of interest and to save defendant from costs of suit.

Upon the first point the only contention appears to be that the attorney had done nothing but write one letter, demanding

payment, from which we may infer that defendant now regards the charge as excessive. It is not claimed there was no obligation to pay a sum as attorney's fees. We shall refer later to the amount of the fee demanded by plaintiff.

[2, 3] It cannot be seriously maintained that an obligation which includes a liability for attorney's fees can be satisfied by the payment of the sum exclusive of attorney's fees. When the obligation to pay such a charge has accrued it becomes a part of the principal obligation. A creditor to whom payment is due has no duty to accept less than the entire debt. Defendant cites no authority on the point and plaintiff says it does not appear to have been directly decided in our state whether a tender of payment which does not include an offer to pay attorney's fees which are a part of the entire obligation, is a sufficient offer of payment. This is understandable. It is not a debatable question.

[4] The second contention is that plaintiff did not object to the form or amount

1. "February 14, 1955

"Tapered Parts, Inc.

"11254 Regentview

"Downey, California

"Attention: R. L. Porter

"Re: Clayton E. Heimstadt

"Dear Sir:

"Enclosed herewith is your check No. 288 in the amount of \$2000. I call your attention to the statement thereon, 'Balance Due on Principal: \$12,000'. Mr. Heimstadt has advised me that he cannot accept this check subject to the above-quoted limitation, because of a \$212 deficiency in principal payments. Your attention is also directed to the fact that the first interest installment which became due on January 20, 1955, has not been paid and is presently in default.

"In view of the above, Mr. Heimstadt hereby exercises his option under his note to declare the entire sum of unpaid principal and interest immediately due and payable.

"Unless all sums due under Mr. Heimstadt's note, together with \$300 in attorney's fees, are received by this office no later than February 18, 1955, Mr. Heimstadt will institute foreclosure proceedings against you.

"Very truly yours,
Marvin H. Magad"

2.

"July 8, 1955

"Marvin H. Magad, Esq.

"5204 Laurel Canyon Blvd.

"North Hollywood, California

"Re: Tapered Parts v. Heimstadt, et al.

"Dear Mr. Magad:

"This is to advise that Tapered Parts, Inc., wishes to pay the full balance due on its promissory note of June 16, 1954 to John A. McKee, and which I understand from you is now held by Clayton E. Heimstadt.

"According to my figures there is a principal balance of \$14,000 and interest of \$872.00, which includes interest to July 20, 1955.

"We are now prepared to make this payment, without, however, waiving any claim my client has against Mr. McKie.

"If you will advise me where payment can be made and the promissory note and release of chattel mortgage procured, such payment will be made immediately.

"In the event I have made any error in calculating the interest, will you please call that to my attention so that I may correct the amount of our offer to pay.

"Yours very truly,
Nathan M. Dicker"

of the tender and waived all objections thereto; wherefore it is contended that the tender must be deemed a sufficient offer to pay all that was due.

Section 2076, Code of Civil Procedure, provides that one who does not object to the form or amount of a tender cannot be heard to complain later that it was insufficient in those particulars.³ Section 1501 of the Civil Code is to the same effect.

But the rule is unavailable to defendant to excuse the inadequacy of its offer of payment. The reason for the rule is that a debtor who is able and willing to pay his debt has a right to know what his creditor will demand in order that his offer may be made to conform, if he chooses to do so. The offer of payment carries with it certain advantages which should not be lost through the debtor's mistake in anticipating the amount claimed by the creditor. The creditor cannot be permitted to take advantage of his debtor by remaining silent after receiving an offer of payment and thereafter coming forward with an additional demand of which the debtor had no knowledge or notice. Defendant's offer of payment was sufficient as to the amount except as to the charge for attorney's fees. The court determined that defendant did not owe the item of \$212. But the offer was inadequate in that it did not include an offer to pay anything on account of the attorney's fees.

[5] Defendant cannot escape from the inadequacy of its tender by asserting that plaintiff did not point out the particulars in which it was deemed inadequate. Plaintiff had made his demand. There was no uncertainty as to the amount he was claiming. Defendant did not have to comply with that demand with respect to the attorney's fees. It had no obligation to pay more than a reasonable amount as attorney's fees. If the amount demanded was considered excessive defendant should have so stated

and should have offered to pay an amount it deemed reasonable. Such an offer may well have led to an agreement as to the amount. The fact that plaintiff may have been demanding too much did not relieve defendant of the duty to pay a fair amount. Defendant's offer of payment amounted to a refusal to pay anything. It was, in effect, a demand that plaintiff accept the lesser amount in satisfaction of the entire debt and himself pay the attorney without reimbursement. It is too late for defendant to assert that the charge was excessive. That objection should have been made, with an offer to pay a sum defendant deemed reasonable, before plaintiff brought suit for foreclosure.

The judgment is affirmed.

PARKER WOOD and VALLÉE, J.,
concur.



In the Matter of the ESTATE of Juliana
Matilda FLETCHER, also known as
Mabel Fletcher, Deceased.

Margaret J. Loftus and William W. Loftus,
Proponents and Appellants,

Montez Ione Oakes, Contestant and
Respondent.*

Chv. 9198.

District Court of Appeal, Third District,
California.

Dec. 12, 1957.

Hearing Granted Feb. 5, 1958.

Will contest. The Superior Court, Napa County, Percy King, Jr., J., rendered judgment denying probate of will. Pro-

tion be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

3. "Objections To Tender Must Be Specified: The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objec-

* Opinion vacated 325 P.2d 103.

ponents appealed. The District Court of Appeal, Schottky, J., held that proponents established prima facie case as to due execution of contested will by introducing evidence that will was signed by testatrix and by witnesses who subscribed their names following attestation clause, and rebuttable presumption of due execution then arose, and conflicting evidence of one of the subscribing witnesses did not remove presumption or destroy prima facie case, and trial of will contest should have proceeded and contestant should have introduced evidence in support of the contest.

Reversed with directions.

Wills ⇐289, 302(1)

Proponents established prima facie case as to due execution of contested will by introducing evidence that will was signed by testatrix and by witnesses who subscribed their names following attestation clause, and rebuttable presumption of due execution then arose, and conflicting evidence of one of the subscribing witnesses did not remove presumption or destroy prima facie case, and trial of will contest should have proceeded and contestant should have introduced evidence in support of the contest.

Harold J. Thorsen, St. Helena, for appellants.

Francis H. Frisch, Napa, for respondent.

SCHOTTKY, Justice.

Appellants, Margaret J. Loftus and William W. Loftus, sister and brother of the above-named decedent, filed a petition for probate of the will of decedent and for the issuance to them of letters testamentary. The will was typewritten and bore the signature of decedent and two witnesses, the latter two signatures following a formal attestation clause. The will left three-fourths of the estate to 2 sisters and 2 brothers of decedent, and one-fourth to 2 nephews and 3 nieces, one of whom is the contestant.

Montez Ione Oakes, the contestant and a niece of decedent, filed a contest of the will

before probate, and for grounds of contest alleged that at the time of the execution of the purported will the testatrix was not of sound and disposing mind; that the offered will was not signed by the decedent nor executed with the formalities required by law, and that at the time of execution the decedent was acting under the undue influence of William Loftus. Appellants' answer denied all material allegations.

The contest was set for trial and came on for hearing before the court, sitting without a jury. Counsel for contestant stated it was his understanding of the law "that before evidence on the contest proceedings is adduced, the law requires the proponents to make out a prima facie case of due execution of the will." Counsel for proponents then stated, "we will put on prima facie proof," and the court stated: "Very well; you may proceed."

Proponents then called William W. Loftus who testified that the will was signed by decedent and by the two subscribing witnesses. The signatures of the witnesses were not disputed. The evidence showed that one of the witnesses, Dwight V. Maurice, was deceased. The other witness, Doris Vroubel, was called as a witness by the appellants and although she admitted her signature to the attestation clause, she testified that the recitals in the attestation clause were not true and that the purported will was not executed with the formalities required by law. She testified that the decedent was in a semi-conscious slumber or coma at the time and that the manner in which the purported will was signed by her was by William Loftus placing a pen in the decedent's hand and directing the signature by holding her hand in his. She testified that the decedent did not know what was transpiring and did not declare it to be her will in any manner. She further testified that she signed as a witness under protest. It was apparent from the testimony of Doris Vroubel that she was hostile to proponent William Loftus, and at one stage of her testimony the court stated, "She surely is adverse."

The final page of the reporter's transcript shows the following:

"Mr. Thorsen: Your Honor, in answer to Counsel, of course we have not made out a case that the will is to be admitted to probate, that is to be decided after the whole case is heard.

"The Court: You rest now?

"Mr. Thorsen: On the prima facie case.

"The Court: You rest?

"Mr. Thorsen: Yes.

"The Court: The petition for probate of will will be denied.

"Mr. Thorsen: Well, Your Honor, on that phase, can we proceed just as if,—put on our case as if we were plaintiffs in this matter?

"The Court: You have put on your case and you didn't prove the will was properly executed."

The court made findings in favor of contestant on all material issues and concluded "That petitioners for probate of will have failed to make out a prima facie case of due execution of the will." Proponents have appealed from the judgment entered denying probate of the will.

Appellants contend that as proponents of the will they made out a prima facie case of due execution of the will and that the trial court should then have reserved its decision upon the petition for probate and should have directed the contestant to proceed with her case. Appellants cite *In re Estate of Latour*, 140 Cal. 414, at page 438, 73 P. 1070, 74 P. 441, at page 442, in which it is stated:

"* * * This preliminary proof is addressed to the court alone. If a jury has been called to try the issues arising upon the contest, the preliminary proof is for the court, and not for the jury, unless the court directs the contrary, or the parties treat it as part of the case for the jury. If, after hearing this proof, the court is of the opinion that a prima facie case is made in support of the will, it should reserve its decision upon the petition and di-

rect the trial to proceed upon the contest in the manner specified in section 607 [of the Code of Civil Procedure]: the contestant, as plaintiff, first introducing his evidence in support of his written grounds of opposition, and the proponent, as defendant, then producing his evidence in support of his answer thereto, and in rebuttal of the evidence on behalf of the contestant. If the preliminary proof does not satisfy the court, it should thereupon refuse probate and end the proceeding without further ceremony."

Appellants argue that by proving the signatures of the testatrix, the deceased witness and the only living witness, who was adverse, they made out a prima facie case of due execution of the will. They rely heavily on *In re Estate of Pitcairn*, 6 Cal.2d 730, at page 732, 59 P.2d 90, at page 92, in which the court said:

"We have, then, a case where the signatures of the testatrix and subscribing witnesses are genuine; the will is attested, but lacks a formal attestation clause reciting the steps in execution; the attesting witnesses, seemingly adverse but uncontradicted on the essential issues, testify to a technical failure to comply with the formalities of execution. In such a case, may the trial court admit the will to probate? We think it may.

"The rule is well established that a regular and complete attestation clause makes out a prima facie case of due execution of the will. The authorities have clearly recognized that where witnesses are dead, unavailable, or unable to testify or recollect, or are adverse or corrupt, it is necessary to rely upon other evidence of the sufficiency of the instrument, and accordingly have applied the above-mentioned presumption. See, generally, *Hawkinson v. Oatway*, 143 Wis. 136, 126 N.W. 683, 139 Am. St.Rep. 1091; *In re Sullivan's Will*, 114 Mich. 189, 72 N.W. 135; *Rood on Wills*, 2d Ed., § 798a, p. 822; note, 76 A.L.R. 617. It is sometimes suggested

that the recitals in the attestation clause furnish the basis for the presumption, so that the court in upholding the will against contradictory evidence is really making a finding from the declarations in the instrument. Following this theory contestants seek to limit the presumption to cases where a full attestation clause is contained in the will.

"In our view the distinction thus drawn is illogical and the rule is too narrow. There is no need of an 'attestation clause'; it is sufficient that a will be witnessed or attested, and the recital of the steps in execution is not required. 68 C.J. 711, § 392. It does not seem reasonable, therefore, to have the important presumption of due execution turn upon the presence or absence of this unnecessary provision. The foundation of the presumption is the proof of genuineness of the signatures, for the instrument is then on its face a valid will. Doubtless recitals in an attestation clause are entitled to greater weight, but the logical basis for the presumption, as well as its practical necessity, is the same whether or not there is such a clause. This view has the support of a number of authorities. [Citing cases.]

* * * * *

"The contestants herein seek to distinguish most of the cases applying the presumption in the absence of an attestation clause on the ground that the witnesses were either not present or unable to recall the facts. They contend that even if the presumption is applicable to those situations, the presence of subscribing witnesses who give adverse testimony destroys the presumption. But in our opinion, if the presumption be recognized, it is seldom material to an appellate court whether the subscribing witnesses were unavailable, unable to remember, or gave affirmative testimony adverse to the will. A presumption is recognized in this state to be independent evidence which may be weighed against positive testimony, and

in a proper case the lower court may follow the presumption of due execution from proof of genuineness of the signatures, though the witnesses attack the will."

In *Re Estate of Braue*, 45 Cal.App.2d 502, at page 505, 114 P.2d 386, at page 387, the court said:

"On this testimony, the trial court found that the will was duly and properly executed, and admitted it to probate. Appellants urge that the contradicted evidence of two of the three subscribing witnesses establishes that the testator did not sign or acknowledge his signature to the document in the presence of two of the subscribing witnesses, nor declare to the witnesses that it was his will, nor did the witnesses sign in the presence of each other. Appellants admit that upon proof of the signatures of the testator and of the subscribing witnesses a rebuttable presumption of due execution arises. This presumption arises whether or not the will contains an attestation clause, but certainly arises where, as in the instant case, such a clause is contained in the will. In *re Estate of Pitcairn*, 6 Cal.2d 730, 59 P.2d 90; In *re Estate of Kent*, 161 Cal. 142, 118 P. 523; In *re Estate of Tyler*, 121 Cal. 405, 53 P. 928. Appellants urge, however, that where the attesting witnesses are all before the court and testify to facts that demonstrate that the will was not properly executed, the presumption has no place in the case and will not support a finding of due execution.

"This contention is unsound. The trial judge saw and heard the witnesses. He, as the trier of the facts, had the power to pass on their credibility. This court has no such power. Whatever may be the rule in other states, the rule in this state is that a disputable presumption, whether contradicted by other evidence or not, will support a finding. A disputable presumption does not go out of the case when contradicting evidence is introduced, if the

trier of the facts does not believe that contradicting evidence. *Smellie v. Southern Pacific Co.*, 212 Cal. 540, 299 P. 529. This rule has been applied to the very presumption involved in this case. In *Re Estate of Pitcairn*, supra, the two subscribing witnesses, both called by the proponent, testified that the will was not properly executed. There was no evidence to the contrary. There was no complete attestation clause. The trial court admitted the will to probate. In affirming the order admitting the will to probate the Supreme Court stated (page 732 of 6 Cal. 2d, page 92 of 59 P.2d):"

The court then quoted extensively from *In re Estate of Pitcairn* and said, 45 Cal.2d at page 506, 114 P.2d at page 388:

"This case is decisive of the present appeal. Appellants urge, however, that the rule only applies where the witnesses are unavailable, have forgotten the facts, or where the witnesses are hostile, guilty of connivance, or are unworthy of belief. Of course, it is a general rule that the trier of the facts is the sole judge of the credibility of the witnesses, and may generally disregard even uncontradicted evidence. *Kelly v. Jones*, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. 796."

Respondent in reply relies chiefly on *In re Estate of Krause*, 18 Cal.2d 623, 117 P.2d 1, and argues that it is determinative of the instant appeal. The cited case was an appeal from an order admitting a will to probate. We quote from page 624 of the opinion in 18 Cal.2d, at page 1 of 117 P.2d:

"On the hearing of the cause the testimony of a subscribing witness, Mrs. Frizelle, furnished practically the only evidence showing the circumstances surrounding execution of the instrument. This testimony, in substance, was embodied in findings of the court, from which the following is quoted:

"On or about the 25th day of March, 1929, Orrie Emma Krause tel-

ephoned next door to Mina H. Cullinan and asked her to come over with Mrs. Frizelle and witness a will; and Mrs. Frizelle at the request of Mrs. Cullinan went over to Mrs. Krause's home with her to witness a will. Mrs. Krause did not say anything about her will when said witnesses arrived in her presence to witness a will, other than: "There is the pen and ink, sign it." Said paper was folded so that the signature thereon, if any, could not be seen. The only creases appearing on the sheet at time of trial were the usual ones, made by folding 8 x 13 paper twice. * * * Orrie Emma Krause did not sign said will in the presence of said witnesses, nor declare or acknowledge to them, or either of them, that it was her will or that she had subscribed said will.' From the facts so found the court concluded as a matter of law that the purported will 'was executed in accordance with the requirements of law (*In re Estate of Pitcairn*, 6 Cal.2d 730, 59 P.2d 90), and it should be admitted to probate'. The order of admission was entered accordingly."

The Supreme Court reversed the trial court and distinguished the *Pitcairn* case, supra, by stating that in that case "There was evidence of an adverse attitude on the part of these witnesses, and the recollection of one of them was untrustworthy." The court also said, 18 Cal.2d at page 626, 117 P.2d at page 2:

"The factual situation disclosed by the record in the case at bar is not analogous to that of the *Pitcairn* case. Here the attitude of the subscribing witness was not adverse and her testimony was clear, uncontradicted, and without conflict. It showed positively that the testatrix did not sign the purported will in the presence of the attesting witnesses, and that she neither declared nor acknowledged to them that it was her will or that she had subscribed it. The trial court gave credit to this testimony and made specific findings in accordance with it. The

facts so established and the specific findings admitted of no other conclusion than that the will was not executed in accordance with the requirements of law. In the *Pitcairn* case, uncertain testimony was discredited, findings were made in accordance with the presumption of due execution, and the trial court was entitled to rely upon the presumption in drawing its conclusions of law. In the present case the contradicted testimony was credited, the facts were found in accordance with it, and the court was not justified under such circumstances in forming its conclusions in accordance with the presumption but should have based them upon the facts found."

Respondent states: "The trial court had the right upon the authority of the [*In re*] Estate of Krause, supra to accept the testimony of Doris Vroubel *as overcoming the presumption of due execution and to make specific findings contrary therewith.*" This statement convinces us that respondent has not properly analyzed the decision in *Re Estate of Krause*, and is also a virtual concession that the presumption of due execution arose in the instant case. For in the very recent case of *In re Estate of Gerst*, 153 Cal.App.2d 528 at page 538, 315 P.2d 49, at page 56, in which a hearing was denied, the court said:

"As we read the *Krause* case, 18 Cal. 2d 623, 117 P.2d 1, it was not there held that 'the presumption of due execution did not apply where testimony of witnesses showed positively that the will was not executed in accordance with the requirements of the law'. In the *Krause* case, the trial court found that the testatrix 'did not sign said will in the presence of said witnesses nor declare or acknowledge to them, or either of them, that it was her will or that she had subscribed said will' and that 'said paper was folded so that the signature thereon, if any, could not be seen by the witnesses.' The Supreme Court, 18 Cal.2d at page 625, 117 P.2d at page 2, said: 'These for-

malities cannot be waived or disregarded'. And at page 626 of 18 Cal.2d, at page 2 of 117 P.2d: 'The trial court gave credit to this testimony and made specific findings in accordance with it. The facts so established and the specific findings admitted of no other conclusion than that the will was not executed in accordance with the requirements of law.' In our opinion, the *Krause* decision was reversed because the findings in accordance with the testimony of the witnesses did not support the order admitting the will to probate. The rule of the *Pitcairn* decision, supra, is not changed in any way by the *Krause* decision."

In *Re Estate of Morey*, 75 Cal.App.2d 628, at page 634, 171 P.2d 131, at page 135, the court said:

"* * * Proof of the signatures of Mr. Morey and of the subscribing witnesses placed in operation a presumption that the will had been duly executed. In *re Estate of Pitcairn*, 6 Cal.2d 730, 732, 59 P.2d 90; In *re Estate of Braue*, 45 Cal.App.2d 502, 505, 114 P.2d 386; In *re Estate of Silva*, 169 Cal. 116, 120, 145 P. 1015. This presumption was to be weighed with the testimony of the subscribing witnesses as to what took place or did not take place and as to what they remembered or did not remember. The findings that the will was duly executed are not unsupported by the evidence."

In *Re Estate of Pelton*, 140 Cal.App.2d 512, at page 515, 295 P.2d 483, at page 485, the court said:

"If the trial court had reached the conclusion that no credence should be given to any of the testimony given by the attesting witnesses it could have admitted the will to probate, basing its finding of due execution solely on the presumption that arises from proof of the signature of the testatrix and the signatures of the attesting witnesses (In *re Estate of Pitcairn*, 6 Cal.2d 730, 732 et seq., 59 P.2d 90; In *re Estate*

of Braue, 45 Cal.App.2d 502, 505, 114 P.2d 386). The trial court, however, was not obligated to disbelieve the testimony given by the witnesses at the trial, because of their admissions of perjury in their depositions. It was the exclusive province of the trial court to winnow the grains of truth from the chaff of falsehood in the testimony of these witnesses, and its determination of what was true and what was false cannot be reviewed by this court. [Citations.]”

We are convinced that, under the foregoing authorities, appellants in the instant case established a prima facie case as to the due execution of the contested will when they introduced evidence that the will was signed by the testatrix and by the witnesses who subscribed their names following the attestation clause. Upon the introduction of that evidence a rebuttable presumption of due execution arose, and the contradictory evidence of Doris Vroubel did not remove the presumption from the case or justify the conclusion of the trial court that a prima facie case has not been established. The court therefore erred in not ordering the trial of the contest to proceed and the evidence upon all issues of the contest to be completed. Then and only then could the court properly weigh all of the evidence, including the presumption, and determine the issues involved. It may well be that had the trial of the contest been allowed to proceed proponents may have been able to introduce evidence contradicting or casting doubt upon the testimony of Doris Vroubel, but at the outset, and before the contestant introduced evidence in support of her contest, proponents were not required to do more than make out a prima facie case. No case has been cited, and we have found none, where, after a presumption of due execution has been established, the contestant has not been required to go forward with whatever evidence he desired to introduce in support of the contest.

We, therefore, conclude that the court erred in finding that a prima facie case of

due execution of the will has not been established and in summarily denying the petition for probate of the will.

The judgment is reversed with directions to the trial court to proceed with the trial of the contest.

VAN DYKE, P. J., and WARNE, J.
pro tem., concur.



155 Cal.App.2d 807

**Application of Robert Roland AYALA for a
Writ of Habeas Corpus.**

Cr. 3430.

District Court of Appeal, First District,
Division 1, California.

Dec. 9, 1957.

Hearing Denied Feb. 5, 1958.

Habeas corpus proceeding to secure release of petitioner convicted of violation of section of penal code prohibiting solicitation of prostitution. The District Court of Appeal, Bray, J., held that where defendant pleaded guilty to information charging that between certain dates, knowing that woman was a prostitute, defendant solicited for her prostitution, although information would have been subject to demurrer, it, in effect, charged defendant with type of solicitation prohibited, and for all purposes on habeas corpus information sufficiently charged public offense.

Writ discharged.

Habeas Corpus ⇨30(2)

Where defendant pleaded guilty to information charging that between certain dates, knowing that woman was a prostitute, defendant solicited for her prostitution, although information would have been subject to demurrer, it, in effect, charged defendant with type of solicitation prohibited, defendant's plea of guilty admitted that he

had violated Code by engaging in type of solicitation prohibited, and for all purposes on habeas corpus information sufficiently charged public offense. West's Ann.Pen. Code, §§ 266h, 318.

Arthur M. Lebow, San Rafael, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Dep. Atty. Gen., for respondent.

BRAY, Justice.

The petition for habeas corpus raises the question of whether or not the amended information upon which petitioner was convicted states a public offense sufficiently to give the court jurisdiction to accept defendant's plea of guilty.

Record.

Count I of the amended information¹ charged petitioner with the crime of violation of section 266h of the Penal Code. Petitioner pleaded guilty to this count and was sentenced to the state prison. He is now in San Quentin.

Based primarily upon *People v. Smith*, 44 Cal.2d 77, 279 P.2d 33, decided subsequently to his sentence, petitioner contends that either no public offense was alleged in the information, or, if any, merely a misdemeanor, and that hence the superior court had no jurisdiction to act.

Sufficiency of the Information.

The portion of section 266h, Penal Code, applicable here reads: "Any male person who, knowing a female person is a prostitute * * * *solicits* or receives compensation for soliciting for her, is guilty of pimping, a felony * * *." (Emphasis added.)

In the *Smith* case, *supra*, the defendant was charged with violating section 266h, Penal Code. (The language of the information does not appear.) The evidence

at the preliminary examination showed that the "defendant had solicited a customer for a woman who was known to defendant to be a prostitute, but there was no evidence to show that defendant either solicited compensation or received compensation for the solicitation of any customer." 44 Cal.2d at page 78, 279 P.2d at page 33. The sole question before the Supreme Court was "Does section 266h of the Penal Code proscribe the mere solicitation of a customer for a prostitute?" 44 Cal.2d at page 78, 279 P.2d at page 34. The court concluded that it did not, stating that the section provides that pimping may be committed in one of two ways: (1) by the receipt of compensation for soliciting for a prostitute (this was the charge in the second count here, which was dismissed), and (2) by soliciting compensation for soliciting for a prostitute. It further held that merely soliciting a customer for a prostitute, and not for compensation, was not a crime under this section, and that such solicitation would be a misdemeanor under section 318, Penal Code.

In order to determine the contention here presented it is important to know how far the sufficiency of the information can be questioned on habeas corpus. In *re Wilson*, 196 Cal. 515, 518, 238 P. 359, 360, discusses this subject. It quotes from 13 Cal.Jur., page 232, section 14: "The scope of inquiry upon *habeas corpus* into the sufficiency of an indictment or information is limited, for, although the petitioner may be discharged if the pleading totally fails to charge an offense known to the law, if there is attempted to be stated an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into." It quotes from *In re Kavanaugh*, 180 Cal. 181, 182, 180 P. 533: "The information in the superior court upon which the judgment against petitioner is based clearly attempted to charge the

1. Count II charging defendant with receiving compensation for soliciting for the prostitution of June Fowler was dis-

missed when defendant pleaded guilty to the first count.

felony, defined by section 476a of the Penal Code. Whether the specific facts alleged as constituting the particular offense failed to sufficiently show the public offense attempted to be charged is a question which cannot be considered on *habeas corpus* under the well-settled rule of this jurisdiction. * * *

In *In re Cook*, 13 Cal.App. 399, 110 P. 352, the defendant was charged in an indictment in the language of the then section 105, Penal Code, with *escape* from prison. He pleaded guilty to *attempt to escape* from prison, a crime prohibited by then section 106, Penal Code. While undergoing sentence therefor, he petitioned for discharge on *habeas corpus* on the ground that section 105 was unconstitutional and therefore in charging him with escape, the indictment did not state a public offense. The court agreed that the escape statute was unconstitutional but stated that the attempt to escape statute was not and that as a charge of attempt to escape was necessarily included in a charge of escape, the indictment was sufficient on *habeas corpus*, even though it would probably have been subject to demurrer had one been filed at the proper time. The court stated that by his plea of guilty the defendant waived whatever defects might characterize the statement of the offense to which he pleaded guilty.

In *Ex parte Williams*, 121 Cal. 328, at page 330, 53 P. 706, at page 706, the court stated: "While the inquiry on *habeas corpus* may extend to the question whether the complaint or information charges an offense known to the law, since this objection goes to the question of jurisdiction (*Ex parte Maier*, 103 Cal. 476, 37 P. 402 [42 Am.St.Rep. 129]), the proceeding may not be made to subserve the office of a demurrer; and if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie."

"On *habeas corpus* the inquiry into the sufficiency of an indictment is limited. We think the true rule is that, where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on *habeas corpus*." *Matter of Ruef*, 150 Cal. 665, 665-667, 89 P. 605. See also *In re Simmons*, 71 Cal.App. 522, 235 P. 1029, where the complaint, charging the petitioner with possession of intoxicating liquor purported to state an offense under a Bakersfield ordinance, was held to sufficiently state on *habeas corpus* a violation of the state law.

With these rules in mind let us look at the information. The information charges defendant with "violation of Section 266h of the Penal Code" in that between certain dates "knowing June Fowler was a prostitute, he did solicit for her prostitution." While undoubtedly the information would have been subject to demurrer, for all purposes on *habeas corpus* it sufficiently charges a public offense. It, in effect, charges defendant with the type of solicitation prohibited by section 266h, Penal Code, and defendant by his plea of guilty admitted that he violated that section by engaging in the type of solicitation which it prohibits. At least, "the facts alleged squint at a substantive statement of the offense," even though "defectively or inartificially" pleaded. *Ex parte Williams*, supra, 121 Cal. at pages 330-331, 53 P. 706, at page 706. See *People v. Beesly*, 119 Cal.App. 82, 87, 6 P.2d 114, 116, 970, where the court on appeal from a judgment of conviction stated that the plea of guilty is a waiver of the sufficiency of an information or indictment even where it "is so defective that a demurrer thereto should have been sustained * * *."

In *re Ballas*, 53 Cal.App. 109, at page 111, 199 P. 816, states: "The courts of this state have never made a practice of releasing persons convicted of felonies through the writ of *habeas corpus* in the

absence of a clear and unquestionable showing upon the face of the record of the case that the court in which the conviction was had was wholly without jurisdiction to try the accused for the offense charged, and of which he had been convicted."

Here there is no clear and unquestionable showing on the face of the record that the trial court did not have jurisdiction of the offense. It did have jurisdiction of any violation of section 266h, and the record does not show that the solicitation prohibited by the section did not take place. While for purposes of demurrer the information would have to state facts showing that it did, for purposes of habeas corpus the charge of violating section 266h is sufficient.

The writ is discharged.

PETERS, P. J., and FRED B. WOOD, J., concur.



155 Cal.App.2d 762

Florida Franklin LEE, Plaintiff and Appellant,

v.

MERCHANTS COLLECTION ASSOCIATION OF OAKLAND, in which firm name and style George B. Fink is doing business; George B. Fink, Defendants and Respondents.

No. 17423.

District Court of Appeal, First District, Division 1, California.

Dec. 6, 1957.

Rehearing Denied Jan. 3, 1958.

Hearing Denied Jan. 28, 1958.

Action for conversion of plaintiff's automobile by levy and sale under void judgment. The Superior Court, Alameda County, Marvin Sherwin, J., rendered judgment for plaintiff, but in an amount deemed inadequate, and plaintiff appealed. The District Court of Appeal, Bray, J., held that, in fixing damages the trial court

had properly deducted sums advanced by judgment creditor and paid by levying officer to clear title.

Affirmed.

1. Execution ⚡472

In conversion action predicated upon execution sale pursuant to judgment subsequently set aside for lack of service, it was proper to deduct liabilities which existed against automobile at time of conversion, notwithstanding defendant's failure to plead any set-off or counterclaim.

2. Execution ⚡472

In fixing damages to be awarded judgment debtor for conversion of her automobile by levy and sale under void judgment, court properly deducted sums advanced by judgment creditor and paid by levying officer to clear title.

3. Execution ⚡472

Where automobile levied upon and sold under void judgment had been seized originally under an attachment, value of judgment debtor's interest in vehicle at time of sale was reduced by lien of that attachment; and in judgment debtor's action for conversion, judgment creditor, who had thereafter obtained a valid judgment, was entitled to have conversion judgment reduced by amount of plaintiff's indebtedness to him.

4. Subrogation ⚡26

Judgment creditor's mistake, if any, in paying prior lienholders in reliance on a defective attachment, would not make him a volunteer or deprive him of his right of subrogation.

5. Subrogation ⚡12

Even if chattel mortgagee lost its lien as to creditors of mortgagor by asking that moneys, advanced by judgment creditor to clear title to automobile levied upon under judgment, be held until such time as sale had been completed, judgment debtor's debt to mortgagee was not discharged; and judgment creditor, by advancing to marshal sums needed to pay debt secured by mortgage, became subrogated to rights of mortgagee as against mortgagor-debtor.

6. Judgment ⚡715(3)

Issue, in judgment debtor's action for conversion of her automobile by levy and sale under void judgment, was not "taxable costs" but how much judgment debtor had been damaged by conversion; and therefore refusal of municipal court to tax as costs, in subsequent action culminating in valid judgment, amount which judgment creditor had advanced, to marshal making levy and sale under void judgment, for purpose of clearing title to vehicle, was not *res judicata* of issues in conversion action.

7. Trover and Conversion ⚡60

In order to obtain exemplary or punitive damages in conversion action, plaintiff would have to prove that defendant had acted with malice.

8. Judgment ⚡720

Questions of law and of fact actually litigated and determined in prior action are conclusive between parties in subsequent action.

9. Judgment ⚡544

Final adjudication of inferior court made within its jurisdiction is binding and conclusive upon higher court in subsequent action.

10. Appeal and Error ⚡1010(1)

Appellate court will sustain judgment if supported on any theory raised below and sustained by evidence.

11. Execution ⚡472

Where motion to set aside default was made on ground of lack of service as well as upon ground that default had been taken by fraud and deceit, and order granting motion did not state upon which of grounds court relied, judgment debtor could not successfully rely upon that ruling as ground for awarding punitive damages in action for conversion of her automobile by levy and sale under void judgment.

12. Execution ⚡472

Even if judgment creditor was wrong in deciding that amount tendered was in-

sufficient, his refusing of tender and proceeding with execution under judgment could not be held to have been so malicious as to entitle judgment debtor to punitive damages in action for conversion of her automobile pursuant to levy and sale made under judgment, which had thereafter been set aside for lack of service.

Irving M. Liner, Oakland, for appellant.

Harry M. Gross, Oakland, for respondents.

BRAY, Justice.

The questions raised by plaintiff's appeal from a judgment in her favor in this action for conversion of her automobile are:

1. In estimating plaintiff's damage were the deductions made by the court proper?
2. Did the chattel mortgagee waive its lien?
3. Was the municipal court judgment *res judicata*?
4. Was plaintiff entitled to punitive damages?
5. Should plaintiff have been allowed interest?
6. Rejection of evidence.

Record.

Defendant¹ operating a collection agency levied execution upon plaintiff's automobile under a judgment which was subsequently set aside for lack of service. It was stipulated that there was a conversion as of the date of the purported execution sale. The court found the market value of the automobile to be \$4,300 (the car sold for \$3,640 at the purported execution sale) and held that there should be deducted therefrom the following sums: satisfaction of judgment, \$684.50; upholsterer's lien, \$228.-80; chattel mortgage, \$2,250; total \$3,163.-30, leaving a balance of \$1,136.70. There was on deposit in court a marshal's warrant for \$511.47 which was the net amount received by the levying officer from the

1. Although defendant George B. Fink is the owner of defendant Merchants Collection Assn., the answer was filed by

him individually and not under his firm name. The judgment was likewise against him individually.

sale of the car after paying the above amounts. The court ordered this sum to be paid plaintiff, deducting it from the \$1,136.70, and gave plaintiff judgment for the balance of \$625.23 together with interest on the last mentioned sum from the date of conversion.

1. Deductions.

Plaintiff contends that the amounts paid by defendant were not deductible for two reasons: (a) defendant did not plead any set-off or counterclaim, and (b) as the levy and sale were made under a void judgment, sums paid by the levying officer to clear title and to pay the judgment thereafter obtained against plaintiff could not be deducted from the value of the car.

[1] (a) The deductions were not made as a set-off or counterclaim. The issue in the case was the damage caused plaintiff by the conversion. As said in *Ward v. Sherman*, 1909, 155 Cal. 287, 291, 100 P. 864, where the defendant took possession of a cattle ranch under a judgment thereafter reversed and the court gave defendant judgment for moneys expended in taking care of the ranch and cattle in excess of moneys received from sale of cattle, the victim of a conversion is entitled to be placed as nearly as possible in the condition in which he previously stood, and the defendant must account for the property with his liability being measured by the prudent businessman rule applicable to trustees. In view of the court's finding of lack of malice the following quotation from 4 Cal.Jur.2d, Appeal and Error, § 676, appearing in *Stockton Theatres, Inc. v. Palermo*, 121 Cal.App.2d 616, at pages 619-620, 264 P.2d 74, at page 77, is applicable: "The law proceeds upon the theory that, in equity, the party who receives money or property in good faith under an erroneous judgment, thereafter reversed, should be required to restore what he has received, and not upon the theory of a supposed wrong committed. Restitution must be made of all that was received under the erroneous judgment, but no further liability should be imposed. After reversal the respondent stands in the

position of a trustee for the appellant of the property obtained under the judgment. He must handle that property as an ordinarily prudent man of business would, and is not chargeable with more than he received.'" While these cases dealt with erroneous judgments, we can see no reason why the same rule should not apply to void judgments, particularly where, as here, the evidence supports the court's finding that defendant did not act maliciously nor was he guilty of fraud and deceit in the taking of the default judgment and levying execution thereon. Plaintiff is not entitled to be placed in any better position than she would have been in had the conversion not taken place. Thus, the court was correct in deducting the liabilities which existed against the automobile at the time of the conversion. In other words, the value of the car to plaintiff then was its actual value less the liens upon it.

[2] (b) Payments under void judgment. The upholsterer's lien was paid off by the marshal from money received from defendant and later repaid to defendant from the sale price. The chattel mortgage was paid from a fund in which had been deposited the moneys advanced by defendant to the marshal to pay the mortgage and the moneys received by the marshal from the sale. Even though this sale resulted from a judgment thereafter found to be void, plaintiff received the benefit of those payments. Plaintiff's property was subject to those liens and plaintiff would have been required to pay them.

[3,4] The deduction of the \$684.50 raises a problem. Finding VI gives as one of the payments made by the marshal out of proceeds of the execution sale on "the judgment hereinafter referred to (a) Satisfaction of Judgment \$684.50." Finding VII finds that the judgment (apparently the judgment last referred to) and the execution issued thereon were void. Finding VI states that the marshal paid \$684.50 to satisfy the said writ (the void one). Thereafter, defendant obtained a valid judgment against plaintiff for a higher

amount and claims the right to keep said \$684.50 in satisfaction thereof. While defendant did not plead plaintiff's indebtedness upon which the judgment was based as a set-off, his answer did set forth plaintiff's indebtedness to him in the sum of \$519.50 (apparently the principal upon which the \$684.50 judgment was based). To require defendant to return said sum to plaintiff would result in an unjust enrichment of plaintiff. Moreover, the automobile had been seized originally under an attachment. Thus the value of plaintiff's interest in the car at the time of sale was reduced by the lien of that attachment. Therefore, the statement in the findings that the money was paid in satisfaction of the void judgment is unimportant. While it was so paid it became a credit upon the higher judgment later obtained. As we have said, the value of plaintiff's interest in the automobile was reduced *pro tanto*:

Again, the issue is not whether the marshal had the right under a void judgment to pay off these liens. The issue is how much plaintiff was damaged by the conversion of her automobile. She did not attempt to recover her car which had been sold at a void sale. She elected to let the sale stand and to sue for conversion, thereby putting in issue the value of her interest in the car at the time of sale. It is rather interesting to note that in her direct testimony plaintiff brought out the fact that the automobile was subject to the upholsterer's claim and the chattel mortgage.

While the court found that it was not true that defendant paid off the third-party claim of the mortgagee but that it was paid by the marshal out of the sale proceeds pursuant to the instructions of defendant, the uncontradicted evidence shows that defendant advanced the money to the marshal and he later repaid defendant from the sale proceeds. As said by plaintiff in her opening brief, the marshal was acting as defendant's agent. In advancing the money

for the chattel mortgage and the upholsterer's lien defendant was not acting as a volunteer-officious intermeddler, whom it has been held would not have the right of subrogation (see authorities cited in *Stein v. Simpson*, 37 Cal.2d 79, 84, 230 P.2d 816). Defendant had an interest in the automobile because of his attachment thereon. Moreover, defendant through mistake believed that by reason of the writ of execution he also had an interest in the car. "It has been held that where a person discharges a lien not incurred by him on property not his own, but which he mistakenly believes to be his, [he] is subrogated to the rights of the lienholder." (37 Cal.2d at page 84, 230 P.2d at page 820).

Plaintiff attacks the validity of the affidavit and undertaking on attachment claiming that because the signature of the notary public on the attestation clause is a stamped signature rather than one in his own handwriting, the attachment was void.² Assuming, but not deciding, that the attachment was thereby invalidated and that such invalidity may be determined in this collateral action (no motion to set aside the attachment was made in the municipal court) such fact would not affect the situation here. Defendant's mistake, if it was one, in paying prior lienholders, relying on a defective attachment, would not make him a volunteer nor deprive him of his right of subrogation.

2. Mortgagee's Lien.

When the marshal attached plaintiff's automobile the mortgagee filed a third-party claim. As prescribed by law (Code Civ. Proc. § 689b) the marshal demanded of defendant the payment of the amount of the claim. Defendant then sent check for the amount due but requested the marshal to "hold this pay-off money in trust until the date of the car sale." Defendant's letter stated that the mortgagee would also send an assignment of its mortgage. The next day the mortgagee wrote the marshal, ap-

2. See section 8205, subdivision (c); Government Code, which provides: "Any deposition, affidavit, oath or affirma-

tion shall be signed by him [the notary public] in his own handwriting."

parently enclosing the pink slip to the car, but no assignment, and stated " * * * it is our desire for you not to pay us off on the 1951 Cadillac * * * until such time as the sale of the car has been completed." Plaintiff contends that by this letter the mortgagee waived its lien. *Kuehn v. Don Carlos*, 5 Cal.App.2d 25, 28, 41 P.2d 585, was an action brought by the mortgagee against the mortgagor and the successor in interest of the purchaser at execution sale. The judgment creditor and the mortgagee had agreed that the creditor would either pay the balance due on the mortgage or deliver him the mortgaged airplane on payment of the amount of his judgment plus costs. The mortgagee then delivered the constable a receipt showing payment of the amount due, although no money was actually paid. The constable then sold the airplane free from the mortgage. The sale did not bring enough to satisfy the judgment, let alone the mortgage. The court stated (5 Cal.App.2d at page 28, 41 P.2d at page 586): "In this case, if the airplane had been sold for an amount sufficient to discharge the mortgage indebtedness it appears to be fundamental that the mortgagee could not assert his lien as against the purchaser merely because the judgment creditor failed to pay over the money received from the sale. It is not reasonable that the rule should be any different merely because the judgment creditor failed in the performance of his agreement by neither purchasing the property nor bidding up to the amount of the mortgage indebtedness and thus assuring a sufficient return from the sale to satisfy plaintiff's demand. The conduct of the mortgagee, as disclosed by the record in this case, was so inconsistent with the continued existence of the mortgage lien that we are forced to the conclusion that the lien was waived."

[5] It should be noted that the opinion discusses the release of the lien as against the purchaser. It, of course, does not hold that the *mortgagor* is thereby released either from the debt or that the lien is released as to him. *Maier v. Freeman*, 112 Cal. 8, 44

P. 357 holding that the chattel mortgagee lost its lien by authorizing a creditor of the mortgagor to sell the mortgaged cattle, dealt solely with the effect of such authorization on the creditors of the mortgagor. The mortgagee in our case was not asking to be paid out of the proceeds of the sale. It was merely asking that the moneys then in the hands of the marshal paid to him by defendant as required by law be held until the sale. Whether or not the mortgagee lost its lien as to creditors of the mortgagor is not important here. Plaintiff's debt to the mortgagee was not discharged. Defendant by paying to the marshal the chattel mortgage debt became subrogated to the rights of the mortgagee as against plaintiff mortgagor.

Failure to plead this type of subrogation under the circumstances of this case was not fatal to the court's right to decide that in arriving at a determination of the amount in which plaintiff had been damaged this indebtedness of plaintiff should be deducted.

3. Res Judicata.

[6] After obtaining a valid judgment against plaintiff in the municipal court defendant attempted by a motion to tax costs to include in the costs the amount of the upholsterer's lien and the chattel mortgage. The court denied the motion. Plaintiff contends that this ruling is *res judicata* of the right of the court in this case to consider those amounts in valuing plaintiff's damage. Obviously that ruling could not be *res judicata* of the issues here. The municipal court properly found that those payments were not "taxable costs." The issue here is not "taxable costs" but plaintiff's damages. See *Horton v. Goodenough*, 184 Cal. 451, 460, 194 P. 34, which holds in effect that for a former judgment to be binding as collateral estoppel it must appear from the record that the issue as to which estoppel is claimed must appear on the face of the record to have been decided and that it does not follow that merely because the issue was made and judgment then had that the issue was determined by the judgment.

4. Punitive Damages.

[7] This was not an action for fraud and deceit. It was for conversion. In order to obtain exemplary or punitive damages plaintiff has to prove that defendant acted with malice. The trial court held that defendant did not so act. Plaintiff contends (1) that the action of the municipal court in setting aside the default judgment was a finding that defendant in obtaining the default did so by fraud and deceit and that therefore the trial court here should have found malice; and (2) that the evidence in this case shows that defendant acted maliciously.

(1) Introduced in evidence was the notice of motion to set aside the default.³ It stated that the motion would be made on two grounds: (a) that the default was taken without service of summons and complaint on the defendant (plaintiff here) and (b) that the default judgment was taken by fraud and deceit. The notice stated that it would be based on defendant's affidavit on file and on oral or written testimony to be adduced at the hearing. The municipal court's minute order stating that the motion to set aside the default was granted did not state upon what grounds. The affidavit referred to and the proceedings on the motion are not in the record here.

[8-11] While it is true that " * * * questions of law and of fact actually litigated and determined in the prior action are conclusive between the parties in a subsequent action" (*Braye v. Jones*, 129 Cal. App.2d 827, 830, 278 P.2d 29, 31), that "The final adjudication of an inferior court made within its jurisdiction is binding and conclusive upon a higher court in a subsequent action" (*Todhunter v. Smith*, 219 Cal. 690, 695, 28 P.2d 916, 918), and that on appeal from a judgment the appellate court will sustain the judgment if supported on any theory raised below and sustained by the evidence, the situation here is different. The municipal court made no finding on the issues presented, if more than one was ac-

tually presented. While the court could have granted the motion on either issue or both, if actually presented, we have no way of knowing upon what basis it granted the motion. It is impossible to apply *res judicata* in such a situation.

[12] (2) Plaintiff contends that defendant acted maliciously in causing plaintiff's automobile to be sold under the void judgment. Such contention is based mainly on plaintiff's testimony, which, if believed, would show that the sale was had during the very time that plaintiff had been given an extension of time and after plaintiff had tendered defendant the money due on the void judgment. However, defendant denied specifically plaintiff's story of the transaction with the possible exception that plaintiff may have tendered the amount defendant claimed due on the judgment. This defendant refused on the theory that at that moment he was entitled also to the moneys advanced by him to pay the chattel mortgage lien. Even though he was wrong on this theory at the time, such error, if any, would not show malice but only mistake. The court believed defendant's version of the interviews between defendant and plaintiff. We, of course, are bound by the trial court's determination of the credibility of the witnesses. *Beeler v. Plastic Stamping, Inc.*, 144 Cal.App.2d 306, 300 P.2d 852. Defendant's version of the transaction supports the court's finding that defendant acted without malice, fraud or deceit.

5. Interest.

The court allowed interest from the date of conversion on the balance of \$625.23 only. We see no error in this. Plaintiff was not entitled to interest on the money which was paid out for her benefit in discharge of the liens, the valid judgment or the amount of the warrant which the bailiff sent plaintiff and which she returned and which was deposited in court.

6. Rejection of Evidence.

An objection was sustained to a question asked defendant's manager by plaintiff as

3. According to statements of counsel in the record this was an additional notice

of motion; the first one apparently only contained the ground of lack of service.

to whether in preparing to meet the motion to set aside the default made in the municipal court defendant Fink told the manager to hire an investigator. Plaintiff contended that she was thereby attempting to show the witness' veracity. We fail to see how this question was material. Plaintiff then asked if the witness recalled the instance of the hiring of a certain investigator, and contended that the question went to the issue of malice. The objection was sustained. Plaintiff then offered to show that defendants obtained "another affidavit" from the investigator and paid him \$400. It is not clear from the record whether "another affidavit" referred to one dealing with the default matter or one in an entirely different case. There was no contention made in the record that the investigator was hired, if at all, to do anything wrong nor that the affidavit was or was to be false. We find no error in the court's action.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



155 Cal.App.2d 740

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Jack Toto LOMENTO, Defendant and
Appellant.

Cr. 6039.

District Court of Appeal, Second District,
Division 1, California.

Dec. 5, 1957.

Rehearing Denied Dec. 19, 1957.

Hearing Denied Jan. 28, 1958.

Prosecution for bookmaking and making and accepting bets. The Superior Court, Los Angeles County, Beach Vasey, J., entered judgment of conviction and defendant appealed from judgment and sentence. The District Court of Appeal, Fourth,

J., held that evidence, including testimony that when an unknown person said to defendant "give me Miss Bulldozer to win," and then told defendant in substance horse he was selecting was running in a certain position in a certain race at Santa Anita race track and handed defendant currency, a bet was made between unknown person and defendant as to horse in question in a particular race, sustained conviction.

Judgment affirmed, purported appeal from order of sentencing dismissed.

1. Gambling ☞98(3)

A conviction for accepting a wager can be sustained on the showing of acceptance of a single bet. West's Ann.Pen.Code, § 337a.

2. Gambling ☞98(3)

Evidence, including testimony that when an unknown person said to defendant "give me Miss Bulldozer to win," and then told defendant in substance horse he was selecting was running in a certain position in a certain race at Santa Anita race track and handed defendant currency, a bet was made between unknown person and defendant as to horse in question in a particular race, sustained conviction for bookmaking and making and accepting bets. West's Ann.Pen.Code, § 337a, subs. 1, 6.

3. Criminal Law ☞481

In prosecution for bookmaking and making and accepting bets, testimony of a police officer that bets were kept track of by numbers in Los Angeles County by people who accept bets was admissible in view of fact defendant stipulated that officer was an expert in bookmaking activities and paraphernalia as carried on in Los Angeles, and, in addition, court asked questions of the officer to ascertain whether he was qualified as an expert, and determined that the officer did so qualify. West's Ann.Pen.Code, § 337a, subs. 1, 6.

4. Criminal Law ☞1023(10)

An order of sentence is a nonappealable order.

David A. Fall and Kenneth W. Gale, San Pedro, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an information filed in Los Angeles county, the appellant was charged with violating subdivision 1 (bookmaking), and subdivision 6 (making and accepting bets), of section 337a, Penal Code.

Appellant pleaded not guilty and the case was submitted on the transcript of the testimony taken at the preliminary hearing. Appellant was found guilty on both counts, probation was denied and he was sentenced to the county jail for three months on each count, the sentences to run concurrently. Appellant has appealed from the judgment, and has purportedly appealed from the sentence.

On January 25, 1957, at about 1:40 o'clock p. m., Officer S. A. Trotsky of the Los Angeles police department went into a bar in San Pedro, called the Mission Smoke House. Trotsky saw the appellant and an unknown person enter the bar by the back door. The officer was about 15 feet from them when the unknown person was looking at the National Daily Reporter (a publication which contains a list of all of the horse races at the various tracks in the United States), commonly called a "scratch sheet," and then said to the appellant, "Give me Miss Bulldozer to win." Appellant replied, "What's the number?" The unknown person then looked at the "scratch sheet" again and said, "Four and Five." The unknown person gave appellant two pieces of currency and appellant and said person then left by the back door.

Trotsky qualified as an expert in bookmaking activities in Los Angeles county, and stated that in his opinion the unknown person's reply of "Four and Five," to appellant's question, referred to a horse, "Miss Bulldozer," entered in the fourth race in the fifth handicap position. A National Daily Reporter for January 25, 1957, set forth that

a horse named Miss Bulldozer was to run in the fifth pole position in the fourth race at Santa Anita on that day. Trotsky also testified that in Los Angeles county bookmakers or others accepting bets on horses kept a record of the bets accepted by numbers. Appellant did not testify nor offer any evidence in his own behalf.

Appellant contends that:

1) The evidence is insufficient to sustain the judgment as to count I, and as to count II, and

2) The court erred in allowing Trotsky to testify as to what bookmakers do in Los Angeles county.

Section 337a, subdivision 1, of the Penal Code reads as follows:

"Every person,

"1. Who engages in pool-selling or bookmaking, with or without writing, at any time or place; * * *

* * * * *

"* * * Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

Bookmaking means the "making of a betting book and includes the taking and receiving of bets and wagers." *People v. Kobey*, 105 Cal.App.2d 548, 563, 234 P.2d 251, 259.

"A bet is a wager or agreement between two or more persons that a sum of money or other valuable thing, contributed by those taking part, shall become the property of one or the other of them, depending on the happening of some future event, at present uncertain." *People v. Oreck*, 74 Cal.App.2d 215, 220, 168 P.2d 186, 190.

Clearly, the evidence in this case, taken in the light most favorable to the People, demonstrates that when the unknown person said to appellant, "Give me Miss Bulldozer to win," and then told the appellant in substance that the horse he was selecting was running the fifth pole position in the fourth race at the Santa Anita race track, and then handed appellant some currency, that then and there a bet was made between

the unknown person and appellant as to Miss Bulldozer in that particular race. Appellant saw fit to make no explanation of the conduct and words spoken and we view it as being clearly a wager.

[1] Appellant also asserts that a series, or more than one bet must be made before a conviction can be sustained. The last paragraph of section 337a, Penal Code, reads as follows:

"This section shall apply not only to persons who may commit any of the acts designated in subdivisions one to six inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions one to six inclusive."

As to the second count, subdivision 6 of section 337a of the Penal Code reads as follows:

"Every person,

* * * * *

"6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

[2] What has heretofore been set forth with reference to count I is applicable to count II. The court accepted the officer's testimony as being true, and that testimony coupled with the other facts and circumstances and the reasonable inferences to be drawn therefrom, support the conviction. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.

The appellant's failure to deny or explain the evidence presented against him, when

it was within his power to do so, was undoubtedly considered by the court as tending to indicate the truth of the People's evidence. *People v. Goldstein*, 139 Cal.App.2d 146, 155, 293 P.2d 495.

[3] Appellant's last contention is that Officer Trotsky's testimony that bets were kept track of by numbers in Los Angeles county by people who accept bets was inadmissible. The appellant stipulated that the officer was an expert in bookmaking activities and paraphernalia as carried on in Los Angeles county, and in addition thereto the court asked questions of the officer to ascertain whether he was qualified as an expert, and determined that the officer did so qualify. In *People v. Bateman*, 57 Cal.App.2d 585, at page 587, 135 P.2d 192, at page 193, the court said:

"* * * The law is established in California that the testimony of a duly qualified expert such as Officer Boswell, is admissible to explain the significance of cryptic letters and figures which appear upon papers, books, and paraphernalia customarily used by bookmakers (*People v. Hinkle*, 64 Cal.App.375, 378, [385] 221 P. 693; see also *People v. Pruitt*, 1942, 55 Cal.App.2d 272, 277, 130 P.2d 767).

"In view of the fact that our Supreme Court has denied a hearing in the last cited case any statements contained in *People v. Davis*, 1941, 47 Cal. App.2d 331, 334, 117 P.2d 917, contrary to the rule of law above stated must be deemed to have been overruled. * *"

We find no prejudicial error in the record.

[4] The judgment is affirmed; the order of sentencing being a non-appealable order, the purported appeal therefrom is dismissed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.

**A. J. FAIRINGTON, D. L. Fairrington,
Ray Fairrington and Frances Lilley,
Plaintiffs and Appellants,**

v.

**DYKE WATER COMPANY, a Corporation,
Defendant and Respondent.***

Civ. 5596.

**District Court of Appeal, Fourth District,
California.**

Dec. 11, 1957.

Hearing Granted Feb. 5, 1958.

Action to quiet title and for injunctive relief to require defendant to remove sign from plaintiffs' land. The Superior Court of Orange County, Raymond Thompson, J., entered judgment that relief to plaintiffs should be withheld but retained jurisdiction to entertain a future application by plaintiffs for injunctive relief and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where permission had been granted to defendant to erect sign by predecessors in interest of plaintiffs, defendant was granted a revocable license to install sign and that license was revoked by death of predecessor in interest, and trial court did not abuse its discretion in failing to order immediate removal of sign but rather attempting to do equity by giving defendant a reasonable time within which to comply with demand of plaintiffs, to remove sign and reserving jurisdiction to enforce its findings.

Judgment affirmed.

1. Equity ☞39(1)

Generally, a court of equity, having once acquired jurisdiction, will adjust all differences between parties arising from cause of action in order to do complete justice and prevent further litigation, whether or not the particular relief sought was requested.

2. Quieting Title ☞50

In action to quiet title and for injunctive relief to require defendant to remove sign on plaintiffs' property which sign had been erected with permission

granted to defendant by predecessors in interest of plaintiffs, although trial court had determined that defendant was granted a revocable license to install sign and that license was revoked by death of predecessors in interest, trial court did not abuse its discretion in failing to order immediate removal of sign but rather attempting to do equity by giving defendant a reasonable time within which to comply with demand of plaintiffs to remove sign and reserving jurisdiction to enforce its findings.

Mize, Larsh, Mize & Hubbard, Santa Ana, for appellants.

James E. Walker, Santa Ana, for respondent.

MUSSELL, Justice.

This is an action for injunctive relief and to quiet title. Plaintiffs are the owners of the following described property situate in the county of Orange, State of California:

Lots Six (6) and Seven (7) in Block "A" of Brown's Addition of Garden Grove, as per Map recorded in Book 21, page 92, of Miscellaneous Records of Los Angeles County, California; also the South 10 feet of Ocean Avenue, adjoining said lots on the North as abandoned by Order of the Board of Supervisors of Orange County, California, May 20, 1907.

In December, 1952, the defendant, Dyke Water Company, purchased from Henry W. Fairrington and Irma I. Fairrington, plaintiffs' predecessors in interest, real property adjoining plaintiffs' property on the south, and described as:

The East half of Lot 13, all of Lot 14, and the West half of Lot 15, Block "A", of Brown's Addition to the Town of Garden Grove, as shown on a map recorded in Book 21, page 92 of Miscellaneous Records of Los Angeles County, California.

The escrow instructions contained the following provisions:

* Opinion vacated 323 P.2d 1001.

"The Sellers also give to the Buyers permission to erect a sign on Garden Grove Boulevard between the driveway and the sidewalk next to the Post Office Building."

Henry W. Fairrington and his wife, Irma, parents of plaintiffs, both died in September, 1953, and plaintiffs inherited the property herein specifically first above described. Shortly after September, 1953, defendant placed upon the northwest corner of Lot 7 of plaintiffs' property a sign bearing the words "Dyke Water Company". This sign was mounted upon a 6½ inch pipe, embedded in a concrete base. Plaintiffs demanded that defendant remove this sign and upon their refusal so to do, this action was filed.

The court found, in addition to the foregoing facts, that defendant purchased the property in reliance upon the permission given to erect said sign, but with full knowledge that such permission was a revokable license; that defendant expended money in the erection of said sign and that said sign is a substantial benefit to defendant in the carrying on of its business; that said sign constitutes no substantial detriment to plaintiffs at the present time and does not interfere with any present or contemplated use of their property by them. The court concluded that defendant was granted a revokable license to install said sign; that said license was revoked by the deaths of Henry W. Fairrington and Irma I. Fairrington; that relief to plaintiffs should be withheld "at this time" by the court sitting in equity and that the court retains jurisdiction to entertain further application by plaintiffs for injunctive relief. The judgment was "1. That relief to plaintiffs should be withheld at this time by the Court sitting in equity; 2. That the Court retains jurisdiction to entertain a future application by the plaintiffs herein for injunctive relief."

Plaintiffs appeal on the judgment roll alone and contend that the court erred in refusing them immediate injunctive relief. Defendant has not appealed from the judgment.

Plaintiffs argue that the trial court erred in not granting immediate injunctive relief in accordance with the findings. However, the trial court evidently was of the opinion that defendant by equity should be permitted to leave the sign on plaintiffs' property for some reasonable time until it caused a detriment to plaintiffs and jurisdiction was retained to entertain further application for injunctive relief.

[1] This is an action in equity and it is the general rule that a court of equity, having once acquired jurisdiction, will adjust all differences between the parties arising from the cause of action in order to do complete justice and prevent further litigation, whether or not the particular relief sought was requested. *Sears v. Rule*, 27 Cal.2d 131, 149, 163 P.2d 443. In *Lobdell v. Miller*, 114 Cal.App.2d 328, 344, 250 P.2d 357, 367, it was held:

"Where it is possible to bring about substantial justice by adjusting the equities between the parties, the fact that the status quo cannot be exactly reproduced will not preclude the plaintiffs from equitable relief. No matter what may be the complications or complexities, the powers of a court of equity are so broad as to adequately meet the exigencies of the case and render a decree which will justly determine the rights of the respective parties."

[2] In *Lewis v. Winfield*, 48 Cal.App.2d 543, 545, 120 P.2d 65, it was held that on the broad principle of equity that where jurisdiction is once attained, and the parties have joined issue, the court will endeavor to dispose of the entire controversy, the judgment here should be affirmed if it is within the equities and not a miscarriage of justice. In *Riverside Rancho Corp. v. Cowan*, 88 Cal.App.2d 197, 203, 198 P.2d 526, 530, it was held that "Under the pleadings, the evidence and the findings the court, with its broad jurisdiction in equity, was empowered to do exact justice to the parties and to enter a judgment that would fairly meet the situation." It is a basic doctrine of equity jurisprudence that

he who seeks equity must also do equity. 18 Cal.Jur., Equity, Sec. 30, p. 190.

In the instant case it does not appear that the trial court abused its discretion in failing to order the immediate removal of the sign involved. It may reasonably be inferred that defendant relied upon the permission given to erect said sign at the time it purchased the property and the record shows that it spent \$250 in the erection of said sign. There is evidence that the trial court was attempting to do equity by giving defendant a reasonable time within which to comply with the demand of plaintiffs, reserving jurisdiction to enforce its findings.

Judgment affirmed.

BARNARD, P. J., concurs.



155 Cal.App.2d 727

Wallace O. POWLEY, Ernestine Powley and Dennis Garrison, a Minor by his Guardian ad Litem, Ernestine Powley, Plaintiffs and Appellants,

v.

Harold R. APPLEBY, Jr., Harold R. Appleby, Sr., State Farm Mutual Automobile Insurance Company, a Corporation, et al., Defendants,

Harold R. Appleby, Jr., and Harold R. Appleby, Sr., Respondents.

Civ. 22201.

District Court of Appeal, Second District,
Division 1, California.

Dec. 5, 1957.

Rehearing Denied Dec. 31, 1957.

Hearing Denied Jan. 28, 1958.

Action for injuries sustained by minor bicyclist struck at intersection by an automobile driven by defendant. From a judgment of the Superior Court, Los Angeles County, Gerald C. Kepple, J., and from an order denying motion for a new trial,

the plaintiffs appealed. The District Court of Appeal on rehearing, Fourn, J., held, inter alia, that where defendant testified fully as to his conduct at and prior to time of collision, there was substantial prejudice to plaintiffs in giving instruction which gave defendant the benefit of presumption of exercise of due care prior to collision when all of the various factors in case were considered.

Judgment reversed, and appeal from order dismissed.

Opinion, Cal.App., 314 P.2d 761, vacated.

1. Automobiles ⇨242(1), 246(60)

A motorist who testified fully as to his conduct at and prior to time of collision with bicyclist should not have been accorded benefit of presumption that he was in exercise of due care prior to collision, and instruction to such effect was erroneous.

2. Appeal and Error ⇨1064(1)

Trial ⇨296(1)

Question whether error in giving of instruction is or is not prejudicial turns on circumstances of the case, including the facts and the remainder of the instructions.

3. Appeal and Error ⇨1064(1)

In action for injuries to minor bicyclist struck at T intersection by automobile driven by defendant who testified fully as to his conduct at and prior to time of collision, there was substantial prejudice to plaintiffs in giving instruction which gave the defendant the benefit of presumption of exercise of due care prior to collision when all of the various factors in case were considered.

4. Negligence ⇨121(1)

Presumption that a person has exercised due care is not available when a fact proved by a party or his witness is wholly irreconcilable with the presumption, or when litigant relying upon presumption introduces evidence contrary to fact presumed, or to establish conflict in evidence,

or when litigant invoking presumption has introduced evidence encompassing subject matter of the presumption.

5. Negligence ⇨121(1)

The presumption that a person has exercised due care may not be relied on by a party who can and does produce complete and explicit evidence as to his conduct in the premises.

6. Automobiles ⇨246(51)

In action for injuries to minor bicyclist struck at T intersection by automobile, instruction on applicability of section 530 of Vehicle Code providing limitations on overtaking and passing vehicles traveling in same direction, was erroneous as inapplicable to facts, but jury should have been instructed that applicable law was section 525 of Vehicle Code providing that upon all roadways of sufficient width a vehicle shall be driven upon right half of roadway, except when such vehicle is lawfully making a left turn. West's Ann.Vehicle Code, §§ 525(2), 530.

7. Trial ⇨296(3)

In action for injuries to minor bicyclist struck by automobile at T intersection, error in instructing that statute providing that no vehicle shall at any time be driven to left side of roadway when view is obstructed was applicable, was not cured by instruction which correctly stated the applicable law to be as set forth in section 86 of Vehicle Code defining the term "intersection" and in section 540 of Vehicle Code prescribing the required position and method of turning left at intersections. West's Ann.Vehicle Code, §§ 86, 530, 540.

8. Appeal and Error ⇨1064(1)

Instructions that are contradictory in essential elements may warrant reversal of a judgment on ground that it cannot be ascertained which instruction was followed by jury.

9. Trial ⇨243

Decisive question in determining whether instructions are conflicting is whether instructions read as a whole and in light of circumstances of case in which they were

given are apt to confuse a person of ordinary intelligence.

10. Appeal and Error ⇨110

An order denying motion for new trial is not appealable.

Carter, Young, Zetterberg & Henrie, Pomona, for appellants.

Spray, Gould & Bowers, Los Angeles, for respondents.

FOURT, Justice.

Plaintiffs brought an action for damages for personal injuries sustained by the minor plaintiff, Dennis Garrison, when he was struck by an automobile while riding his bicycle. Prior to trial, dismissal was granted as to defendant State Farm Mutual Automobile Insurance Company. Plaintiffs have appealed from the judgment on a verdict in favor of defendants, and have attempted to appeal from the order denying their motion for a new trial.

The collision occurred shortly after noon on July 29, 1954, at the intersection of Williams Street and Illinois Street in the City of Pomona, California. This area was residential in character; both Williams Street and Illinois Street were paved public highways, forty feet wide from curb to curb; Williams Street extended in an east-west direction, and dead-ended, forming a "T" intersection at Illinois Street, which extended in a north-south direction; there were no markers, buttons or signs within or adjacent to the intersection; the corner lot immediately west of Illinois Street and north of Williams Street was raised slightly from street level, and contained a hedge approximately four feet high which partially obstructed the view of traffic for drivers approaching the intersection in an easterly direction on Williams Street or in a southerly direction on Illinois Street.

At the time of the accident Dennis Garrison was ten years of age, and Harold R. Appleby, Jr., was seventeen years of age.

There is little evidence concerning the activities of the parties immediately prior to and at the moment of the collision.

Dennis Garrison had a new bicycle. He lived on White Avenue, which was one block west of and parallel to Illinois Street. It was his intention to ride around the block before lunch. Dennis testified that he did not remember riding down Williams Street, or whether he was on the right or left side of Williams Street; he could not remember looking before entering the intersection. He said he did not remember how many miles per hour he was going; whether he was pedaling or had applied the brakes on his bicycle. He could not say where the car was in relation to him. He did not know whether the car was moving, and he did not remember seeing the driver of the car. He did recall that he was barely idling when he saw the grille, the headlights and the hood of a car. He had no memory of telling his mother that the driver was looking in another direction and did not see him, or that the car was coming "real fast." He did not remember talking to any policeman after the accident. His first memory after the accident was of having his shirt cut off at the hospital.

Harold Appleby, Jr., had been at his aunt's house on Laurel Avenue, which was one block north of and parallel to Williams Street. He testified that after leaving his aunt's house and driving approximately half a block, he was in high gear when he turned right on to Illinois Street. He accelerated slightly and was traveling in the middle of the southbound lane between twenty and twenty-five miles per hour as he entered the intersection of Illinois and Williams Streets. He did not recall looking to the right or left prior to the collision, although he said he caught a glimpse of Dennis out of the corner of his right eye just an instant before the impact, and he heard Dennis scream. He said he did not see Dennis long enough before the collision to know whether he was seated or standing or pedaling, and that when the impact occurred, it felt as if his brakes

were holding; that he did not know whether the windshield of his car was clean, or remember whether he was wearing glasses, although his driver's license bore the notation "must wear corrective lenses."

Harold Appleby, Jr., at the trial, initially located the point of impact in Illinois Street, approximately fifteen feet north of the intersection, although he admitted that in his deposition he said the collision took place in the northwest quarter of the intersection and then located the point of impact as approximately ten feet south of an extension of the north curb line of Williams Street and fifteen feet east of an extension of the west curb line of Illinois Street.

The automobile came to rest with its front bumper approximately in line with an extension of the south curb line of Williams Street. The bicycle was underneath the front end of the automobile and Dennis was lying in the street in front of and approximately ten feet south of the automobile, his body having traveled through the air before hitting the pavement.

No other witnesses testified concerning the collision or the events immediately prior thereto, and there is no evidence that there was any disinterested eye witness to the collision.

A police officer, Mr. Root, arrived at the scene shortly after 12:20 o'clock p.m., took pictures, made observations, and stepped off measurements.

As plaintiffs' witness, officer Root testified that there were skid marks which ran approximately north and south, that the skid mark made by the right-hand wheel commenced approximately one foot to the north of the other skid mark, and he stepped it off as approximately twenty-seven feet long. He also stated there was a gouge mark apparently made by the left pedal of the bicycle in the middle of the two skid marks, and from this he determined that the point of impact was apparently fifteen feet to the east of the extension of the west curb line of Illinois Street and ten feet to the south of the extension of the

north curb line of Williams Street—adding that it could have been farther north.

As defendants' witness, officer Root testified that after the accident he asked Dennis at the Pomona Valley Community Hospital what he was doing at the time of the accident; and that Dennis, in the presence of the admitting nurse and a woman who identified herself as Dennis' mother, said that "he was taking one more ride around the block before putting his bicycle up, so he thought he would go real fast." Officer Root further testified that Dennis stated that usually he stopped at Illinois Street when going east on Williams, but that he thought since the street usually wasn't busy he wouldn't this time, and therefore cut the corner fast, and to quote his expression, "Boom!" Officer Root also stated that from the length of the skid marks he determined that Appleby's car was traveling at a speed of twenty-four miles; and that the speed limit was twenty-five miles per hour. A motion to strike this latter testimony on the basis that it invaded the province of the jury was denied. On cross-examination, officer Root stated that his view of the northwest corner of the intersection was partially obstructed from a position in a car on Illinois Street one hundred feet north of the intersection.

Ernestine Powley, the mother of Dennis, testified that she did not recall being present in the room at the hospital when officer Root questioned Dennis about how the accident happened.

The sufficiency of the evidence to justify the verdict is not questioned by the appellants. Appellants do contend the trial court committed prejudicial error in refusing plaintiffs' requested instruction that the minor plaintiff was presumed to have been exercising due care in operating his bicycle at the time of the collision; and in giving the instruction that at the outset both parties were entitled to the presumption of due care. Appellants also contend there was error in failing to allow certain expert testimony to be introduced and in

failing to allow the jury to view the scene of the collision.

Plaintiffs requested the following instruction (B.A.J.I. 135-A), which the trial court refused: "The law presumes that (Dennis Garrison) one of the plaintiffs in this action, in his conduct at the time of and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to and be in accordance with my instructions on the burden of proof."

In lieu of the foregoing instruction, on its own motion the trial court instructed the jury as follows (B.A.J.I. 135): "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

Appellants assert that the plaintiff Dennis Garrison, having suffered in the accident severe head injuries which caused a loss of memory, was entitled to the benefit of the presumption of due care; and that inasmuch as defendant Harold R. Appleby, Jr. testified fully as to his own conduct prior to and at the time of the accident, he was not entitled to the benefit of the presumption of due care, with the result

that the error in refusing plaintiffs' requested instruction was compounded when the court gave an instruction which extended the presumption to include both parties.

[1,2] Appellants are correct in their contention that it was error to accord the benefit of the presumption to the defendant automobile driver as to whom there were no special circumstances preventing him from testifying fully as to all of the circumstances prior to and through the happening of the accident. It is true that there are cases which have held that the error in giving a party not entitled thereto the benefit of the presumption was not prejudicial. *Tudorios v. Hertz Drivurself Stations*, 70 Cal.App.2d 192, 198, 160 P.2d 554; *Speck v. Sarver*, 20 Cal.2d 585, 588-589, 128 P.2d 16. The test appears to be as stated in *Stout v. Southern Pacific R. Co.*, 127 Cal.App.2d 491, 497, 274 P.2d 194, "Whether the error in the giving of the instruction is or is not prejudicial turns upon the circumstances of the case, including the facts and the remainder of the instructions." Citing *Speck v. Sarver*, supra; *Ford v. Chesley Transp. Co.*, 101 Cal. App.2d 548, 225 P.2d 997; *Rozzen v. Blumenfeld*, 117 Cal.App.2d 285, 255 P.2d 850.

[3] We are of the opinion that there was substantial prejudice to the plaintiffs in giving the defendant the benefit of the presumption when all of the various factors in the instant case are considered. See, *Ford v. Chesley Transp. Co.*, supra; *Zollars v. Barber*, 140 Cal.App.2d 502, 295 P.2d 561; *Nunnemaker v. Headlee*, 140 Cal. App.2d 666, 295 P.2d 438; *Hensley v. Harris*, 151 Cal.App.2d 821, 312 P.2d 414; *Burns v. Churchill*, 152 Cal.App.2d 491, 313 P.2d 575; *Nahas v. Pacific Greyhound Lines*, 153 Cal.App.2d 91, 313 P.2d 886.

[4] The presumption originally was applied under circumstances where there was a complete lack of testimony as to the conduct of a decedent. The presumption has been held not to be available when a fact proved by a party or his witness is

wholly irreconcilable with the presumption, (see *Mar Shee v. Maryland Assurance Corp.*, 1922, 190 Cal. 1, 9, 210 P. 269); or when a litigant relying upon the presumption, introduced evidence contrary to the fact presumed, (see *Tice v. Kaiser Co.*, 1951, 102 Cal.App.2d 44, 226 P.2d 624); or to establish a conflict in the evidence, (see *Mundy v. Marshall*, 1937, 8 Cal.2d 294, 65 P.2d 65); or when the litigant invoking the presumption has introduced evidence encompassing the subject matter of the presumption, (see *Stout v. Southern Pacific R. Co.*, supra).

However, more recent cases involving decedents have somewhat modified the effect of these rulings. In *Anthony v. Hobbie*, 1945, 25 Cal.2d 814, at page 820, 155 P.2d 826, at page 830, the court in holding that plaintiff was entitled to the presumption of due care because the evidence was not wholly irreconcilable with the exercise of ordinary care by the decedent said, "Certainly if he was not guilty of contributory negligence as a matter of law, there is no evidence completely refuting the presumption that he was not."

In *Gigliotti v. Nunes*, 1955, 45 Cal.2d 85, 286 P.2d 809, it was held to be prejudicial error to refuse the instruction merely because other witnesses testified fully as to acts and conduct of the party unless his evidence was wholly irreconcilable with the presumption. Recently, in *Brandelius v. City and County of San Francisco*, 47 Cal.2d 729, 733, 306 P.2d 432, 435, after reviewing a record where witnesses of the decedent testified as to all events, the Supreme Court in affirming an order granting a new trial "solely because the court felt that 'the jury was not properly instructed'", approved the giving of an instruction of due care on the part of deceased at the time of the accident, stating (47 Cal.2d at page 736, 306 P.2d at page 437), "* * * the benefit of the presumption is available if such person be deceased and the testimony of plaintiffs' witnesses respecting the deceased's acts and conduct at the

time involved is not 'wholly irreconcilable' with such presumption." See also, Hefington v. Paul, 152 Cal.App.2d 235, 313 P.2d 157.

In Scott v. Sheedy, 1940, 39 Cal.App.2d 96, 102 P.2d 575, the court analyzed the reasons for the rule stated in Westberg v. Wilde, 14 Cal.2d 360, 94 P.2d 590, that the decedent was entitled to the presumption of due care, notwithstanding the evidence of other witnesses, because all possible facts relating to the negligence of the party were not before the court; and then concluded (39 Cal.App.2d at page 101, 102 P.2d at page 578), "* * * we feel it can make no difference whether the injured party dies or is incapacitated by loss of all memory of the circumstances of the accident, the result of brain injury from the collision."

[5] Some cases have appeared to limit the use of the presumption in situations involving loss of memory to cases in which the party has produced no witnesses who testified as to events prior to or at the time of the impact. See McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 15, 146 P.2d 34; Duvall v. T. W. A., 98 Cal.App.2d 106, 111, 219 P.2d 463; Ford v. Chesley Transp. Co., supra. However, in each of these cases the facts indicate no witnesses actually had testified for the party sustaining injuries concerning the circumstances surrounding the accident. The applicable rule is stated in Ford v. Chesley Transp. Co., supra, (101 Cal.App.2d at page 552, 225 P.2d at page 1000) to be, "The presumption may not be relied on by a party *who can and does produce complete and explicit evidence as to his conduct* in the premises." (Emphasis added.)

There are some cases holding the presumption to be applicable in circumstances wherein the facts concerning the happening of the collision were not fully covered by witnesses of the party sustaining a loss of memory. See Russell v. Anderson, 101 Cal. App.2d 684, 696, 226 P.2d 350; Eramdjian v. Interstate Bakery Corp., 153 Cal.App.2d 590, 315 P.2d 19.

In Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313, an investigating police officer

testified that he interviewed the defendant driver in the hospital some three or four hours after the accident, and was told by the driver that he evidently had gone to sleep. In the Scott case the driver testified he had no recollection of the accident although he did remember that there was very little traffic on the road when he took the wheel; that he did not remember applying the brakes or being interviewed by the police officer; that he did remember being taken to the hospital and arriving there; that his highest speed was sixty miles per hour; and that in his best opinion he did not fall asleep prior to the accident. The jury was held to have been properly instructed that the *res ipsa loquitur* doctrine was applicable, thereby raising an inference that the defendant driver was negligent; and it was contended that it was error under such circumstances to give an instruction that the defendant driver was entitled to the presumption of due care. The Supreme Court held (39 Cal.2d at page 393, 247 P.2d at page 316) it was proper to instruct the jury that "if the jury believed that defendant as a result of the shock of the accident was unable to remember and testify as to his own conduct or other facts of the accident then a presumption arose that he 'was obeying the law and was exercising ordinary care and doing such acts as an ordinarily prudent person would have done in the same circumstances.'" The court then proceeded to explain (39 Cal.2d at page 398, 247 P.2d at page 319) as follows "* * * just as either an inference or a presumption may outweigh positive evidence adduced against it by the opposing party, so may either outweigh the other; i. e., it is for the trier of fact to determine under the circumstances of each case whether to give greater weight to an inference than to a disputable presumption which conflicts therewith, or vice versa."

After holding it was error to have given both parties the benefit of the presumption of due care where only one party claimed to have sustained a loss of memory, the court in Zollars v. Barber, supra, carefully considered whether the effect was prejudicial to the party claiming to have sustained

the loss of memory where she fully testified as to her actions prior to the accident and where there was a conflict in the evidence as to her unconsciousness. The court concluded (140 Cal.App.2d at page 507, 295 P.2d at page 564), " * * * the instruction on the presumption of due care should have been conditioned on the jury's believing that she was unconscious. Although in that respect the instruction may have been somewhat too favorable to plaintiff it cannot be said as a matter of law that the two distinct errors must have cancelled each other out in their effect upon the jury."

Hensley v. Harris, *supra*, is another case in which the police officer testified that the party claiming loss of memory told him at the hospital that on the day of the accident he was traveling twenty-five miles per hour and also told him other details of the accident and of the time immediately prior thereto. Under the instruction given, each party received the benefit of the presumption of due care; and, in reversing, the court held that whether a loss of memory had in fact been suffered was a question of fact and that it was grave error to take this vital factual question from the jury. The court then explained (151 Cal.App.2d at page 828, 312 P.2d at page 418), " * * * proper instructions respecting the presumption of the exercise of care would have stated that only the defendants were seeking the benefit of the presumption and that they would be entitled to it only in case it was determined by the jury that Harris [defendant], because of loss of memory due to the accident, as he testified, was unable to recollect and relate what his actions were up to the moment of the collision."

The recent case of *Brumley v. Barney O'Hern Trucking Co.*, 152 Cal.App.2d —, 314 P.2d 200, involved a party with little recollection of what happened at the time of, or before the accident. There was evidence that said party previously had made statements that when the accident happened he was on his own side of the road and that he was hit there, and it was contended, with this testimony in the record, that it was error for the jury to be instruct-

ed that he was entitled to the presumption of due care. In holding the instruction to have been given properly, this court through Mr. Justice Drapeau (*pro tem.*), said (152 Cal.App.2d at page —, 314 P.2d at page 203), "Coming finally to the instruction complained of. The case of *Gigliotti v. Nunes*, 45 Cal.2d 85, 286 P.2d 809, settles the contention that it was error to give this instruction. For that case holds that a person is entitled to the presumption defined in the instruction notwithstanding the fact that other witnesses for the parties testified to alleged acts of negligence.

"In this case Mr. Brumley testified that he had no recollection of the accident. The fact that another witness testified that *on another occasion Mr. Brumley remembered some of the details of the accident* does not deprive him of the benefit of the presumption." (Emphasis added.)

It remains to be determined whether, under the facts of this case, the prejudicial effect of instructing the jury erroneously that each party was entitled to the benefit of the presumption of due care at the outset, may have been overcome by any of the other instructions given in this case. The verdict in this case can reasonably be accounted for only on the theory that the jury made an implied finding that plaintiff Dennis Garrison was guilty of contributory negligence. Our independent examination of each of the instructions given has disclosed errors in the record which are more serious and even more prejudicial than those which have been called to the attention of the court by counsel upon this appeal.

Instructions 37 and 38 are herein set forth in order that a proper evaluation may be made of the effect of certain other instructions upon the jury.

"37. If a party to this action violated any of the statutes just read to you, a presumption arises that he was negligent. This presumption is not a conclusive one. It may be overcome by other evidence showing that, under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as

might reasonably have been expected from a person of ordinary prudence.

"(In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise.)"

"38. However, in this action, a violation of law is of no consequence unless it was a proximate cause of (or contributed as a proximate cause to) an injury found by you to have been suffered by (the plaintiff) Dennis Garrison."

Instruction No. 36 was requested by defendants and as given by the court in modified form, reads as follows: "Section 530 of the California Vehicle Code was in full force and effect at the time of the happening of this accident and read in part as follows:

"(b) * * * No vehicle shall at any time be driven to the left side of the roadway when the view is obstructed upon approaching within 100 feet of an intersection. * * *" (Emphasis added.)

Section 530 of the Vehicle Code pertains generally to limitations on overtaking and passing vehicles traveling in the same direction on the same roadway (and to

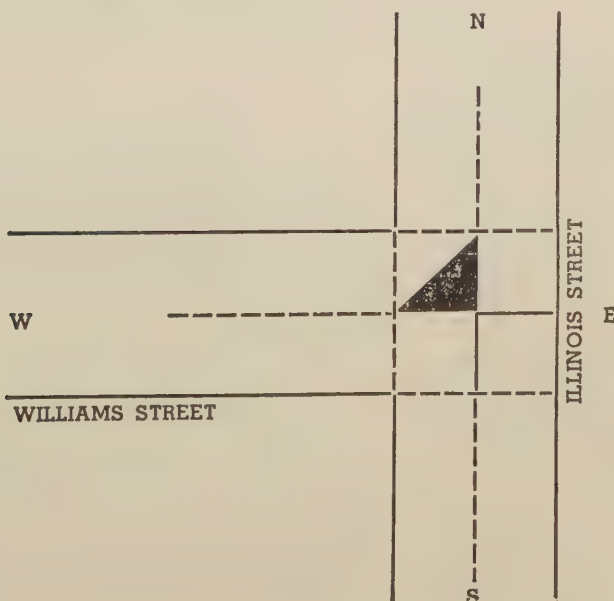
some other situations not applicable to the instant case).

[6] We believe the jury should have been instructed that the applicable law is set forth in section 525 of the Vehicle Code, the pertinent provisions of which are: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

* * * * *

"(2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making a left turn." (Emphasis added.)

Under the instruction given, the only lawful manner of making a left turn would be to proceed around an imaginary button in the center of the intersection. As applied to the facts in this case, this would mean that if Dennis was at any time in the northwest quarter of the intersection he was in violation of the provisions of section 530 of the Vehicle Code. Actually, under the provisions of section 525 of the Vehicle Code, Dennis could properly have been in the southeasterly diagonal one-half of the intersection (as shown by the shaded area in the diagram herein set forth), if the jury determined that he was in the process of making a lawful left turn.



155 Cal.App.2d 772

**Louis PETE, Jr., Administrator of the Estate
of Louis Pete, Sr., Deceased, Plaintiff
and Appellant,**

v.

**Annie S. HENDERSON, Administratrix of
the Estate of John C. Henderson,
Deceased, Defendant and Respondent.**

Civ. 17429.

District Court of Appeal, First District,
Division 1, California.

Dec. 6, 1957.

[7] This error was not corrected by Instruction No. 35, which correctly stated the applicable law to be as set forth in section 86 of the Vehicle Code defining the term, "intersection," and in section 540 of the Vehicle Code prescribing the required position and method of turning left at intersections.

[8,9] It has been well stated in *Sebrell v. Los Angeles Ry. Corp.*, 31 Cal.2d 813, 817, 192 P.2d 898, 900, that "Instructions that are contradictory in essential elements may warrant the reversal of a judgment on the ground that it cannot be ascertained which instruction was followed by the jury. (Citing cases.) In determining whether there is such a conflict the decisive question is whether the instructions read as a whole and in the light of the circumstances of the case in which they were given, are apt to confuse a person of ordinary intelligence."

Certainly there can be no question that a conflict was created by the instructions given; one of the essential elements in determining whether Dennis Garrison was guilty of contributory negligence was whether he could lawfully be where he was at the time of the happening of the collision.

Other incidents of the trial, including various rulings on the admissibility of evidence assigned as error, may not occur in the challenged form on the new trial which may be had, and hence are not now discussed.

It is not improbable that the verdict would have been different had the jury been properly instructed.

[10] The judgment is reversed. The order denying the motion for new trial being non-appealable, the purported appeal therefrom is dismissed.

WHITE, P. J., and DRAPEAU, J. pro tem., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

Action to recover for alleged negligence in permitting judgment in breach of contract action to become final without taking an appeal. The Superior Court, Alameda County, Richard S. Chamberlain, J., rendered judgment deemed adverse by plaintiff, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held (with regard to probable efficacy of appeal in breach of contract action) that agreement by landowner to let woman occupy for the rest of her life, at a stipulated monthly rental, a room to be constructed by her at rear of landowner's house had given woman a life estate in room; and held that any dissatisfaction of landowner with man who came to live with woman in room would not furnish a legal basis for her eviction.

Affirmed.

1. Appeal and Error *⌋*106, 110, 870(2, 6)

Order denying plaintiff's motion for new trial and order denying his motion to set aside submission and reopen case for further evidence were not appealable orders, but could be reviewed upon appeal from judgment.

2. Attorney and Client *⌋*129(2)

In action to recover for negligence in permitting judgment in breach of contract action to become final without taking appeal, evidence, on issue as to probable efficacy of appeal, showed that findings in breach of contract action had been supported by sufficient evidence.

3. Contracts ⇐103

To render contract illegal, it must appear that meretricious acts themselves constituted a part of consideration therefor.

4. Life Estates ⇐3, 4

Agreement by landowner to let woman occupy for the rest of her life, at a stipulated monthly rental, a room to be constructed by her at rear of landowner's house gave woman a life estate in room; and any dissatisfaction of landowner with man who came to live with woman in room would not furnish a legal basis for her eviction.

5. Attorney and Client ⇐129(2)

Negligent handling of trial of breach of contract action was not within issues in action to recover for negligence in permitting judgment rendered in breach of contract action to become final without taking an appeal; and statute of limitations having run against claim for negligent handling of trial, it was not error to exclude evidence tending to show that contract had been rescinded prior to filing of complaint in breach of contract action. West's Ann. Code Civ.Proc. § 336.

Louis Pete, Jr., in pro. per.

Vaughns, Dixon & White, Oakland, for respondent.

FRED B. WOOD, Justice.

Upon the first appeal herein the judgment was reversed with directions that plaintiff "be given the opportunity to amend his complaint, and to prove, if he can, that, had the judgment in the first action properly been appealed, it would have been reversed." Pete v. Henderson, 124 Cal.App.2d 487, 492, 269 P.2d 78, 81, 45 A.L.R.2d 58, to which we refer for the antecedent history of this case.

Plaintiff did so amend and the cause was retried, resulting in a judgment of \$150

for attorney fees which plaintiff had advanced to defendant's predecessor to take an appeal in a former action (Alderson v. Pete, Superior Court, Alameda County, Civ. No. 213,874) but no reimbursement for moneys which had been paid by plaintiff in satisfaction of the judgment (\$1,660) rendered in the former action. The denial of any such reimbursement was predicated upon findings that although the attorney-defendant was negligent (the notice of appeal was filed too late) the judgment would not have been reversed even if the appeal had been perfected in time and thereafter prosecuted with care and caution.

[1, 2] In support of his appeal herein¹ plaintiff urges (1) insufficiency of the evidence to support the findings in the Alderson suit, (2) error in excluding evidence of rescission of the Pete-Alderson contract, and (3) error in disregarding plaintiff's claim that plaintiff could have settled the Alderson \$1,660 judgment for \$705 but for his attorney's assurance that it would be reversed upon appeal.

The judgment in the Alderson case awarded damages in favor of Minnie Alderson against Louis Pete, Jr., as administratrix of the estate of Louis Pete, Sr., for breach of a contract between Alderson and Louis Pete, Sr.

The contract, as found by the trial court in that case was as follows: Alderson promised to erect and pay for an additional room at the rear of a house belonging to Louis Pete, Sr., at a cost of not less than \$900; Pete agreed to let Alderson occupy the room for the rest of her life at a monthly rental of \$24, the rental to be charged first against the actual cost of constructing the room, and thereafter to be paid monthly in cash; Alderson constructed the room at a cost of \$945.69 and commenced to occupy it about May 11, 1947; about March 7, 1948, Pete wrongfully evicted Alderson from the room;

and reopen the case for further evidence. These are nonappealable orders but may be reviewed upon the appeal from the judgment.

1. Plaintiff gave notice of appeal from the judgment, from an order denying his motion for new trial, and from an order denying motion to set aside submission

the reasonable rental value of the room is \$30 per month; Alderson at the time of eviction was 49 years old and had a life expectancy of 22 years; and Alderson was damaged in the sum of \$1,660.87, plus \$19.95, the value of a rug of Alderson's which Pete retained in his possession.

The evidence supports these findings. On some points there is a conflict in the testimony, one which the trial judge, who saw and heard the witnesses, resolved in favor of Alderson.

[3] Plaintiff contends that the contract was illegal (that it embraced a meretricious relationship) and claims error in the failure of the trial court to find on that issue. The pleadings did not specifically present such an issue. Nor did the evidence establish the existence of such a relationship between the parties, at least none that had such a connection with this contract as would necessarily infect the contract with illegality. It did appear that Mrs. Alderson came from Oklahoma City to Oakland at the invitation of Mr. Pete, Sr., and that he paid her fare and that she lived in his house three or four months. It does not appear that such relationship had any connection with the contract for the construction and occupancy by her of a room at the rear of his house. More must be shown. It must appear that the meretricious acts themselves constituted a part of the consideration for the contract. *Trutalli v. Meraviglia*, 215 Cal. 698, 701-702, 12 P.2d 430; *Hill v. Estate of Westbrook*, 95 Cal.App.2d 599, 602, 213 P.2d 727; *Garcia v. Venegas*, 106 Cal.App.2d 364, 368-369, 235 P.2d 89.

[4] To the extent, if at all, that the asserted grounds for rescission are predicated upon the fact that after the room was constructed Mrs. Alderson allowed a Mr. Anthony Stewart to occupy it with her, evidence of a rescission seems wanting. There is evidence that Mr. Pete, Sr., did not object to Stewart living in Mrs. Alderson's room. The two men were friendly at first and for several weeks; also, Pete, Sr., collected \$20 a week from Mrs. Alderson in respect to Stewart's

occupancy. Even if after a while Pete, Sr., became dissatisfied with Stewart and did not want him around, that would not furnish a legal basis for the eviction of Mrs. Alderson. She had a life estate in the room. Moreover, Stewart moved away prior to the eviction.

Plaintiff questions also the sufficiency of the proof of damages. There was evidence that rooms of like size were renting at \$6 to \$9 a week. That supports the finding that this room has a rental value of \$30 a month. We have found no error in the trial court's use of the mortality tables in determining the period of Mrs. Alderson's life expectancy and in applying it to the elements of damage in this case; nor has plaintiff brought any such error to our attention.

[5] Plaintiff urges that it was error for the trial court in the instant action to exclude evidence tending to show that the Alderson-Pete contract was rescinded prior to the time that Mrs. Alderson filed her complaint. Plaintiff's theory in this regard seems to be that attorney Henderson negligently handled the Alderson case. Such a contention is wholly outside the issues in the instant case. Plaintiff amended his complaint herein to allege negligence only in the taking of the appeal, not in the conduct of Pete, Sr.'s defense prior to judgment. Plaintiff did not ask permission to amend so as to plead this new cause of action. Moreover, at the time of the second trial, the statute of limitations had run against such a claim. The Alderson-Pete trial took place between February 16 and March 2, 1950; the second trial herein, between February 3 and April 3, 1956. We find no error in the challenged exclusion of evidence.

For like reasons it was not error to deny plaintiff's motion to vacate the submission of the instant case and reopen it for the taking of evidence of rescission and of illegality.

Plaintiff alludes to a proposed compromise settlement with Alderson, a settlement which Mr. Pete, Sr., rejected upon advice of his counsel, the attorney whom

he later sued. But plaintiff never pleaded any such cause of action against the attorney. Even if he had amended during the second trial (six years after the Alderson-Pete trial) he would have been met by the Statute of Limitations, Code Civ.Proc. § 336, which had already run against any such claim.

Plaintiff predicates error also upon the fact that findings prepared by him, directly contrary to those the court had announced it would sign, were not included in the clerk's transcript upon this appeal. Inclusion of the proposed unsigned findings would not change the result upon this appeal. They seem quite immaterial to the present inquiry.

We conclude that there is no basis for reversal of the trial court's finding herein that the Alderson judgment would not have been reversed if a timely appeal had been taken from it and thereafter prosecuted with care and caution.

The judgment is affirmed and the appeals from the orders are dismissed.

PETERS, P. J., and BRAY, J., concur.



155 Cal.App.2d 853

Jane SEEFELDT and Ray Seefeldt,
Plaintiffs-Appellants,

v.

PACIFIC GREYHOUND LINES et al.,
Defendants-Respondents.

No. 17391.

District Court of Appeal, First District,
Division 1, California.

Dec. 10, 1957.

Rehearing Denied Jan. 9, 1958.

Hearing Denied Feb. 5, 1958.

Action to recover for death of son who was killed when automobile in which he was riding as a passenger, was struck by defendant's bus. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment for bus com-

pany and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that under circumstances, there was no prejudicial error in giving certain instructions on negligence or in the refusal to give plaintiffs' requested instruction on basic speed law.

Affirmed.

1. Trial ⇐296(3)

In action to recover for death of deceased who was killed while riding as a passenger in automobile struck in intersection by bus, owner of which was sole defendant, court's instruction respecting the negligence while introducing an element of conflict and confusion as to possible concurrent negligence of the drivers of the two vehicles was not prejudicial in view of court's further instruction that plainly told jury that if the negligence of bus driver contributed to accident, that would be sufficient to render bus company liable.

2. Automobiles ⇐246(58)

In action to recover for death of plaintiffs' son who was killed while a passenger in automobile that was struck by defendant's bus at highway intersection, where issue of son's negligence was raised in the pleadings and there was some evidence from which his negligence might be inferred, there was no error in instructing jury that even though negligence of driver could not be imputed to son, son was bound to exercise ordinary care for his own safety. West's Ann.Vehicle Code, §§ 510, 511, 513.

3. Trial ⇐260(8)

In action to recover for death of son who was killed while riding as passenger in automobile that was struck by defendant's bus at highway intersection, there was no prejudicial error arising from court's refusal to submit plaintiff's requested instruction as to basic speed law, when court later gave further instructions as to fact that bus was governed by the same vehicle laws as all other ve-

hicles. West's Ann.Vehicle Code, §§ 510, 511, 513.

4. Trial 253(3)

Not every instruction on negligence need also speak of proximate cause.

Nicholas Zoller, San Francisco, for appellants.

Carroll, Davis & Burdick, San Francisco, for respondents.

FRED B. WOOD, Justice.

The collision occurred on August 21, 1954, about 5:45 a. m., in the intersection of Highway 101, a north-south two-lane arterial at this point, and Fulton Road, an east-west county road. Defendant Macomber was driving a Greyhound bus southerly on 101. The plaintiffs' son Raymond was riding in a passenger car which had approached 101 on Fulton from the west. Raymond and one Robert Little, the driver of the passenger car, died from injuries sustained in the accident.

Verdict was given and judgment rendered in favor of defendants Macomber and Pacific Greyhound Lines. In support of their appeal, plaintiffs claim prejudicial error in the giving of certain instructions on negligence and the refusal to give their requested instruction on the basic speed law.

(1) *Certain instructions bearing upon the question of possible concurrent negligence of the drivers of the two vehicles are questioned by the plaintiffs.*

[1] They first complain of the following instruction: "Where the evidence is as consistent with neglect of duty or care on the part of the plaintiff's automobile operator as it is with the neglect of duty or care on the part of the defendants, then the plaintiffs cannot recover." (Defendants' Instruction No. 15.) Out of context, this instruction seems to disregard the possibility of defendants' liability in the case of concurring negligence on the part of both drivers causing the collision, but it followed two instructions on the burden

of proof, and could reasonably have been understood to have related to that subject, requiring a verdict for defendants if plaintiffs had not proved by a preponderance of the evidence that defendants were guilty of negligence.

Plaintiffs also complain of defendants' instructions Nos. 7 and 11, for the same reason. No. 7 read in part: "And should you find from the evidence in this action that the said Robert Little failed to yield the right-of-way to the said Macomber, and that at the time Robert Little was about to cross said through highway, the bus driven by defendant Macomber was so close to said intersection as to constitute an immediate hazard; and should you further find that the conduct of Robert Little proximately caused the happening of the accident, then you should render your verdict in favor of the defendants."

No. 11 read: "Should you find from the evidence that the vehicle in which the decedent, Raymond Seefeldt, was an occupant, immediately before this accident was operated in violation of the statutes, and that the violation of the statutes proximately caused the happening of the accident, your verdict should be for the defendants."

Plaintiffs say that both instructions are fatally defective because they omitted the word "solely" before "proximately caused."

No. 11 was immediately followed by this instruction: "If you find that the driver of the vehicle in which Ray Seefeldt was riding was negligent, and that his negligence was the sole proximate cause of the accident, and of the death complained of, then, in that event, it is your duty to return a verdict in favor of the defendants." Also, in an earlier instruction the jury were informed: "This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor or one element. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such case each of the participating acts or omissions is regarded in law as a proximate cause."

It appears to us that defendants' instructions 15, 7 and 11 introduced an element of conflict and confusion which if not corrected would have been cause for reversal. See *Buttrick v. Pacific Elec. Ry. Co.*, 86 Cal.App. 136, 141-142, 260 P. 588; *Soda v. Marriott*, 118 Cal.App. 635, 642-643, 5 P.2d 675; *Torvend v. Patterson*, 136 Cal.App. 120, 28 P.2d 413. However, the jury after commencing its deliberations returned to the court room for clarification. They asked: "We want to know if the Little car was negligent and the bus was, can we bring in a double verdict that isn't covered on this?"

The court responded: "Well, I might say, as I have instructed you before, if you find that the Greyhound bus was negligent, and that their negligence proximately contributed to the cause of this accident, you may return a verdict against them. You see? They are the only party to this action against whom you might return a verdict. The driver of the other car is not a party to this action. And, as I told you also previously, as I instructed you, if you find the driver of the Plymouth, or the Little car, as you referred to it, was negligent, his negligence is not imputable to the guest in his car. So this action is just an action between the parents of the Seefeldt boy and the Greyhound Bus Company. So that if you find that the Greyhound Bus Company was negligent, and their negligence contributed to the accident, then you can return a verdict against them, even if you find both were negligent; the negligence of the Greyhound bus that contributed to the accident would be sufficient to hold them."

Thereby, we think, the court erased the error. The applicable principal was well expressed in *Martin v. Vierra*, 34 Cal.App.2d 86, 92, 93 P.2d 261, 264, 94 P.2d 567: "The governing rule is that the giving of conflicting instructions does not serve as ground for reversal where it appears that the jury was not misled thereby * * *; and manifestly this is such a case, for as will be seen from the foregoing, the jury itself noted the conflict before it reached an agreement on

the merits, and upon returning into court it was not only correctly instructed on the doubtful point but as shown by the record the confusion which had theretofore apparently arisen by reason of the conflict was clarified to the satisfaction of the jury before it again retired to deliberate upon its verdict." See also *Silveira v. Siegfried*, 135 Cal.App. 218, 221, 26 P.2d 666.

(2) *Did the trial court commit prejudicial error when instructing as to the negligence, if any, of plaintiffs' son?*

[2] The court instructed that the negligence, if any, of the driver of the Little car "may not be imputed to Ray Seefeldt, Jr., and, therefore, you shall find that there is no contributory negligence on the part of Ray Seefeldt, Jr.," explaining that under certain circumstances the negligence, if any, of a driver is imputed to a guest "but there are none of those circumstances here."

A few paragraphs later the court gave this instruction: "Even where the negligence of the driver of a vehicle is not to be imputed to a passenger, the passenger nonetheless is bound to exercise ordinary care for his own safety and he may not shut his eyes to an obvious danger, he may not blindly rely on the driver in approaching a place of danger." This was a correct instruction if the evidence warranted the giving of an instruction upon that subject. See *Howard v. Alta Chevrolet Co.*, 111 Cal.App.2d 38, 43, 243 P.2d 804; also, *Parmenter v. McDougal*, 172 Cal. 306, 309, 156 P. 460; *Thompson v. Los Angeles & S. D. B. Ry. Co.*, 165 Cal. 748, 753, 134 P. 709.

Defendants say that the giving of such an instruction was proper in view of the testimony of Raymond's father that Raymond was familiar with the intersection where the accident occurred and evidence that the car in which he was riding did not stop or pause but picked up speed as it approached Highway 101 despite the "Stop" sign posted on Fulton Road near the intersection. The cases last cited tend to support the giving of such an instruction

under such circumstances save for the fact that they were personal injury not death cases and the individuals concerned could testify as to their conduct. That does not appear to be a differentiating factor.

In *Martindale v. Atchison, T. & S. F. Ry. Co.*, 89 Cal.App.2d 400, 201 P.2d 48 (hearing by Supreme Court denied), a car collided with a train. Two of the three passengers of the car were killed and one was unable to remember anything about the accident. There were no eyewitnesses but from the physical evidence an inference of negligence on the part of the driver was justified. The court held that the contributory negligence of the passengers was properly submitted to the jury. *Lugo v. Atchison, T. & S. F. Ry. Co.*, 128 Cal.App.2d 402, 406, 275 P.2d 605, also approved the giving of instructions on contributory negligence of the passenger when both the driver and passenger were dead. In *Miller v. Peters*, 37 Cal.2d 89, 230 P.2d 803, the passenger testified she did not see the bus before the collision and the court stated in dicta that "other factors in evidence relating to the speed of the son's automobile and the manner in which he was driving immediately prior to the accident would justify submitting to the jury the matter of the mother's [passenger's] contributory negligence for determination as a question of fact under all the circumstances of the case." 37 Cal.2d at page 96, 230 P.2d at page 807.

Plaintiffs rely heavily upon *Buttrick v. Pacific Electric Ry. Co.*, supra, 86 Cal.App. 136, 260 P. 588. In that case, the plaintiff was injured while walking with a Mr. Weeks. The court instructed that "If you believe that the plaintiff, or Mr. Weeks, being in a place of safety, suddenly went on the track or so close thereto as to be in danger of being struck by a passing car, then plaintiff cannot recover." 86 Cal. App. at page 139, 260 P. at page 590. There was no evidence that plaintiff was on the car track or so close to it as to be in danger of being hit by defendants' car; there was no evidence of a relationship between plaintiff and Weeks such that

Weeks' negligence would be imputed to plaintiff; and the instruction omitted what the motorman was doing at the time foreclosing the possibility of concurring negligence. The court held the instruction was erroneously given. The case is not comparable to the present one. The instruction here given clearly relates to Seefeldt's negligence alone.

Plaintiffs quote a passage from *Westberg v. Willde*, 14 Cal.2d 360, 367, 94 P.2d 590, to the effect that there is a substantial difference between a case in which a plaintiff's negligence is in issue and a case in which the conduct of a decedent is an issue. There, the question was whether it was proper to instruct the jury that the decedent is presumed to have exercised ordinary care. That is quite different from the question here involved.

Since the issue of Raymond, Jr.'s negligence was raised in the pleadings and there was some evidence from which his negligence might be inferred, we find no error in the giving of the instruction under discussion.

(3) *Was it prejudicial error to refuse plaintiff's requested instruction on the basic speed law, section 510 of the Vehicle Code?*

[3] Plaintiff requested and the court refused this instruction: "If you find from the evidence that defendant, George Rossland Macomber, was driving the Greyhound bus upon the highway at a speed greater than was reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, or at a speed which endangered the safety of the plaintiff, then I instruct you that defendants were negligent." This is a paraphrase of BAJI No. 144. It was inaccurate to refer to the safety of the "plaintiff" instead of the "plaintiffs' son" or other appropriate designation but that could easily have been corrected and would not justify total rejection.

A more serious question is presented by the substitution of "plaintiff" or "plaintiffs' son" for "persons or property" where the latter expression occurs in BAJI No. 144

and in the statute (Veh.Code, § 510). A jury might well believe that, since the accident did happen, danger to plaintiffs' son was shown and that defendants were negligent as a matter of law.

[4] Defendants criticize the rejected instruction for its failure to include the element of proximate cause. We are not impressed. The element of proximate cause was adequately covered by other instructions. Not every instruction on negligence need also speak of proximate cause.

Under any theory of the case we think the plaintiffs suffered no prejudice, in view of certain instructions given when the jury returned for further advice. The court said in part " * * * furthermore, you wanted some instructions regarding the caution of a bus on the highway, and I might say that there is no such special law as to a bus. A bus is governed by the same law that governs all vehicles. All vehicles are governed by the same law, so I will read you this:

"It is the duty of a driver of a motor vehicle, using a public highway, to be vigilant at all times, and to keep the vehicle under such control that, to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position. It is the duty of every person operating a motor vehicle upon a public highway to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision. In other words, he has the duty of ordinary care."

The only factors added by the rejected instruction are that the jury's attention is specifically directed to the factors of "the traffic on, and the surface and width of, the highway." There is no testimony that would indicate that conditions required going less than 55 miles an hour on this road. The highway was dry and relatively straight. The only evidence concerning other traffic on the road was that of a passenger on the bus; he seemed to recall a logging truck some distance ahead. The highway was a two-lane highway, but this

would not seem to make a material difference in this case. The basic question would seem to be whether the bus driver was going too fast to allow for the possibility of cars on side roads running through the stop signs. This question was adequately covered by instructions that were given.

Moreover, plaintiffs' theory as presented in their opening brief upon this appeal was that the bus was traveling faster than the 55 mile speed limit. Respondents commented thereon in their brief and observed that plaintiffs had tried the case upon that theory in the court below, a statement which plaintiffs have not denied in their closing brief. Significantly, it appears, plaintiffs' instructions on the prima facie speed limit law (§§ 511 and 513, Vehicle Code) were given by the trial court. The giving of those instructions would seem to have satisfied plaintiffs' theory of the case.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



155 Cal.App.2d 672

Mary Elizabeth BLANKENSHIP, Petitioner
and Appellant,

v.

Robert E. MICHALSKI, as City Attorney,
City of Palo Alto, Respondent.

Civ. 17460.

District Court of Appeal, First District,
Division 1, California.

Dec. 3, 1957.

Rehearing Denied Jan. 2, 1958.

Hearing Denied Jan. 28, 1958.

Proceeding in mandamus to compel city attorney to commence an abatement proceeding against claimed violators of city zoning ordinance. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., denied the application and petitioner appealed. The District Court of Appeal,

Peters, J., held that in view of fact that it was reasonably debatable as to whether a prescription pharmacy constructed in the lobby of a medical clinic was a permissible use under zoning ordinance allowing accessory uses in a certain zone, determination of city attorney that no violation had occurred was well within his discretion, and such determination therefore would not be set aside by mandamus.

Judgment affirmed.

1. Mandamus ☞3(1)

If a city ordinance imposes a mandatory duty on city attorney to commence a proceeding to enforce such ordinance, mandamus will lie to compel him to take such action, even though another or other remedies may also exist.

2. Mandamus ☞72

Mandamus cannot be employed to control exercise of discretion by an administrative officer.

3. Mandamus ☞99

Where claimed violation of a city ordinance is clear and obvious, determination by city attorney charged with enforcement of such ordinance, that no violation has occurred, and his refusal to bring an abatement proceeding would be such a clear abuse of discretion that mandamus would issue to compel him to take enforcement action, although, if it is reasonably debatable whether violation of the ordinance has occurred, determination of the city attorney of no violation is within his discretion and should not be controlled by mandamus.

4. Mandamus ☞99

Municipal Corporations ☞601(26)

In view of fact it was reasonably debatable as to whether a prescription pharmacy constructed in the lobby of a medical clinic was a permissible use under zoning ordinance allowing accessory uses in a certain zone, determination of city attorney that no violation had occurred was well within his discretion, and such determina-

tion therefore would not be set aside by mandamus.

McDougall & Fairfax, Kenneth R. McDougall, William T. Joyce, Palo Alto, for appellant.

Robert E. Michalski, City Atty., Palo Alto, for respondent.

PETERS, Presiding Justice.

Petitioner, as a resident and citizen of Palo Alto, brought this proceeding in mandamus to compel the city attorney to commence an abatement proceeding against the claimed violators of the Palo Alto zoning ordinance. The trial court denied the application. Petitioner appeals.

It is the basic claim of petitioner that the Beck Prescription Pharmacy, operating in the Palo Alto Medical Clinic, is a drug store functioning in a zone in which drug stores are prohibited, and, therefore, is violating the zoning ordinance.

The zoning ordinance in question divides the city into geographical areas and defines the uses permitted in each zone. The Clinic is located in an R-4 zone. In such a zone there are permitted certain enumerated uses, and also all uses permitted in R-3-P, R-3, R-2, and R-1 zones. In R-1 zones various uses are permitted including "one-family dwellings, including private garages, accessory buildings and uses and home occupations." Medical and dental clinics are expressly allowed in R-3-P zones, and therefore, of course, are permitted in R-4 zones. Section 22.05 of the ordinance includes within the "accessory uses" permitted in R-4 zones, the "operation of necessary service facilities and equipment in connection with schools, colleges, hospitals, and other institutions when located on the site of the principal use." An accessory use is defined in section 4.03 as "a use or building incidental and subordinate to the principal use or building located upon the same lot." Drug stores are expressly allowed in C-1 and less restrictive zones, but are not

allowed in more restrictive zones, and, in particular, are not allowed in R-4 zones.

In August of 1955 the Clinic applied for a permit for the construction of a "professional pharmacy" in the Clinic. Respondent, in his official capacity, advised the City Manager that "the sale of drugs and pharmaceuticals and the filling of prescriptions in a clinic is an authorized accessory use in an R-3-P and R-4 district." In March of 1956 a building permit was issued to the Clinic for the construction of the pharmacy. The pharmacy was constructed in the lobby of the Clinic and then leased to Walter Beck, who operates it. It covers about 400 square feet of the lobby. No signs are used on the outside of the building, and the lease prohibits the use of such signs. The lease provides for rent based on a percentage of gross sales. Beck testified that he, three licensed pharmacists, and a clerk operate the pharmacy. A pharmacy license is displayed on the premises, and Beck has a permit to sell narcotics. The pharmacy is equipped with mortars, graduates, spatulas, labels, a typewriter, and the usual tools used in such a shop. It is stocked with a complete line of pharmaceuticals and prescription items but does not carry "any of the so-called drug-store items such as toothpaste and kleenex," nor does it carry other non-pharmacy items usually sold in a drug store. It does not operate a lunch counter. The lease provides that the leased premises "shall be actually used and occupied by the Lessee as a prescription pharmacy and for no other purpose * * *. A prescription pharmacy is herein defined to [be] the following, and nothing else: (1) a place where drugs are dispensed and sold; (2) a place where prescriptions are compounded and dispensed." Admittedly, some drug items not requiring a prescription are sold, and some prescriptions are filled that are issued by non-clinic doctors. There was no evidence of what percentage of operations involved the filling of prescriptions issued by non-clinic doctors, or the percentage of sales of non-prescription items.

Under these facts petitioner claims that the pharmacy is operating in a zone prohibited by the ordinance, is a public nuisance, and should be abated. She demanded of respondent that he commence abatement proceedings. He refused, whereupon this proceeding in mandamus was instituted. The trial court found that it was not true that the use of the premises so described was a public nuisance, and that it was not true that the petitioner has no plain, speedy or adequate remedy at law. It concluded that the use involved was incidental and accessory to the use of the property as a clinic, and denied the petition for a writ of mandamus.

[1] Respondent claims that mandamus will not lie because petitioner has a speedy and adequate remedy at law—an action for declaratory relief in which Beck and the Clinic, who are not parties to the present proceeding, could also be made parties. This contention is without merit. If the ordinance imposes a mandatory duty on respondent to commence a proceeding to enforce the ordinance, mandamus would lie even though another or other remedies may also exist. *Board of Supervisors of Los Angeles County v. Simpson*, 36 Cal.2d 671, 227 P.2d 14; see also *Ross v. Board of Education*, 18 Cal.App. 222, 122 P. 967; *Saxton v. Board of Education*, 206 Cal. 758, 276 P. 998; *Raisch v. Board of Education*, 81 Cal. 542, 22 P. 890.

[2] A much more difficult question is whether the duty imposed on the respondent as city attorney by the ordinance is discretionary or mandatory. Mandate, of course, cannot be employed to control the exercise of discretion by an administrative officer. *Brock v. Superior Court*, 109 Cal.App.2d 594, 241 P.2d 283; *Drumme v. State Bd. of Funeral Directors*, 13 Cal.2d 75, 87 P.2d 848; *Bank of Italy v. Johnson*, 200 Cal. 1, 251 P. 784. Section 28.02 of the ordinance provides: "Any building set up, erected, built, moved or maintained and/or any use of property contrary to the provisions of this Ordinance shall be and the same is hereby declared to be unlawful and a public

nuisance, and the *City Attorney* shall immediately commence action or actions, proceeding or proceedings, for the abatement, removal, and enjoinder thereof in the manner provided by law and shall take such other steps and shall apply to such court or courts as may have jurisdiction to grant such relief as will abate and remove such building or use and restrain and enjoin any person, firm or corporation from setting up, erecting, building, moving or maintaining any such building or using any property contrary to the provisions of this ordinance."

In the present case the respondent, as city attorney, determined that no violation of the zoning ordinance would occur by the issuance of the permit, and so advised the city manager. Respondent contends that the ordinance necessarily confers upon him the power to determine, in the first instance, whether or not a violation has occurred. If he determines that a violation has occurred he must then proceed to try and abate it and can be compelled to do so by mandamus. *Board of Supervisors of Los Angeles County v. Simpson*, 36 Cal.2d 671, 227 P.2d 14. But, so he contends, if he in good faith determines that a violation has not occurred, then he is under no duty to start abatement proceedings and cannot be compelled to do so by mandamus. This contention appears to be sound (see *Boyne v. Ryan*, 100 Cal. 265, 34 P. 707), at least where there are other more complete remedies available to a taxpayer who seeks to challenge the determination. Certainly, someone, in the first instance, must determine whether a proposed use will violate the ordinance. This requires an analysis of the facts and an interpretation of the ordinance. The responsibility of determining this question, in the first instance, is placed on the city attorney. He necessarily must have some discretion. Certainly, if he, in good faith, determines that no violation has occurred, he should not be compelled to institute abatement proceedings at the whim or caprice of every taxpayer who disagrees with him.

[3] It may be that where the claimed violation is clear and obvious the determination by the city attorney that no violation had occurred, and his refusal to bring an abatement proceeding, would be such a clear abuse of discretion that mandamus would issue. But that is not this case. Here, to say the least, it is reasonably debatable whether a violation has occurred. In such a situation the determination of the city attorney that no violation had occurred was well within his discretion, and should not be controlled by mandamus.

[4] That the instant case involves a situation where the district attorney has in good faith and within his discretion determined that no violation of the zoning ordinance has occurred is demonstrated by the facts and by the terms of the ordinance. The trial court has determined that the use of part of the Clinic's premises for a pharmacy does not violate the ordinance. It not only determined that the question was reasonably debatable, but found, as a fact, that such use was not a public nuisance, as it would be were it in violation of the ordinance. The court concluded that the pharmacy use "is incidental and accessory to the use of said property as a clinic and as such is a permitted use and is not a public nuisance." There is much to be said in support of this conclusion.

Section 22.05 of the ordinance defines accessory uses permitted in R-4 zones as the "operation of necessary service facilities and equipment in connection with schools, colleges, hospitals, and other institutions when located on the site of the principle use." Appellant argues that "necessary" means "indispensable," and contends that the operation of the pharmacy is not "indispensable" to the operation of the Clinic. She also contends that the Clinic is not one of the "other institutions" mentioned in the section.

It will also be remembered that Article 6 of the ordinance permits "accessory buildings and uses" in R-1 zones, and that in R-4 zones, in one of which the Clinic is located, certain enumerated uses are per-

mitted and also all uses permitted in other zones, including R-1 zones. Thus, it follows, inevitably, that "accessory" uses are permitted in R-4 zones. Appellant argues that a "drug store" cannot be an accessory use for the Clinic because "drug stores" by necessary implication are prohibited from being in R-4 zones. She also urges that a "drug store" is not incidental to a clinic because a "drug store" is not dependent on a clinic for its existence, and that it is not a normal activity of a doctor or group of doctors to operate a "drug store." It is claimed that the doctors are not using the "drug store" as an incident to the operation of the Clinic, but as a commercial enterprise, and are leasing it to a third person who is engaged in a commercial project.

Several of these arguments demonstrate how difficult and impractical it is to determine these matters in this type of proceeding in which the evidence as to actual operations is very limited, and in which Beck and the Clinic are not parties. We have no doubt that, if the doctors simply leased a portion of their premises for the operation of a commercial drug store, such use would violate the ordinance. The fact that the prescriptions of Clinic doctors are filled at such a drug store would not necessarily make it a proper incidental or accessory use. But here, all we know from the record is that the pharmacy fills the prescriptions of the Clinic doctors for Clinic patients and also fills prescriptions prescribed by other than Clinic doctors. What the proportion of inside to outside sales may be we do not know. This might be of decisive importance.

Certainly, the fact that the 85 doctors involved who own and operate the Clinic decided to lease the operation to an independent contractor is not decisive. No one could reasonably contend that the doctors could not have hired a licensed pharmacist to fill their prescriptions and could not have assigned him space in the building to perform his duties. Such use would clearly be incidental and accessory to the operation of the Clinic. If they could have done this by the hiring of a pharmacist, the fact they de-

cided to do it through a lease and contract with an independent contractor is not decisive. The question is as to the nature of the use, not the mechanics of how such use is secured.

We do know that Beck did not operate the pharmacy like an ordinary drug store. He only filled prescriptions and sold only drugs.

In support of her contention that the use here involved violated the terms of the ordinance appellant heavily relies on the case of Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse, 21 Cal.2d 411, 132 P.2d 457. In that case a lessor leased a ground floor store of his building for the operation of a drug store. The lease provided that the "Lessor agrees not to lease or sublease any part or portion of the Medico-Dental Building to any other person * * * for the purpose of maintaining a drug store or selling drugs or ampoules, * * * during the term of this lease." 21 Cal.2d at page 415, 132 P.2d at page 460. The lessor then leased a floor of the building to a group of doctors. They maintained a drug room where drugs were sold and prescriptions filled upon request of the doctors. The drug store downstairs refused to pay rent. The lessor sued the drug store for rent. The court held that the doctor's drug store was in competition with the downstairs store, and the landlord should have tried to abate this unlawful competition. By not doing so, the landlord breached the lease and so could not collect the rent.

The basis of the court's ruling was that the provision of defendant's lease above-quoted was to protect him from the competition of the sale of drugs. Obviously, the defendant drug store expected a large part of its business to be from doctors in the building. When the doctors went into the business of selling drugs, they were in a business in direct competition with the defendant. This case involves the interpretation of a covenant against competition in a lease—not the interpretation of a zoning ordinance. Not only is the language of the lease far different from the language of the

zoning ordinance here involved, but, obviously, the intent and purpose of such a covenant is entirely different from the intent and purpose of a zoning ordinance.

For these reasons we hold that the trial court properly denied the petition for a writ of mandate. The judgment so holding is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



156 Cal.App.2d 82

Eddie SKIPPER, Appellant,

v.

GILBERT J. MARTIN CONSTRUCTION COMPANY, a California Corporation; Vista Land Company, a Corporation, Respondents.

Civ. 5573.

District Court of Appeal, Fourth District,
California.

Dec. 12, 1957.

Action for foreclosure of mechanic's lien and for money alleged to be due under contract and for materials and labor representing material in addition to that provided for in contract. The Superior Court, San Bernardino County, Carl B. Hilliard, J., sustained demurrer to complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that plaintiff, who was not licensed contractor, was not entitled to recover under contract for construction of houses, but that complaint for extra materials and labor did not show on its face that it was incapable of amendment to state cause of action for reasonable value of materials furnished to defendant under implied oral contract and sustaining of demurrer without leave to amend was an abuse of discretion.

Reversed.

1. Contracts ⇐176(1)

Where plaintiff and defendants entered into a written contract which was clear and unambiguous, its interpretation was question of law and relationship of parties must be determined therefrom.

2. Licenses ⇐39.43

Where party's action was principally for profit on labor employed by him under construction contract providing that owner would furnish payroll, tools, and all materials and that party would furnish all labor and himself as general foreman, party was not an "employee" and was not exempt from law providing that contractor may not recover for performance of contract without proving that he was duly licensed contractor. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7053.

See publication Words and Phrases, for other judicial constructions and definitions of "Employee".

3. Pleading ⇐225(1)

Complaint, filed by party, who was not licensed contractor, and who had allegedly furnished materials and labor representing extra work and materials in construction of dwelling units in addition to work performed under contract, did not show on its face that it was incapable of amendment to state cause of action for reasonable value of materials furnished under implied or oral contract not contemplated by parties, and sustaining of demurrer without leave to amend was improper. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7053.

4. Pleading ⇐225(2)

It is an abuse of discretion to sustain without leave to amend a demurrer to an original complaint unless the complaint shows on its face that it is incapable of amendment.

Casey & Kerrigan and Richard J. Weller,
San Bernardino, for appellant.

Pines & Walsh, Milnor E. Gleaves, Adele Walsh, Los Angeles, for respondents.

MUSSELL, Justice.

This is an action for foreclosure of a mechanic's lien and for money alleged to be due under a contract. The demurrer to plaintiff's second amended complaint was sustained without leave to amend and plaintiff appeals from the judgment of dismissal thereupon entered.

It is alleged in the second amended complaint that the defendants, owners of certain real property in San Bernardino county, were engaged as joint venturers in the construction of sixty houses on said property; that on or about November 30, 1955, plaintiff and defendants entered into the following written agreement:

"This agreement, made this day, November 30, 1955, between Gilbert J. Martin Construction Co. and Eddie Skipper for the purpose of framing 60 houses at Vista Manor to wit:

"That Gilbert J. Martin Construction Co. agrees to furnish payroll, tools and all allied materials and supplies for the purpose of framing said houses.

"Eddie Skipper agrees to furnish all labor and himself as general foreman for the purpose of framing said houses at the basic price of 38¢ per square foot per house.

"Payment to be made as follows: All labor to be paid no more than scale as established by the Unions. Said wages to be deducted from the net amount as computed by the square footage weekly. Balance or difference to be paid Mr. Skipper less 12½% which takes care of health and welfare benefits and overhead. All houses to pass VA, FHA, County and City inspection before final payment.

"Gilbert J. Martin Construction Co.

"By /s/ G. C. McDaniel

"Eddie Skipper

"/s/ Eddie Skipper."

Plaintiff further alleged that he has fully kept and performed said agreement; that pursuant to the terms thereof the sum of \$32,909.52 became due and owing for work performed pursuant to said contract; that defendants paid \$27,668.18 on said contract, leaving a balance of \$5,241.34 unpaid; that

in addition to the framing of said houses, the plaintiff also furnished materials and labor representing extra work and extra materials in said construction, having a value of \$1,842.50, in addition to the contract price, which said sum defendants agreed to pay but which is unpaid. Plaintiff also alleged that his only duty under said agreement was to furnish labor and himself as general foreman for the purpose of framing said houses; that the defendants had and exercised active control of all labor and all employees furnished by plaintiff; that plaintiff, acting in his capacity as general foreman, was required to accept orders and direction from the officers of defendant corporations and they actually exercised exclusive control over the laborers secured by plaintiff in framing said houses and actually hired said laborers; that defendants gave directions to plaintiff and said laborers in the manner in which said work was to be performed and paid all wages to said laborers; that defendants paid all withholding taxes, social security payments, unemployment insurance payments, and workmen's compensation covering said laborers; that defendants orally requested plaintiff to obtain the extra materials and labor furnished to defendants.

The mechanic's lien filed by plaintiff recites, inter alia, that "Said lien is claimed for labor and rentals in constructing the buildings on the above described lots furnished at the request of Gilbert J. Martin Construction Company in accordance with an agreement dated November 30, 1955, for and used in the construction or work of improvement of said buildings between the 25th day of November, 1956 and the 24th day of January, 1956."

There was no allegation in the complaint that plaintiff was, at the time the work was performed and materials furnished under the contract, a licensed contractor, and it was stipulated that plaintiff did not hold any such license.

Appellant's principal contention is that he was an employee and not a contractor as defined in section 7026 of the Business and Professions Code and therefore was

not required to allege and prove he was a licensed contractor.

Section 7026 of said code defines a contractor as "any person, except an owner * * *, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to * * * or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith."

Section 7031 provides: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." These provisions do not apply to any person who engages in the activities therein regulated as an employee with wages as his sole compensation. *Bus. & Prof. Code, Sec. 7053; Denton v. Wiese*, 144 Cal.App.2d 175, 179, 300 P.2d 746.

[1-3] In the instant case, plaintiff and defendants entered into a written contract which is clear and unambiguous. Its interpretation is a question of law and the relationship of the parties must be determined therefrom. *Albaugh v. Moss Construction Co.*, 125 Cal.App.2d 126, 130-131, 269 P.2d 936. It is apparent that plaintiff's action is principally for a profit upon the labor of those employed by him, based on the price of 38¢ per square foot per house and that he is not an employee with wages as his sole compensation, entitling him to exemption from the license law in performance of the written contract. Under the allegations in the second amended complaint, plaintiff, having failed to allege compliance

with the provisions of section 7031 of the Business and Professions Code, cannot recover on the written contract. *Albaugh v. Moss Construction Co.*, supra. However, it is alleged in said complaint that plaintiff "also furnished materials and labor, representing extra work and materials in the construction of said dwelling units, having the value of \$1,842.50 in addition to the contract price, which the defendants agreed to pay." In view of these allegations, we can not here hold that plaintiff could not state a cause of action for the reasonable value of materials furnished to defendants under an implied or oral contract not contemplated by the parties in their written agreement or included therein. There is no provision in the written contract relative to the furnishing of materials by plaintiff.

[4] The general rule is that it is an abuse of discretion to sustain without leave to amend a demurrer to an original complaint unless the complaint shows on its face that it is incapable of amendment. *Phillips v. Phillips*, 137 Cal.App.2d 651, 653, 290 P.2d 611. In *Augustine v. Trucco*, 124 Cal.App.2d 229, 236, 268 P.2d 780, 785, the court said:

"All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. *Tristram v. Marques*, 117 Cal.App. 393, 397, 3 P.2d 947. 'In determining whether or not the complaint is sufficient as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged.' *Matteson v. Wagoner*, 147 Cal. 739, 742, 82 P. 436, 438."

In *Shook v. Pearson*, 99 Cal.App.2d 348, 351, 221 P.2d 757, 760, it was held that "It is the general rule, as adopted by this court in *Bacon v. Wahrhaftig*, 97 Cal.App.2d 599, 218 P.2d 144 (Hearing in the Supreme Court denied), that a demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection, citing *Lord v. Garland*, 27 Cal.2d 840, 853, 168 P.2d 5. If any count or cause of action in a complaint setting up several counts or causes of action is good as against demurrer, a judgment of dismissal for insufficiency of the complaint cannot be sustained."

The record shows that the general demurrer herein is directed to the entire second amended complaint and we conclude that it was error to sustain the demurrer without leave to amend.

The judgment of dismissal is reversed.

BARNARD, P. J., concurs.



SOUTHERN CALIFORNIA GAS COMPANY, a corporation, Plaintiff and Respondent,

v.

CITY OF LOS ANGELES, a municipal corporation, Defendant and Appellant.*
Civ. 22389.

District Court of Appeal, Second District,
Division 1, California.

Dec. 9, 1957.

Rehearing Denied Dec. 31, 1957.

Hearing Granted Feb. 5, 1958.

Action by gas company against city for cost of relocating lines necessitated by construction of new sewer lines. The Superior Court of Los Angeles County, Philbrick McCoy, J., rendered judgment for plaintiff and defendant appealed. The

District Court of Appeal, Drapeau, J. pro tem., held that city was liable for such cost.

Affirmed.

1. Eminent Domain ⇐122

The state's police power to take citizens' property without paying for it is always qualified by its constitutional obligation to pay just compensation. West's Ann. Const. art. 1, § 14.

2. Eminent Domain ⇐2(1)

Under police power, in emergencies calling for immediate action, when conditions dangerous to life, health or property are present, the state may take or destroy private property without compensation. West's Ann. Const. art. 1, § 14.

3. Eminent Domain ⇐211

Constructing sewers in ordinary growth of cities is not within emergency scope of police power that would permit taking of private property without compensation. West's Ann. Const. art. 1, § 14.

4. Constitutional Law ⇐101

Eminent Domain ⇐86

Gas company's lines under street constituted a species of realty appropriately designated as a "franchise," which was a vested property right and neither state nor any of its agencies could take it for constructing sewers without paying just compensation. West's Ann. Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Franchise".

5. Eminent Domain ⇐108

City was liable to gas company for cost of relocating gas lines under street resulting from construction of new sewer lines necessitated by growth of city. West's Ann. Const. art. 1, § 14.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Claude E. Hilker, Deputy City Atty., Los Angeles, for appellant.

T. J. Reynolds, Allen L. Cleveland, Bates Booth, Los Angeles, C. R. Salter, Whittier, for respondent.

DRAPEAU, Justice pro tem.

The facts in this case are without conflict.

To keep up with its enormous growth of population, the City of Los Angeles was compelled to construct new sewer lines to serve a part of the city located in the San Fernando Valley. One of these lines runs to a juncture with the city's Hyperion disposal line, and goes through a narrow strip of land in West Hollywood. This strip is within the county of Los Angeles, and is often called the "County Strip".

Part of this sewer line was routed under streets in the county strip that were already occupied by gas lines of Southern California Gas Company, a public utility corporation, and put there under a franchise from the county. These gas lines were in the way of the projected sewer line, and had to be relocated.

The gas company contended that the city should pay the cost of the relocation. The city would not agree to this. So the gas company relocated its lines, and brought this action in the superior court against the city for \$12,003.92, the cost of the work.

Judgment was for the gas company, and the city appeals.

Thus we have for decision a single question, as stated in the city's opening brief on appeal: "Is a public utility obligated to relocate at its own expense its facilities underlying public streets within an unincorporated portion of the county to make way for a public improvement being installed therein by a city?"

The city contends:

1. That the installation and maintenance of sewers by a municipality for the protection of the public health is an exercise of the police power.

2. The use by a public utility of public streets is subservient to the public use thereof, and a public utility must at its own expense relocate its facilities therein to avoid conflict with such public use.

3. The police power of the state is being exercised by a municipality when it constructs sewers beyond its boundaries and a utility must relocate its interfering lines in public streets at its own expense.

4. The state's authority over the public streets is a proper basis for its grant of authority to municipalities to install sewers therein.

[1] The state's police power to take its citizens' property without paying for it is always qualified by its constitutional obligation to pay just compensation for it. Cal. Const. Art. I, sec. 14.

[2] Of course, under the police power, in emergencies calling for immediate action, when conditions dangerous to life, health, or property of the people are present, the state may take or destroy private property without compensation. Private property is then subservient to the right of the state to act in the public interest. But this power is never permitted to go beyond proper bounds, and when it does it comes within the purview of eminent domain. Cf. *House v. L. A. County Flood Control Dist.*, 25 Cal.2d 384, 388, 153 P.2d 950.

[3] In our opinion, constructing sewers in the ordinary growth of cities does not come within the emergency scope of the police power, that would permit taking of private property without compensation for it.

[4] The gas company's property here in question is "a species of real property appropriately designated as a franchise." *City of South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 586, 93 P. 490, 493.

Such a property right is vested, and neither the state nor any of its agencies may under the police power take it for constructing sewers without paying just compensation for it. *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 120, 116 P. 557; *Archer v. City of Los Angeles*, 19 Cal.2d 19, 119 P.2d 1; *Rose v. State of California*, 19 Cal.2d 713, 123 P.2d 505; *County*

of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 196 P.2d 773; City of Los Angeles v. Los Angeles Gas & E. Corp., 251 U.S. 32, 40 S.Ct. 76, 64 L.Ed. 121.

Industry of counsel has brought to us cases from out of state which hold both ways, i. e.—

That the public utility must move its lines at its own expense:

New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831; Anderson v. Fuller, 51 Fla. 380, 41 So. 684; Transit Commission v. Long Island R. Co., 253 N.Y. 345, 171 N.E. 565.

That a franchise is a property right protected by the federal constitution:

Russell v. Sebastian, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912; Panhandle Eastern Pipe Line Co. v. State Highway Comm., 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090. (Distinguishing New Orleans Gaslight Co. v. Drainage Commission of New Orleans, supra, 197 U.S. 453, 25 S.Ct. 471, 49 L.Ed. 831.)

[5] This court concludes that the decision of the superior court was right, not only as a matter of law, but also as a practical matter. As one looks into the future and sees the continuing growth of population of California, with its cities forced to extend their facilities in many directions and for long distances, it would seem only fair that public utility companies whose properties may be in the way of such extensions should be compensated for their relocation. Seeking, as we should, for the ultimate justice in this case, it is to be said that in the last analysis either the people of the City of Los Angeles or the people served by the gas company will have to pay this expense. Quite likely in this case it will be mostly the same people who will contribute their share through one agency or the other. But it will be the people of the city who will enjoy the benefits of this public work, and they should, therefore, bear the burden of its cost.

There is nothing in the case of Merced Falls Gas. & Electric Co. v. Turner, 2 Cal.

App. 720, 84 P. 239 that is contrary to this conclusion.

In that case it was held that a public utility franchise did not grant an absolute, indefeasible right in particular spots of earth where its poles were placed originally; that the right to maintain them was subject always to changing conditions.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



155 Cal.App.2d 814

Matter of the ESTATE of Alfred J. GUIDOTTI, also known as Alfred Guidotti, and A. J. Guidotti, Deceased.
Ann GUIDOTTI, Appellant,
v.

AMERICAN TRUST COMPANY, as Executor of the Estate of Alfred J. Guidotti, also known as Alfred Guidotti and as A. J. Guidotti, et al., Respondents.

Civ. 17842.

District Court of Appeal, First District,
Division 2, California.

Dec. 9, 1957.

Petition by residuary legatees to terminate family allowance. The Superior Court, Monterey County, Stanley Lawson, J., entered order reducing allowance, and widow appealed. The District Court of Appeal, Draper, J., held that reducing family allowance granted after inventory had been filed from \$450 per month to \$150 per month after \$13,500 in cash and assets of estate producing income of \$9,900 per year had been distributed to widow was not abuse of discretion.

Order affirmed.

See also 318 P.2d 740.

1. Trial ☞404(1)

Findings of trial court are to be liberally construed in support of judgment or order.

2. Executors and Administrators ☞194(5)½)

Finding that reasonable amount for payment to widow as family allowance was stated sum per month was a finding that such sum was reasonable sum for family allowance as to widow and as to estate.

3. Executors and Administrators ☞178, 180

Ownership by widow of property other than interest in estate may be considered in determining amount of family allowance, but such ownership cannot be a ground for denying widow such allowance.

4. Executors and Administrators ☞197

Where \$13,500 in cash, plus assets of estate producing income of \$9,900 per year had been distributed to widow, leaving estate without sufficient cash to pay taxes and closing costs, reducing family allowance granted after filing of inventory from \$450 per month to \$150 per month was not abuse of discretion. West's Ann.Prob.Code, § 681.

5. Executors and Administrators ☞196, 197

Statute providing that after inventory is filed, court may grant family allowance or modify allowance made before filing of inventory did not preclude modification of family allowance made after inventory was filed, particularly where original order making such allowance provided that it should continue until further order of court. West's Ann.Prob.Code, § 681.

6. Executors and Administrators ☞196, 197

On petition to terminate family allowance, court had power to modify allowance. West's Ann.Prob.Code, § 681.

DRAPER, Justice.

Alfred Guidotti died December 16, 1955. On May 18, 1956, after inventory was filed, the probate court ordered an allowance of \$450 per month "beginning at the date of death of said decedent and continuing until the further order of this court." Following partial distribution of the estate, petition to terminate the family allowance was filed by decedent's three sisters, who are the residuary legatees named in his will. By order of April 12, 1957, the court reduced the allowance to \$150 per month. The widow appeals.

[1, 2] The probate court found that substantial assets of the estate had been distributed to appellant, that the annual income from this property is \$9,900 and "[t]hat a reasonable amount for payment to [the widow] as family allowance * * * is * * * \$150.00 per month until further Order of this Court." Appellant somewhat cloudily argues that there is no finding that \$150 was a reasonable sum for the family allowance. The language of the finding seems clear on its face. In any event, findings are to be liberally construed to support the judgment or order (4 Cal.Jur.2d 444). Appellant relies upon *In re Estate of Silver*, 92 Cal.App.2d 173, 206 P.2d 895. That decision reversed an order granting family allowance because the probate court rejected the offer of an objecting heir to show that the widow had ample funds for her support. In dicta, the court pointed out that the particular findings there involved avoided the question whether the amount awarded was reasonably necessary to the widow. In the case at bar, the finding that the reduced amount is "a reasonable amount for payment" to the widow clearly is a finding that it is reasonable as to the widow and as to the estate.

Appellant next contends that the evidence is insufficient to warrant the reduction. The record shows that, at the date of the order for modification, the estate had insufficient cash on hand to pay taxes and closing costs and that its income had been substantially

Mandl & Atteridge, Salinas, Brown, Smith & Taber, Oakland, for appellant.

J. T. Harrington, Raymond W. Shellooe, Paul L. Pioda, Salinas, for respondents.

reduced by distribution of income producing properties. The partial distribution had given to appellant \$13,500 in cash, plus properties producing income of \$9,900 per year. The mere fact that income of \$825 per month had been transferred from the estate to the widow would seem a reasonable ground for reduction of the family allowance.

[3] Appellant, however, relies upon *In re Lux's Estate*, 100 Cal. 593, 35 P. 341, and *In re Lux's Estate*, 114 Cal. 73, 45 P. 1023, for the claimed rule that property received on partial distribution cannot be a basis for reduction of family allowance. The two opinions are confusing, as evidenced by the fact that in the second decision the court divided upon the question of what it had held in the first. Careful reading of the opinions, however, shows the true holding to be that the widow's ownership of property other than her interest in the estate cannot be a ground for denying her a family allowance, but can be considered in determining the amount of the allowance. Although appellant relies upon *In re Estate of Secord*, 84 Cal.App.2d 783, 192 P.2d 81, that decision merely reaches the conclusion just expressed. The first *Lux* decision expressly reserves the right to modify a support order "in the event of a partial distribution to the widow" (100 Cal. at page 604, 35 P. at page 344). We do not hold that the allowance cannot be terminated because of the widow's ownership of other property, whether received in partial distribution or otherwise. That question is not before us. We merely point out that, giving the *Lux* cases their broadest scope, they do not bar the reduction made here.

[4] By the partial distribution here, the estate has surrendered assets which pro-

duced the income to pay the larger allowance, and appellant has received assets producing income far greater than her former allowance. The broad discretion of the trial court was not abused in making the reduction (*In re Estate of Nelson*, 167 Cal. 321, 139 P. 692; *In re Estate of Taylor*, 12 Cal.App.2d 374, 55 P.2d 537; *In re Estate of Clark*, 96 Cal.App. 243, 274 P. 76).

[5] Appellant next argues that, since the addition of Probate Code Section 681 in 1931, there can be no modification of an allowance made after filing of inventory. This strained construction of the 1931 amendment is directly contrary to the view expressed in the notes of the Code Commission, which described the section as "New: avoids necessity for two orders, without affecting any rights" (see, also, 19 Cal.L. Rev. 602, 604). The right to modify an order for family allowance has been exercised repeatedly (*In re Estate of Nelson*, supra; *In re Estate of Taylor*, supra). Where, as here, the original order specifies that it shall continue "until the further order of this court," there can be no question that the right to modify is reserved (*In re Estate of Overton*, 13 Cal.App. 117, 108 P. 1021, 1022). It is apparent that absurdity and injustice would result from a rule that would deprive the probate court of all right to modify an order for family allowance made after inventory.

[6] Appellant also argues that, since the petition here sought to terminate the allowance, the court had no right to modify it. No authority is cited for this novel view, and we find no merit in it.

The order is affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

155 Cal.App.2d 812

Matter of the ESTATE of Alfred J. GUIDOTTI, also known as Alfred Guldotti, and as A. J. Guldotti, Deceased.

Ann GUIDOTTI, Appellant,

v.

AMERICAN TRUST COMPANY, as Executor of the Estate of Alfred J. Guidotti, also known as Alfred Guldotti, and as A. J. Guidotti, Respondent.

Civ. 17653.

District Court of Appeal, First District,
Division 2, California.

Dec. 9, 1957.

Executor filed petition for instructions as to whether property of estate was separate property of testator or community property within meaning of will bequeathing any community property to widow, and widow filed petition alleging that specified items listed in inventory were community property. The Superior Court, Monterey County, Stanley Lawson, J., rendered judgment determining that all questioned items were separate property of testator, and widow appealed. The District Court of Appeal, Draper, J., held that the evidence sustained finding that all property claimed by widow to be community property was in fact separate property of testator.

Judgment affirmed.

See also 318 P.2d 737.

1. Husband and Wife ⇨262(1)

Presumption that property acquired after marriage is community in character may be rebutted.

2. Appeal and Error ⇨1011(1)

Where finding of trial court is based on conflicting evidence, function of reviewing court is merely to determine whether finding is sustained by substantial evidence.

3. Husband and Wife ⇨249

Where family expenses far exceeded income claimed to be community in character, claimed community earnings could not result in any accumulation of community property, in view of presumption that

family expenses are paid from community property.

4. Husband and Wife ⇨264

Evidence tracing all property of estate to that owned by testator before marriage and that his family expenses had far exceeded income which surviving widow claimed to be community in character sustained finding that all property which widow claimed was community property within will bequeathing any community property to her was in fact separate property of testator.

Mandl & Atteridge, Salinas, Brown, Smith & Taber, Oakland, for appellant.

J. T. Harrington, Raymond W. Shellooe, Paul L. Pioda, Salinas, for respondents.

DRAPER, Justice.

Alfred and Ann Guidotti were married October 21, 1950. He died December 16, 1955, leaving a will dated March 24, 1954, and a codicil dated May 5, 1954. The will declares that all testator's property as of that date is his separate property, and leaves specified separate property and "any community property which we may acquire" to his wife, with the residue to his three sisters. The executor petitioned for instructions as to the character of the property of the estate, alleging upon information and belief that all property listed in the inventory was separate property of decedent. The widow filed a petition alleging that specified items listed in the inventory were community property. The two petitions were heard together, and the court determined that all the questioned items were separate property. The widow appeals.

[1-4] Appellant introduced no evidence. She relies upon the presumption that property acquired after marriage is community in character, unless shown to be separate (Meyer v. Kinzer, 12 Cal. 247). But this presumption may be rebutted (Simonton v. Los Angeles Trust & Sav. Bank, 205 Cal. 252, 270 P. 672). In the case at bar, there is evidence tracing all the property in this

estate to that owned by decedent before his marriage. At most, appellant can claim a conflict of evidence. In such case, our function is merely to determine whether the finding of the trial court is sustained by substantial evidence (In re Estate of Trelut, 26 Cal.App.2d 717, 80 P.2d 147). There is also evidence that decedent's family expenses far exceeded the income which appellant claims to be community in character. In view of the presumption that family expenses are paid from community property (Huber v. Huber, 27 Cal.2d 784, 792, 167 P.2d 708), it follows that the claimed community earnings could not have resulted in any accumulation of community property (In re Estate of Ades, 81 Cal.App.2d 334, 184 P.2d 1). Thus the finding of the trial court is amply sustained.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J.,
concur.



155 Cal.App.2d 697

Edmund P. BATES and Viva R. Bates,
Appellants,
v.

INDUSTRIAL PROPERTY HOLDING
COMPANY, Respondent.
Civ. 22408.

District Court of Appeal, Second District,
Division 2, California.
Dec. 3, 1957.

Action by tenants for declaratory relief to determine rights under written lease. The Superior Court of Los Angeles County, Newcomb Condec, J., entered judgment for landlord and tenant appealed. The District Court of Appeal, Richards, J. pro tempore, held that under lease of premises for ten years which gave landlord right to terminate lease at any time after certain date

upon payment of stipulated sum of money and which gave tenant option to extend lease to portion of demised premises for an additional term of twenty years, right of landlord to terminate the lease as to entire premises subsisted notwithstanding tenant's notice of exercise of option to extend term as to portion of premises prior to expiration of original term of lease.

Affirmed.

1. Declaratory Judgment ⚡393

Where sole evidence in tenant's declaratory action to determine rights under written lease was the written lease without any qualifying testimony, construction thereof was a question of law which District Court of Appeal must determine in accordance with applicable principles governing interpretation of contracts.

2. Landlord and Tenant ⚡37

A lease is a contract subject to the same rules of construction as other agreements even though it is in the sense a deed of conveyance. West's Ann.Civ.Code, §§ 1636-1662, 1638, 1641, 1643, 1650.

3. Landlord and Tenant ⚡91

Where 10 year lease of premises for business purposes provided that landlord could terminate lease at any time after a certain date upon payment of stipulated sum of money and tenant was given option to extend lease as to portion of demised premises for an additional term of years if option was exercised before expiration of original term, tenant had option to extend lease as to portion of demised premises and during extended term cancellation clause would not be applicable, but right of landlord to terminate lease as to entire premises subsisted notwithstanding tenant's notice of exercise of option to extend term as to portion of premises prior to expiration of original term of lease. West's Ann.Civ.Code, §§ 1636-1662, 1638, 1641, 1643, 1650.

4. Landlord and Tenant ⚡37

There is no such general rule that leases of real property are to be construed

against landlord and all uncertainties therein to be resolved in favor of tenant.

Irvin G. Freeman, Los Angeles, for appellants.

Macfarlane, Schaefer & Haun and E. J. Caldecott, Los Angeles, for respondent.

RICHARDS, Justice pro tem.

This is an appeal from a judgment in an action in declaratory relief brought by the plaintiffs, appellants herein, to determine their rights under an amended written lease.

On January 11, 1950, respondent Industrial Property Holding Company, as lessor, and Jack J. Lane, appellants' predecessor in interest, entered into a written lease of certain real property in the county of Los Angeles. On April 5, 1950, the lease was amended in certain particulars and thereafter the lessee's interest therein, as amended, was assigned to the appellants with the consent of the respondent. The term of the lease was from August 5, 1950, to August 14, 1960, "unless sooner terminated as hereinafter provided" at a rental of \$300 a month for the first five years and \$350 a month for the remainder of the term plus certain percentages of lessees' gross receipts from the operations of a sports center, including a golf driving range, miniature golf course and other recreational facilities. The lease contained provisions usual to the lease of land for business purposes, and, in addition thereto, two clauses which give rise to the controversy between the parties. These clauses are paragraph 24, which provides for the cancellation of the lease and paragraph 25, which grants to the lessees an option to extend the term of the lease for a period of twenty years as to a portion of the property.

Paragraph 24, as amended, reads: "Lessor shall have the right, and lessee hereby grants such right to lessor, to cancel and

terminate this lease at any time after August 15th, 1956, upon sixty (60) days notice in writing to the lessee and the payment by lessor to lessee of the sum of Twenty Thousand Dollars (\$20,000). Upon the expiration of such sixty (60) days both parties shall be relieved of any and all liability under the terms of this lease. In the event such notice is given, all above ground improvements placed upon said premises by lessee shall remain and be the property of lessee and shall be removed by lessee within sixty days after service of such notice, such removal to be made subject to and in accordance with the provisions of paragraph 7. hereof."

Paragraph 25, as amended, reads in pertinent part:

"Lessor hereby gives and grants unto lessee the option of extending the term of this lease, as to a portion only of the demised premises, being the Northwest corner thereof, rectangular in shape, having a frontage of 230 feet on Manchester Avenue and a depth of 300 feet measured southerly from Manchester Avenue along Bellanca Avenue,¹ for an additional term of twenty (20) years from the expiration date of this lease, at a minimum guaranteed monthly rental for said portion of said demised premises of Two Hundred Seventy-five Dollars (\$275.00), the percentage rentals to be the same as in Paragraphs 4. and 5. hereof provided. In addition to said guaranteed minimum monthly rental and said percentage rentals, lessee shall pay to lessor annually, on or before December 1st of each year of said additional term, an amount equal to the sum by which the land taxes payable in each such year exceed the amount of such land taxes for the year 1952-1953. * * *

"Excepting as changed in and by this paragraph 25. and with the exception that Paragraph 24. hereof shall

1. The portion of the demised premises so described is referred to in the briefs and

in this opinion as the "rectangular parcel."

be excluded therefrom, the lease for such additional term shall be upon the same terms and conditions as herein set out insofar as the same may be applicable.

"Lessee shall give written notice to lessor of lessee's election to exercise this option not less than ninety (90) days prior to the expiration of the term of this lease."

On October 16, 1955, respondent, as lessor, mailed to the appellants a written "Notice of Termination of Lease" as to the entire demised premises. The notice, after referring to the lease and the provisions therein for cancellation, states: "You are hereby advised and notified that the Lessor does hereby elect to exercise the right of cancellation of the said lease, as amended, and does hereby cancel and terminate the same, and you shall consider this as sixty (60) days notice in writing of the exercise of such right by the Lessor. The Lessor hereby offers and tenders to you payment of the sum of Twenty Thousand Dollars (\$20,000.00) coincident with your vacating the said real property and surrendering up the possession thereof to the lessor."

On October 26, 1955, the appellants, as lessees, served upon the respondent a "Notice of Election to Extend Term of Lease," reciting that, pursuant to paragraph 25 of the lease, the lessees exercised the option to extend the term of the lease for twenty years upon the expiration date of the lease as to the rectangular parcel, and at the rental specified in said paragraph 25.

A dispute having arisen between the parties as to the lessor's right to cancel the lease as to any or all of the demised premises, the parties entered into a written agreement on or about November 22, 1955, whereby in consideration of certain sums of money paid to the lessees, they agreed to and did, on or about December 15, 1955, vacate and surrender possession to the lessor of all of the demised premises except the rectangular portion, possession of which was retained by the lessees at an

agreed rental. It was expressly provided in the foregoing agreement that it was without prejudice to the rights of either the lessor or the lessees as to the rectangular parcel under the terms of the original lease, as amended.

Thereafter appellants filed their complaint for declaratory relief setting forth the facts substantially as above-outlined. The respondent's answer admitted the facts so alleged and further admitted that there was a controversy as to the appellants' claim that by the service of the notice of election to extend the term of the lease, the appellants acquired an additional lease on the rectangular parcel for twenty years beginning August 15, 1960. At the trial of the action the court determined that no extrinsic evidence was required and that the interpretation of the lease as amended could be ascertained from the instrument itself. No contention is made by either party that the court erred in not receiving evidence in aid of the interpretation of the lease. The court found that paragraph 24 of the lease, providing for the cancellation and termination thereof, was not made ineffective by the service upon the respondent of the election to extend the term of the lease. Thereupon the court made its conclusion of law that respondent was entitled to exercise its option to cancel and terminate the lease as to the entire premises in the manner and upon the terms provided for in paragraph 24. Judgment was entered accordingly.

[1,2] The sole evidence being the written lease without any qualifying testimony, the construction thereof is a question of law which this court must determine in accordance with the applicable principles governing the interpretation of contracts. *Meyer v. State Board of Equalization*, 42 Cal.2d 376, 381, 267 P.2d 257; *Moore v. Wood*, 26 Cal.2d 621, 629-630, 160 P.2d 772; *Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825. A lease is a contract, subject to the same rules of construction as other agreements even though it is in a sense a deed of conveyance. *Earl Ranch, Ltd. v. Marchus*, 60 Cal.App.2d 379, 384, 140 P.2d

891. The rules for interpretation of contracts are found in Civil Code, sections 1636-1662, and the rules most pertinent to an interpretation of the lease before us are sections 1638,¹ 1641,² 1643³ and 1650,⁴ set forth in the margin.

The principal question for determination is whether, under the terms of the lease, the option clause to extend the lease as to the rectangular parcel, a portion of the premises, takes precedence over the cancellation clause so as to preclude lessor's cancellation of the lease as to the rectangular parcel in the event the lessees exercise the extension option prior to the lessor's exercise of the right of cancellation.

An examination of the lease discloses that there is but one lease and but one parcel of land described as the demised premises. The rental reserved for the entire premises is \$300 a month for the first five years and \$350 a month for the remainder of the term. The term of the lease is for ten years, "unless sooner terminated as hereinafter provided." Three grounds are provided in the lease for the termination thereof before the end of the original term: (1) default of lessees in performance of the terms of the lease, (2) insolvency of the lessees, and (3) cancellation of the lease by lessor pursuant to the provisions of paragraph 24 which, as above set forth, reserves to the lessor the right to cancel and terminate the lease at any time after August 15, 1956, upon 60 days' written notice to the lessees and the payment by the lessor to the lessees of \$20,000, and provides that upon the expiration of the 60 days both parties are relieved of any and all liability under the lease. It is clear that the foregoing provision reserving to the lessor the right to terminate "this lease" was intended to apply to the entire demised

premises and to one inseverable lease thereof.

The question presented is whether the right of cancellation reserved by the lessor is in any way qualified or restricted by paragraph 25 which grants to the lessees an option to extend the term of the lease at a reduced rental as to the rectangular parcel of the demised premises for "an additional term of twenty (20) years from the expiration date of this lease." Had paragraph 25 been limited to the grant of an option to extend the lease as to the rectangular parcel without reference to the cancellation provisions of paragraph 24, we are convinced that the lessor's right of cancellation would subsist for the entire original term of the lease notwithstanding lessees' exercise of the extension option prior to lessor's exercise of the right of cancellation. And we do not understand that appellants contend otherwise.

However, the extension option clause goes on to provide: "Excepting as changed in and by this paragraph 25, and with the exception that Paragraph 24, hereof shall be excluded therefrom, the lease for such additional term shall be upon the same terms and conditions as herein set out insofar as the same may be applicable." The appellants contend that, by reason of the foregoing provision, upon their exercise of the option to extend the term as to the rectangular parcel a new lease is created as to such portion of the premises. They further contend by reason of the foregoing provision, that upon their exercise of the extension option, the lessor's right of termination is cancelled and nullified as to the rectangular parcel.

[3] We cannot agree with the construction which the appellants seek to place upon

1. Civil Code, § 1638. "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

2. Civil Code, § 1641. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

3. Civil Code, § 1643. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

4. Civil Code, § 1650. "Particular clauses of a contract are subordinate to its general intent."

the provisions of the extension-option clause. *Wiener v. H. Graff & Co.*, 7 Cal. App. 580, 95 P. 167, and *Howell v. City of Hamburg Co.*, 165 Cal. 172, 131 P. 130, relied upon by the appellants instead of supporting their contention, hold that the exercise of an option to extend the term of a lease does not create a new lease, but that the original lease becomes "a lease for both the original and extended terms" (*Wiener v. H. Graff & Co.*, *supra*, 7 Cal. App. at page 583, 95 P. at page 169). Furthermore, the provision that "Paragraph 24. hereof shall be excluded therefrom," must be construed as applying to the phrase, "the lease for such additional term," which immediately follows. The additional term provided for in paragraph 25 is for "twenty (20) years from the expiration date of this lease" which is August 14, 1960. The express exclusion of the lessor's right of cancellation from the lease "for such additional term," discloses a clear intention of the parties that such right of cancellation is applicable to the entire original term ending August 4, 1960. We conclude that the reasonable interpretation of paragraph 25 (the extension option) is that, in the event the lease as to the entire premises is not cancelled by the lessor pursuant to the provisions of paragraph 24 during the original term of the lease, the lessees have the option to extend the lease as to the rectangular parcel and that during the extended term the cancellation clause shall be no longer applicable. We further conclude that as reasonably interpreted, without doing violence to the intention of the parties, the rights of the lessor to terminate the lease as to the entire premises subsist notwithstanding the lessees' notice of exercise of the option to extend the term as to the rectangular portion prior to the expiration of the original term of the lease.

Our conclusions are fortified by certain absurdities which would result from appellants' contention that a new lease as to the rectangular parcel only was created by and at the time of their exercise of the extension option. If the lessor exercises its right to cancel the lease after August 15,

1956, and before the lessees have exercised the option to extend the lease, the termination of the lease is effective as to the entire demised premises and appellants apparently so concede. For this privilege the lessor must pay \$20,000 to the lessees. If on the other hand, the lessees exercise the extension option before lessor can or does elect to cancel the lease it is then the appellants' contention that the lessor's right of cancellation is limited to the portion of the property not included within the extension option. The lease makes no provision for any division of the \$20,000 payment to be made by the lessor in the event of cancellation and the lessor would, under the contention urged by appellants, be compelled to pay the full amount of \$20,000 for only a portion of the property. Another absurdity which would result from appellants' interpretation of the lease is that if the lessor is limited to a cancellation of the lease as to the portion of the premises, other than the rectangular parcel in the event the lessees have previously exercised the extension option, the lessees would still be obligated to pay the full amount of \$350 a month from the date of exercise of the extension option and until August 16, 1960, for the rectangular parcel only which is the same rental they are required to pay for the entire property. Moreover, paragraph 25 provides that in addition to the guaranteed minimum monthly rental and percentage rentals, the lessees shall pay during the extended term the land taxes in excess of such taxes for the year 1952-1953 "on or before December 1st of each year of said additional term." The additional term is for twenty years "from the expiration date of this lease" (paragraph 25) and paragraph 2, as amended, provides that the term of "this lease" ends August 14, 1960. Manifestly it was not the intention of the parties that the lessees should pay any of the land taxes prior to the commencement of the additional term of twenty years.

[4] Appellants make the broad assertion that leases of real property are to be

construed against the landlord and that all uncertainties therein are to be resolved in favor of the tenant. It is clear that there is no such general rule. *Earl Ranch, Ltd. v. Marchus*, supra, 60 Cal.App.2d 379, 384, 140 P.2d 891. Nor do the authorities cited by the appellants support this contention. *Glenn v. Bacon*, 86 Cal.App. 58, 260 P. 559, 560, involved the interpretation of a lease for one year "with option of four more years" followed by a provision that the lease should continue "at the option of the parties" for five years. The trial court determined upon extrinsic evidence that through an error of the lessor the phrase "at the option of the parties" was used instead of "at the option" of the lessee. Upon appeal it was held that if there was any uncertainty as to the meaning of the two phrases, it must be resolved in favor of the lessee, the lessor being the scrivener of the lease. In *Erickson v. Boothe*, 79 Cal.App.2d 266, 179 P.2d 611, 615, the lease provided an "option to release" the premises for an additional term. The uncertainty was whether the word "release" meant renewal or extension and the court held that the tenant should be favored in resolving that ambiguity. *Eastern-Columbia, Inc., v. System Auto Parks, Inc.*, 100 Cal. App.2d 541, 224 P.2d 37, involved two leases and the holding of the court was that there were conditions precedent to the lessor's right to cancel one lease which did not occur and therefore the lessor's right of cancellation never arose.

Appellants' final contention is that the lessor's notice of cancellation dated October 6, 1955, was premature. The effect of this notice of cancellation to terminate the lease as to the rectangular parcel is not in issue and is unnecessary to determine in light of the judgment entered here-in which decrees that the lessor may during the term of the lease, at any time after August 15, 1956, cancel and terminate the lease upon giving to lessees, 60 days' notice in writing of its election to so terminate the lease.

We are of the opinion that the case was decided correctly by the trial court and

that there is no reason for disturbing the judgment. The judgment is affirmed.

FOX, Acting P. J., and ASHBURN, J., concur.



155 Cal.App.2d 721

Manuel E. GONZALES and Cleo D. Gonzales, his wife, Joe Angoustures and Theresa Angoustures, his wife, Antone Angoustures and Rose Angoustures, his wife, Antone Corotto and Anna Corotto, his wife, and Henry P. Simon and Marie C. Simon, his wife, Plaintiffs and Appellants,

v.

Bernard ARBELBIDE, Defendant and Respondent.

Martin ERRECA and Mary Louise Erreca, his wife, and John Erreca and Ida May Erreca, his wife, Plaintiffs in Intervention, Respondents and Appellants,

v.

Manuel E. GONZALES and Cleo D. Gonzales, his wife, Joe Angoustures and Theresa Angoustures, his wife, Antone Angoustures and Rose Angoustures, his wife, Antone Corotto and Anna Corotto, his wife, and Henry P. Simon and Marie C. Simon, his wife, Defendants in Intervention, Appellants and Respondents,

Bernard Arbelbide, Defendant in Intervention and Respondent.

Civ. 9221.

District Court of Appeal, Third District, California.

Dec. 4, 1957.

Action to establish and protect rights to use water of creek. Intervening plaintiffs alleged a riparian right to use of water for irrigation and for watering stock. The Superior Court, Merced County, R. R. Sischo, J., rendered judgment, and the plaintiffs and plaintiffs in intervention separately appealed. The District Court of Appeal, Warne, J. pro tem., held that per-

mitting certain riparian owners to take water of creek for herd of cattle before permitting other riparian owners to take water for irrigation was improper and water should have been apportioned so that each riparian owner had a reasonable use of water for irrigation and for stock grazing.

Reversed.

1. Waters and Water Courses ⚡40

Landowners' riparian rights attached to entire tract included in original grant from United States if all of lands lie within watershed of creek, or if not, then that part of the lands which are within watershed and riparian to creek.

2. Waters and Water Courses ⚡39

The extent of land having a riparian status is determined by three criteria: (1) the lands must be contiguous to or abut on the stream, except in certain cases; (2) the riparian right extends only to smallest tract held under one title in chain of title leading to present owner; and (3) the land must be within watershed of stream.

3. Waters and Water Courses ⚡40

The riparian rights of an owner of real property are inherent part of the land.

4. Waters and Water Courses ⚡49

In apportioning waters of creek to riparian landowner, the court may properly take into consideration what part of the lands, if any, are not susceptible to beneficial use of water.

5. Waters and Water Courses ⚡49

Permitting certain riparian owners to take water of creek for herd of cattle before permitting other riparian owners to take water for irrigation was improper and water should have been apportioned so that each riparian owner had a reasonable use of water for irrigation and for stock grazing.

6. Waters and Water Courses ⚡49

In adjudicating rights of riparian owners to use water of creek, permitting certain riparian owners to use water for 800 head of cattle was too indefinite and uncertain as to amount and there should

have been a determination of quantity of water that such owners were entitled to receive for 800 cattle.

7. Pleading ⚡257

In proceeding to enjoin defendant from pumping water from creek for irrigation purposes, if defendant claimed a riparian right to water of creek as distinguished from claim to use only the waters that flow in the creek during a heavy rain season, the defendant should amend his answer so as to clearly set forth the riparian character of his land, the quantity of water or proportion of the stream to which he claims to be entitled as a riparian owner and the location of his land with respect to the lands of the plaintiffs and the plaintiffs in intervention.

8. Pleading ⚡244

In proceeding to enjoin upper owner from pumping water from creek for irrigation purposes, where intervening plaintiffs, who were lower owners adjacent to plaintiffs, asserted that plaintiffs' complaint was based on a claimed prescriptive right rather than a riparian right, plaintiffs, if they claim riparian rights, should amend their complaint to show riparian character of land, quantity of water to which they were entitled and location of their land with respect to lands of defendant and intervening plaintiffs.

9. Pleading ⚡279(4)

Where original complaint asserted that defendants were interfering with plaintiffs' rights to use of water of creek, defendant denied such interference and asserted that he had certain water rights which should be protected and intervening plaintiffs alleged that they had riparian rights which should also be protected, plaintiffs could not file supplemental complaint for damages for alleged trespass on their property, since alleged trespass was not a matter in furtherance of and consistent with original action. West's Ann.Code Civ.Proc. § 464.

10. Pleading ⚡279(1, 4)

The office of supplemental complaint is to bring to notice of court and opposing party facts material to the case occurring after the former complaint which would

affect the rights asserted and the judgment to be rendered; the supplemental complaint must be in furtherance and consistent with the original action. West's Ann.Code Civ. Proc. § 464.

Chas. L. Gilmore, Sacramento, for plaintiffs-appellants.

George G. Murry, Gustine, for plaintiffs in intervention-appellants.

D. Oliver Germino, Los Banos, for respondent.

WARNE, Justice pro tem.

Plaintiffs and the plaintiffs in intervention separately appeal from the judgment adjudicating their rights to the use of the water of Los Banos Creek to which their lands are riparian.

In 1955 defendant Arbelbide, who owned riparian land upstream from that of the plaintiffs and that of the interveners, commenced pumping water from Los Banos Creek for irrigation purposes. Plaintiffs brought this action to enjoin defendant from so doing. They alleged that their lands were traversed by the creek and that for 50 years last past they had diverted water therefrom for irrigation under an open and notorious claim of right. The interveners, who own riparian lands immediately to the south of and adjacent to plaintiffs, contend that plaintiffs' complaint was based on a claimed prescriptive right, and that therefore the trial court was without the issues in finding that they had certain riparian rights. The interveners, by their complaint in intervention, alleged a riparian right to the use of the creek waters for irrigation and for watering stock. Los Banos Creek flows in a general easterly direction. Defendant, in his answer, alleged that he was the owner of 7,000 acres of land riparian to Los Banos Creek and that "during a heavy rain season" he used the waters collected within the creek for irrigation and for watering stock. Plaintiffs maintain that since defendant did not describe his property, the court went without the issues in finding that 60 acres of spe-

cifically described property were riparian and in awarding defendant three-eighths of the normal flow of the creek without restricting it to the "heavy rain season."

The plaintiffs alleged that their respective lands constituted single tracts which had been granted to their predecessors in interest by patents issued by the United States Government. The trial court so found. It also found that the Gonzales lands were traversed for a distance of 5,600 feet by the north fork of Los Banos Creek; that their land and the Angoustures, Corotto and Simon lands were traversed for a distance of one mile by said creek; and that only 60 acres of Gonzales' lands and only 40 acres of the other plaintiffs' lands were riparian to the creek, although it appears that the Gonzales lands traversed by the creek and riparian thereto exceed 60 acres, and that the lands owned by the other plaintiffs traversed by the creek and riparian thereto exceed 40 acres.

[1] We agree with plaintiffs that their riparian rights attached to the entire tract included in the original grant if all of said lands lie within the watershed of Los Banos Creek, or if not, then that part of the lands which are within the watershed and riparian to the stream.

[2] As stated in *Rancho Santa Margarita v. Vail*, 11 Cal.2d 501, 528, 81 P.2d 533, 547, "It is well settled that the extent of lands having riparian status is determined by 3 criteria: 1. The lands in question must be contiguous to or about on the stream, except in certain cases not now involved. * * * 2. The riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner. *Boehmer v. Big Rock Irr. Dist.*, 117 Cal. 19, 48 P. 908. * * * 3. The land, in order to be riparian, must be within the watershed of the stream. *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 P. 978, 11 L.R.A.,N.S., 1062."

[3] All of these requirements are present in the instant case, that is, all the lands are contiguous to the stream, the lands of each of the plaintiffs are held under one title

in the chain of title leading to the present owner, and the lands lie within the watersheds of the stream. "To curtail the right by a fixation of rigid and inelastic boundaries is to destroy the right altogether, for in such case it would become a mere right or priority, or, in other words, it would be tantamount to the substitution of the doctrine of appropriation for the doctrine of riparian rights." *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 P. 444, 448, 56 A.L.R. 264. Further, as stated in *Martin v. Western States Gas and Electric Co.*, 8 Cal.App.2d 226, 230, 47 P.2d 522, 524:

"* * * It is the established law of this state that the riparian rights of an owner of real property to the use and benefit thereof are an inherent part of the land, * * * *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.*, 202 Cal. 56, 65, 259 P. 444, 448, 56 A.L.R. 264. In the case last cited it is said in that regard:

"We therefore here reassert the riparian right to be a vested property right inhering in and a part and parcel of the abutting lands—a right not gained by use or lost by disuse."

[4] However, the trial court, in apportioning the waters of the creek, may properly take into consideration what part of plaintiffs' lands, if any, are not susceptible to a beneficial use of the water.

Plaintiffs in intervention claim ownership of six parcels of land and allege that said lands are traversed for a great distance by Los Banos Creek and that they have used the water for domestic and stock raising purposes. They denied on information and belief that any of the plaintiffs had any rights to the water claimed in their complaint. No specific amount of water was claimed in their complaint in intervention. They further allege that plaintiffs and the defendant Arbelbide were taking the entire flow of Los Banos Creek, and that that would result in injury and damage to the lands of plaintiffs in intervention for the raising of livestock and other farm uses.

The trial court found that the lands of plaintiffs and the lands of the plaintiffs in intervention are riparian to every channel of Los Banos Creek. However, the judgment is silent as to the riparian character of the lands of plaintiffs in intervention.

[5] The judgment, after decreeing the riparian rights of the plaintiffs and defendant to the use of the waters of Los Banos Creek, provides: "That all of the foregoing rights to the waters of said creek for irrigation purposes are subordinate to the right of Plaintiffs in Intervention * * * for the use of water for the maintenance of eight hundred (800) head of cattle pastured on their lands. * * *" The lands were adjudged to contain 4048.10 acres. Since the judgment is based on riparian rights, we feel that the trial court erred in finding and also decreeing that plaintiffs in intervention had a prior and paramount right to the use of the water for the watering of 800 head of cattle although it limited the use to the grazing season from March to November of each year.

We do not believe that the plaintiffs in intervention "are entitled to the use of the stream to water their commercial herds before the defendants may take water for irrigation, and we doubt that any authority could be found which favors, as between these two uses, one of them over the other. We are of the opinion that it is unnecessary to do so under the circumstances of this case, and that here we may be guided by the general principle that each of the riparian owners on the stream is entitled to exercise his usufructuary right in the waters of the stream in common with all of the other riparian owners so as to make the most beneficial use of his land, limited only by what is reasonable, having due regard to the common right of the other riparian owners. Under the circumstances of this case it must therefore necessarily be concluded that the plaintiffs and the defendants [and in the instant case the plaintiffs in intervention] are all entitled to a reasonable use of the waters of the stream for irrigation and for the raising of stock for commercial purposes." *Cowell v. Armstrong*, 210 Cal

218, 226, 290 P. 1036, 1039. The trial court should have apportioned the waters accordingly, and we feel that the failure to do so constituted prejudicial error.

[6] We also feel that there should have been a determination of the quantity of water that the plaintiffs in intervention are entitled to receive for the watering of said 800 head of cattle. To merely find that they are entitled to use of the water of the creek to water 800 head of cattle is too indefinite and uncertain as to amount.

[7, 8] As to the defendant Arbelbide, we do not consider it necessary to discuss the contentions made by plaintiffs since the judgment must be reversed for reasons heretofore stated. However, if defendant claims a riparian right to the use of any of the waters of said creek as distinguished from a claim to use only the waters that flow in said creek during a "heavy rain season," defendant should amend his answer so as to clearly set forth the riparian character of his land, the quantity of water or proportion of the stream to which he claims to be entitled as a riparian owner, and the location of his lands with respect to the lands of the other litigants. In other words, he should comply with the rules stated in *Hudson v. West*, 47 Cal.2d 823, 828-829, 306 P.2d 807. Also in view of the contention made by the plaintiffs in intervention, that plaintiffs' complaint is based on a claimed prescriptive right rather than a riparian right, we feel that plaintiffs should likewise amend their complaint.

We will now turn to the appeal by plaintiffs in intervention.

[9] Plaintiffs in intervention contend that the trial court erred in granting the plaintiffs the right to file a supplemental complaint claiming damages for an alleged trespass on their property.

Plaintiffs commenced this action to establish and protect certain rights to the use of the water of Los Banos Creek with which they claimed defendant was interfering. The defendant answered, denied interference with plaintiffs' alleged rights, alleged certain rights to the use of the water flow-

ing in said creek and prayed that his right to the use of said water also be protected. Likewise, plaintiffs in intervention also alleged that they had certain riparian rights to the use of the waters in Los Banos Creek; that any adjudication of the extent of the rights of either plaintiffs or defendant would interfere with their rights and asked for extra protection. The pleadings, as originally framed, referred only to the respective litigants' rights to the use of the water in said creek. No other issues were involved. However, more than one year after the filing of the original complaint, the plaintiffs were, over the objections of the plaintiffs in intervention, permitted to file a supplemental complaint wherein they sought damages and extra relief for a trespass alleged to have taken place on their property on or about the 12th day of March, 1956, by the defendant and plaintiffs in intervention. The complaint in intervention does not allege that the trespass interfered with or related in any way to the use of the water in Los Banos Creek as set forth in the original complaint. It appears from the findings and the judgment that the real issue presented by the supplemental complaint resolved itself into a dispute as to the location of the boundary line between the properties of the plaintiffs and the plaintiffs in intervention and the maintenance of a fence thereon.

Since the supplemental complaint did not state any matter in furtherance of and consistent with the original action, we conclude that the trial court erred in permitting it to be filed.

[10] As stated by this court in *Erickson v. Boothe*, 127 Cal.App.2d 644, 274 P.2d 460, 462, "the office of a supplemental complaint is to bring to the notice of the court and opposing party 'facts material to the cases occurring after the former complaint * * *', Code Civil Procedure, section 464, which would affect the rights asserted and the judgment to be rendered." Also, it must be in furtherance and consistent with the original action. *Stephani v. Abbott*, 137 Cal. App. 510, 516, 30 P.2d 1033. "Such a right," the court said in the early case of *Gleason v. Gleason*, 54 Cal. 135, "can be exercised

only with reference to matter which may be consistent with, and in aid of the case made by the original complaint, and which occurred between the time of filing the original complaint and the trial or judgment in the action." (See also *Imperial Land Co. v. Imperial Irrigation Dist.*, 173 Cal. 668 [161 P. 116] and 21 Cal.Jur. 172.)

What we have already said in respect to the points raised by plaintiffs in their appeal is sufficient to answer the remaining contentions made by plaintiffs in intervention. No other points require discussion.

The judgment is reversed. Plaintiffs, plaintiffs in intervention and the defendant each to pay one-third of the costs on appeal.

PEEK and SCHOTTKY, JJ., concur.



156 Cal.App.2d 109

George MOORE, Stuart Rawley and Thelma E. Garrigan, Plaintiffs and Appellants,

v.

TWENTYNINE PALMS COUNTY WATER DISTRICT et al., Defendants and Respondents.

Civ. 5710.

District Court of Appeal, Fourth District, California.

Dec. 13, 1957.

Mandamus proceeding to compel water district to supply water to plaintiffs at a particular tap within district. From adverse judgment of the Superior Court, San Bernardino County, Carl B. Hilliard, J., the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where petition to compel water district to supply water to plaintiffs at a particular "tap" contained no allegations that district failed to supply water to plaintiffs, that they were not receiving adequate water from the dis-

trict at points other than the "tap" described, or that they suffered injury by reason of acts of district or that district refused to deliver water to them, court did not abuse its discretion in sustaining a demurrer without leave to amend, when the original complaint had already been twice amended and petition could not be amended so as to state facts entitling plaintiffs to a writ of mandamus.

Judgment affirmed.

1. Mandamus ☞ 163

It must be presumed that a water district has adopted reasonable rules and regulations as to supplying water to persons within district, and failure to allege compliance with such rules and regulations by a person seeking to compel district to supply water to him at a particular "tap" renders the petition vulnerable to attack by general demurrer. *West's Ann. Water Code*, §§ 31024, 31043.

2. Mandamus ☞ 163

On a demurrer by water district to a petition to compel district to supply water to plaintiffs at a particular "tap", it is to be presumed district has performed its official duty and has taken all legal steps required of it. *West's Ann. Water Code*, §§ 31024, 31043.

3. Mandamus ☞ 163

Where petition to compel water district to supply water to plaintiffs at a particular "tap" contained no allegations that district failed to supply water to plaintiffs, that they were not receiving adequate water from the district at points other than the "tap" described, or that they suffered injury by reason of acts of district or that district refused to deliver water to them, court did not abuse its discretion in sustaining a demurrer without leave to amend, when the original complaint had already been twice amended and petition could not be amended so as to state facts entitling plaintiffs to a writ of mandamus.

4. Mandamus ☞7

Mandamus is a remedy which is awarded not as a matter of right but in the exercise of a sound judicial discretion.

5. Pleading ☞225(2)

It is an abuse of discretion to sustain a demurrer without leave to amend unless the complaint shows on its face that it is incapable of amendment.

Gordon Cologne, Indio, and LaVelle Nickerson, Inglewood, for appellants.

Bayard R. Rountree, Twentynine Palms, for respondents.

MUSSELL, Justice.

Plaintiffs, by this proceeding, seek a writ of mandate directing the defendant Twentynine Palms County Water District and its directors to immediately deliver water to plaintiffs at a certain place or "tap" within said district. The trial court sustained a demurrer to plaintiffs' second amended petition without leave to amend and plaintiffs appeal from the judgment dissolving the alternative writ of mandate theretofore issued and decreeing that plaintiffs are not entitled to relief upon their second amended petition.

It is alleged in plaintiffs' amended petition, in substance, that the defendant, Twentynine Palms County Water District, and its predecessors in interest, Frank Bagley and Abell Water Company, did daily and for many years prior to the filing of this action deliver and supply to plaintiffs water at a certain public "tap" located within the service area and boundaries of said district; that the Twentynine Palms County Water District was organized in June 1954, and acquired the interest of Abell Water Company and the interest of Frank Bagley in the well on his property upon which said "tap" is located; that on or about September 14, 1956, the said district cut off said supply of water and has failed and refused to resume delivery thereof to the public or to the petitioners in the manner theretofore established; that plain-

tiffs served a written demand on said district that water deliveries at said "tap" be resumed and offered to pay any rents or charges required for such service.

The sole question here is whether the trial court abused its discretion in sustaining the demurrer without leave to amend.

[1-3] The petitioners are here attempting to compel the defendant district to supply water to them at a particular "tap" and there are no allegations in the petition that the district is required by law or otherwise to supply water to petitioners at the "tap" described. While the use of water required for the purpose of any district is a public use (Water Code, Sec. 31043), the district may establish rules and regulations for the sale, distribution and use of water in the district (Water Code, Sec. 31024). It must be presumed that the district adopted reasonable rules and regulations as to supplying water to petitioners and to others within the district. The failure to allege compliance with such rules and regulations renders plaintiffs' petition vulnerable to attack by general demurrer. Page v. City of Santa Rosa, 8 Cal.2d 311, 65 P.2d 775; 32 Cal.Jur.2d, Mandamus, Sec. 25. On a demurrer, it is to be presumed that the district performed its official duty and has taken all the legal steps required of it. (32 Cal.Jur.2d, Mandamus, Sec. 64.) There are no allegations in the petition indicating that the district is failing to supply water to plaintiffs; that they are not receiving adequate water from the district at points other than the "tap" described; that they have suffered injury by reason of the acts of the defendant district or that the district refused to deliver water to them. Furthermore, the plaintiffs do not allege that they own or have property rights in the water from the well involved nor to they allege facts entitling them to a writ of mandate compelling the defendants to furnish them water at a particular place in the district.

[4,5] Mandamus is a remedy which is awarded not as a matter of right but in the exercise of sound judicial discretion.

Hutchison v. Reclamation Dist. No. 1619, 81 Cal.App. 427, 433, 254 P. 606. The general rule is that it is an abuse of discretion to sustain a demurrer without leave to amend unless the complaint shows on its face that it is incapable of amendment. Phillips v. Phillips, 137 Cal.App.2d 651, 653, 290 P.2d 611. However, in the instant case plaintiffs amended the original petition twice and the demurrer was sustained to their second amended petition. It does not appear that plaintiffs could amend their petition so as to state facts entitling them to the writ sought and the court was not required to give them leave to amend. Taliaferro v. Prettner, 135 Cal.App.2d 157, 160, 286 P.2d 977. No abuse of discretion appears in the order sustaining the demurrer.

Judgment affirmed.

BARNARD, P. J., concurs.



156 Cal.App.2d 169

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Maxine Caroline CHIUMINATTA, Defendant
and Appellant.

Cr. 1168.

District Court of Appeal, Fourth District,
California.

Dec. 16, 1957.

Hearing Denied Feb. 11, 1958.

Defendant was convicted of perjury for falsely testifying at prior trial of her husband. The Superior Court, Riverside County, Russell S. Waite, J., rendered judgment, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that where defendant testified at preliminary hearing of prior proceeding against her husband that her husband had struck

her and dragged her through house and denied such charges at trial, it was for trial court in perjury prosecution, tried to court, to weigh evidence, including reasonable inferences therefrom, and to decide as to which time defendant had told truth.

Affirmed.

Opinion, 318 P.2d 121, vacated.

1. Criminal Law ⇐409

In a perjury case, circumstances legally sufficient to sustain conviction may consist of extrajudicial statements or admissions of the accused, and entire conduct of accused may be looked to for corroborative circumstances. West's Ann.Pen.Code, § 1103a.

2. Perjury ⇐33(1)

In prosecution for perjury of wife who had testified at preliminary hearing of prior case against her husband that husband had struck her and dragged her through house, and who had denied such charges at husband's trial, evidence supported implied finding that husband had struck her and dragged her through house. West's Ann. Pen.Code, §§ 245, 1103a.

3. Perjury ⇐33(8)

In prosecution for perjury of wife, who had testified at preliminary hearing of prior case against her husband that husband had struck her and dragged her through house and who had denied such charges at husband's trial, evidence supported finding that wife had been stating as true matters which she knew to be false when she testified at trial. West's Ann.Pen.Code, §§ 245, 1103a.

4. Criminal Law ⇐260(11)

In prosecution for perjury, tried by court without a jury, of wife, who had testified at preliminary hearing of prior case against her husband that husband had struck her and dragged her through house and who had denied such charges at husband's trial, it was for trial judge to weigh evidence, including reasonable inferences therefrom, and to decide as to which time wife had told truth. West's Ann.Pen.Code, §§ 245, 1103a.

Hennigan, Ryneal & Nixen, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was indicted by the grand jury on three counts of perjury. In the first count she was charged with falsely swearing to a complaint charging her husband with a violation of section 245 of the Penal Code. In the second count she was charged with falsely swearing at the preliminary hearing of the case against her husband that her husband on January 27, 1957, had hit her about the face and head while she lay on the floor and had dragged her through the house by her hair. In the third count it was charged that she wilfully committed perjury at the trial of her husband in the superior court by falsely testifying that on the occasion in question her husband did not hit her about the face and head while she was on the floor and that he had not dragged her through the house by her hair, when she knew that this testimony was false and untrue.

The defendant pleaded not guilty to each count and on motion of the district attorney the first count of the indictment was dismissed. At the time set for trial it was stipulated that the cause be tried by the court without a jury, and that it be submitted on the transcript of the proceeding before the grand jury. The court found the defendant not guilty on the second count of the indictment and guilty on the third count. At the time set for pronouncing judgment the court stayed further proceedings for the purpose of granting probation, and granted probation to the defendant on the conditions that upon her release she seek psychiatric treatment, that she not leave the state, that she violate no law, and that she report to the probation officer once a month. The defendant has appealed from the "judgment of conviction."

The sole point raised on the appeal is that the evidence was not sufficient to prove a corpus delicti in this case or to sustain the conviction of the defendant. It is argued

that the evidence was not sufficient to meet the requirement of section 1103a of the Penal Code, which provides that perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances; and that there was no direct evidence as to which of the conflicting statements made by the defendant was in fact true.

From the transcript of the evidence before the grand jury it appears that a deputy sheriff interviewed the defendant on January 28, 1957. He testified that at that time she had "black eyes, and bruises about the face and lips, a bruised up nose, pretty well bruised up", and that she signed a written statement at that time. In this statement, which was read into the record, she stated that on January 27 her husband had knocked her off a stool and she fell to the floor, that he "drug" her to the front door, and that he kept on hitting her while she was on the floor. A clerk of the municipal court testified that at the preliminary hearing of her husband on January 31, 1957, the defendant was duly sworn, and a court reporter who took down her testimony read the same into the record. It appears therefrom that the defendant there testified that she was sitting in the dining room of her home and the defendant knocked her off a stool; that while she was on the floor he kept hitting her across the face and head and on the ears; and that "he drug me all through the house by the hair." There was evidence that she was duly sworn at the trial of her husband in the superior court on March 21, 1957, and her testimony there was read into the record by another reporter. She then testified that on the occasion in question her husband did not knock her off the stool; that he did not hit her across the face and head and on the ears; that he did not drag her through the house by the hair; and that he did not hit her when she was down on the floor.

It is appellant's contention that in the absence of direct evidence, other than defendant's statements, of what actually occurred at her home on January 21, 1957,

the evidence is not sufficient to sustain a conviction. It is argued that there is no direct testimony to indicate that any of the statements alleged in the third count were in fact false, and that while circumstantial evidence may be substituted for one of the witnesses required by the statute it cannot be a substitute for both.

[1] While it is true that perjury must be proved by the testimony of two witnesses or one witness and corroborating circumstances it was pointed out in *People v. Macken*, 32 Cal.App.2d 31, 89 P.2d 173, 176, that this does not mean that it is always necessary to produce someone who was present at the defendant's home at the time in question to supply direct evidence as to what there occurred. The court there stated: "It is, however, necessary to have positive testimony as to facts that are absolutely incompatible with the innocence of the accused. (Citation.) Positive testimony of a state of facts contrary to that sworn to by the accused or absolutely incompatible or physically inconsistent with her evidence, may be sufficient." In *People v. Casanova*, 54 Cal.App. 439, 202 P. 45, 47, it is said: "The statute respecting the *quantum* of evidence necessary in perjury cases will be satisfied, if there be the testimony of one witness to facts that are absolutely incompatible with the innocence of the accused, corroborated by circumstances which, of themselves and independently of such directly inculpatory evidence, tend, with a reasonable degree of certitude, to show that the accused is guilty as charged." In *People v. Todd*, 9 Cal.App.2d 237, 49 P.2d 611, the court pointed out that in a perjury case, as in others, the circumstances legally sufficient to sustain a conviction may consist of the extrajudicial statements or admissions of the accused, and that the entire conduct of the accused may be looked to for corroborative circumstances.

[2-4] The evidence of the appellant's statements to the deputy sheriff the next

day after the incident in question which were reduced to writing and signed by her, of her bruised condition at the time, of her swearing to a complaint against her husband, and of her sworn testimony at the preliminary hearing, was sufficient to support the implied finding that it was true that her husband had struck her around the head and face and had dragged her through the house. This evidence, with the inferences that could reasonably be drawn therefrom, support the finding that she was stating as true matters which she knew to be false when she testified on March 21 that her husband had not hit her about the face and head as she lay on the floor, and that he had not dragged her about the house by her hair. It conclusively appears that she swore falsely on one of those occasions. The testimony of the deputy sheriff as to her condition on January 28, and the defendant's own written admission at that time and her later testimony in court are sufficiently incompatible with her innocence of the charge contained in the third count to convince any reasonable person. The guilt of the defendant on either Count 2 or Count 3 clearly appears beyond any question, and the evidence was sufficient to comply with the requirement of section 1103a of the Penal Code. It was for the trial judge to weigh that evidence, including the reasonable inferences therefrom, and to decide as to which time she had told the truth. While some statements made in some prior perjury cases regarding the necessity of other proof, not expressly required by the statute, were proper under the circumstances under which they were used, they should not be accepted as requiring a reversal under the undisputed facts which here appear.

The judgment is affirmed.

MUSSELL, J., concurs.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

156 Cal.App.2d 77

D. SHETA, Plaintiff and Appellant,
v.

**Alan GRAHM, doing business as Associated
Consumers, and Associated Consumers,
Defendants and Respondents.**

Civ. 22850.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1957.

Motion to dismiss appeal on ground that notice of appeal was not filed within required time. The District Court of Appeal, Fox, Acting P. J., held that where trial judge who granted defendants' motion to dismiss signed and filed formal order of dismissal, as prepared by defendants' attorney pursuant to trial court's direction, on August 1, 1957 but order was not entered until August 14, order of dismissal was to be treated as judgment for purposes of taking an appeal and sixty days in which plaintiff could appeal began to run as of August 1, 1957, and plaintiff's appeal which was not filed until October 11, 1957, was not timely.

Appeal dismissed.

1. Appeal and Error ⇨78(4)

An order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment.

2. Appeal and Error ⇨123

Where findings of fact or a further or formal order is required, an appeal does not lie from a minute order.

3. Judgment ⇨214

It is a matter of trial court procedure whether the court chooses to make its final decision by the entry in the minutes of an order without a direction that a written order be prepared, signed and filed, or elects to enter a direction that a formal order be prepared.

4. Appeal and Error ⇨347(2)

Where trial judge who granted defendants' motion to dismiss signed and filed formal order of dismissal, as prepared by defendants' attorney pursuant to trial court's direction, on August 1, 1957 but order was not entered until August 14, order of dismissal was to be treated as judgment for purposes of taking an appeal and sixty days in which plaintiff could appeal began to run as of August 1, 1957, and plaintiff's appeal which was not filed until October 11, 1957, was not timely. West's Ann.Rules on Appeal, rule 2(b) (2).

5. Appeal and Error ⇨347(2)

Where neither the parties nor trial court ever indicated that the defendants' motion to dismiss was being considered as a motion for summary judgment, the Supreme Court would treat the motion to dismiss as a nonstatutory speaking motion to dismiss for purpose of determining whether appeal was filed within proper time by plaintiff whose action was dismissed by order of trial court which directed the attorney for defendants to prepare a formal order of dismissal. West's Ann.Rules on Appeal, rule 2(b) (2); West's Ann.Code Civ.Proc. § 437c.

William John Hyland, III, Beverly Hills,
for appellant.

David M. Zerner and Philip Silverman,
Los Angeles, for respondents.

FOX, Acting Presiding Justice.

This is a motion to dismiss the appeal on the ground that the notice of appeal was not filed within the time required by the Rules on Appeal in view of the provisions of Rule 2(b) (2).

Plaintiff brought this action as an assignee of a Nevada corporation. Prior to filing their answer defendants made a motion to dismiss on the ground, inter alia, that the plaintiff had forfeited its powers, rights and privileges in this state because of nonpayment of its franchise tax. Rev. & Tax.Code, §§ 23301 and 23302. In support

of this motion, defendants submitted the affidavit of one of their attorneys in which he stated that at all times mentioned in the second amended complaint plaintiff's assignor, Eldindia Corporation, was a Nevada corporation; that the right of said corporation to exercise corporate rights and privileges in the State of California was forfeited on September 1, 1950, for failure to pay taxes due to the Franchise Tax Board of the State of California, and that "said corporation has never since been and is not now reinstated or relieved from said forfeiture in California." The affiant attached a certificate of the Secretary of State of California in support of his averments. No counteraffidavit was filed.

On July 23, 1957, the trial court granted the motion to dismiss and directed the attorney for the defendants to prepare a formal order of dismissal. The signed "order dismissing defendants and judgment for their costs" was filed August 1, 1957, and entered August 14th. Notice of appeal was filed October 11, 1957.

It is respondents' position that the time for appeal started to run on August 1, 1957, the date on which the formal order of dismissal was filed, and that since the notice of appeal was not filed until more than 60 days thereafter, it was too late, and the appeal must be dismissed.

Appellant contends, however, that the time for appeal did not start to run until the entry of judgment on August 14, and that since his notice of appeal was filed on October 11 he is in ample time.

Rule 2(b) (2), Rules on Appeal reads: "The date of entry of an appealable order which is entered in the minutes shall be the date of its entry in the permanent minutes, *unless such minute order as entered expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order.*" (Emphasis added.)

[1-3] As pointed out in *Herrscher v. Herrscher*, 41 Cal.2d 300, 304, 259 P.2d 901, 904, "The language of this rule is clear and leaves no room for interpretation." The *Herrscher* case, procedurally, is closely analogous to the one at bar. In the *Herrscher* case, defendant filed a cross-complaint which brought in additional parties. Plaintiff made a motion to strike the cross-complaint; the motion was granted, the minute order, as here, containing a direction to counsel to prepare a formal order. An appeal was taken. In due course, a motion to dismiss the appeal was made. In passing on the matter, the court announced principles that are pertinent to the disposition of the motion in the instant case. The court stated: "An order granting a motion to strike a cross-complaint from the files is equivalent to an order dismissing the cross-complaint. [Citation.] Where the parties to the cross-complaint are not identical with the parties to the original action, the order amounts to a final adjudication between the cross-complainants and cross-defendants and is appealable. [Citations.] It has long been the rule in this state that an order of dismissal is to be treated as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment. [Citation.]

"The time for filing a notice of appeal is determined by the provisions of Rule 2 of the Rules on Appeal, namely, 'within 60 days from the date of entry of the judgment'.* This rule followed the provisions of former Section 939 of the Code of Civil Procedure which it superseded. Difficulties in practice were encountered in determining what was meant by the phrase 'date of entry.' Did it mean the date when the order was set forth in the so-called rough minutes of the court, or did it mean the date when it was entered in the permanent minutes? What was the effect of an appealable order evidenced by a minute entry which was

* "Rule 40(g) of the Rules on Appeal provides; "Judgment" includes any

judgment, order or decree from which an appeal lies."

followed later by a written order or judgment filed? It has been decided that where findings of fact or a further or formal order is required, an appeal does not lie from a minute order. [Citations.] Rule 2(b) (2) was adopted to clarify this situation * * *

"It is a matter of trial court procedure whether the court chooses to make its final decision by the entry in the minutes of an order without a direction that a written order be prepared, signed, and filed, or elects to enter a direction that a formal order be prepared. [Citation.]" (Supra, 41 Cal.2d 303-304, 259 P.2d 903.)

[4] Applying these principles to the case at bar, it is apparent that an order dismissing the complaint herein is equivalent to the order dismissing the cross-complaint in the *Herrscher* case. The order of dismissal herein amounts to a final adjudication between the parties, just as the order dismissing the cross-complaint in the *Herrscher* case amounted "to a final adjudication between the cross-complainants and cross-defendants" therein. Such "an order of dismissal," as stated in the *Herrscher* case, "is to be treated as a judgment for the purposes of taking an appeal" since it finally disposed of the action and prevented "further proceedings as effectually as would any formal judgment." It is thus clear that the order of dismissal is appealable. *Herrscher v. Herrscher*, supra.

In order to eliminate, in such circumstances, any uncertainty as to the date from which the time for appeal started to run, rule 2(b) (2) was promulgated. The portion which we have italicized specifically covers the situation before us. The trial court directed counsel to prepare a formal order for the court's signature. Such order was signed by the trial judge, and filed on August 1st. Under the plain language of Rule 2 (b) (2) the time for appeal then started to run. *Herrscher v. Herrscher*, supra. Since the plaintiff did not file his notice of appeal until October 11, which was more than 60 days after the formal order

of dismissal was filed, it is apparent that plaintiff's notice of appeal was filed too late and that the appeal must be dismissed.

[5] Appellant contends that the motion to dismiss was a "speaking motion" and, as such, it should have been treated as a motion for summary judgment under Code of Civil Procedure section 437c. Hence the time for appeal would not begin to run until the entry of judgment. In this connection plaintiff relies upon *Pianka v. State*, 46 Cal.2d 208, 293 P.2d 458, 461. In that case the plaintiff sought damages for personal injuries resulting from the explosion of a shell which was left by the National Guard on a public firing range. Defendants raised the defense of sovereign immunity by means of a motion to dismiss supported by an affidavit. The trial court granted the motion and our Supreme Court reversed on the ground that the affidavit merely controverted a material allegation of the complaint, therefore presenting a triable issue of fact. It should first be noted that the court decided the case on the merits and not upon a motion to dismiss the appeal. The question of the time within which to file notice of appeal was not involved and was not considered by the court. Moreover, while it is true that the court stated that "a speaking motion to dismiss should be treated as a motion for summary judgment in order to preserve the safeguards provided by the statute" (*Pianka v. State*, supra, 46 Cal.2d at page 212, 293 P.2d at page 461), the court nevertheless noted that "the statute [§ 437c] does not expressly state that it was intended to supersede speaking motions, and the parties did not consider its applicability" in the proceeding. The court therefore "tested the propriety of the judgment under the rules laid down by the decisions involving speaking motions." In the instant case neither the parties nor the court ever indicated that they were treating the motion to dismiss as a motion for summary judgment. Plaintiff now makes this contention as a last effort to avoid the consequences of his own default. We will therefore treat this

matter as did the parties and the trial court—as a nonstatutory speaking motion to dismiss. The case of *Integral Land Corp. v. Anderson*, 62 Cal.App.2d 770, 145 P.2d 364, also relied upon by appellant, is not applicable. It dealt with a motion to dismiss which was made expressly pursuant to section 437c and which was so treated by the parties and the court.

Since the trial court, when it granted the motion to dismiss, elected to direct that a formal order be prepared, signed and filed, and since this was done, the specific provisions of rule 2(b) (2) are controlling. The notice of appeal, not having been filed within 60 days, was filed too late.

The appeal is dismissed.

ASHBURN, J., and RICHARDS, J. pro tem., concur.



155 Cal.App.2d 842

Grace V. ROBINSON, Plaintiff and Appellant,

v.

Alby FELCH, William Felch and Rita Felch, Individually, and dba Hayfork Garage, and the Hayfork Garage, Defendants and Respondents.

William FELCH, Individually, and dba Hayfork Garage, Alby Felch and Rita Felch, Cross-Complainants and Respondents,

v.

Hugh G. BYRD, Hope Staley, Faye Staley, Hugh G. Byrd, as Guardian ad Litem of Hugh G. Byrd, Jr., a minor, Hugh G. Byrd, as Guardian ad Litem of Janice Byrd, a minor, and Hugh G. Byrd, as Guardian ad Litem of Bonnie Byrd, a minor, Cross-Defendants and Appellants.

Civ. 9156.

District Court of Appeal, Third District, California.

Dec. 9, 1957.

Rehearing Denied Jan. 7, 1958.

Owner of truck satisfied judgment against her in action by heirs of deceased

victim for death resulting from negligent operation of truck and brought action for recoupment against bailee and driver of truck and they filed cross-complaint for judgment over against victim's heirs under indemnity provision of covenant not to sue. The Superior Court, Trinity County, C. A. Paulsen, J., rendered judgment against driver alone and judgment over against cross-defendants, and both plaintiff and cross-defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that where bailee with permission of owner permitted another to drive truck, both bailee and driver were liable under West's Ann.Vehicle Code, § 402(d) for amount paid by owner in satisfaction of judgment and costs assessed against her in action by heirs for death resulting from negligent operation of truck, but that such statutory liability did not include amount expended by owner for attorneys' fees in defending death action, and that heirs of deceased victim were liable to answer over to bailee and his agent under indemnity agreement.

Judgment affirmed in part and reversed in part with instructions.

1. Subrogation ⇐11

Where owner of truck was held liable for death resulting from negligent operation thereof by one whom garage operator with consent of owner had permitted to drive truck while under bailment to garage operator, both garage operator and driver were liable under statute to owner of truck for amount expended by her in satisfaction of judgment in death action. West's Ann.Vehicle Code, § 402 and subd. (d).

2. Statutes ⇐236, 240

A statute creating new liability or increasing existing liability, or even a remedial statute giving a remedy against party who would not otherwise be liable, must be strictly construed in favor of persons sought to be subjected to such liability.

3. Subrogation ⇐33(1)

Statutory liability of operator to owner of truck for amount of judgment and costs

recovered against owner for death resulting from negligent operation of truck with consent of owner did not include amount expended by owner for attorneys' fees in defending death action. West's Ann.Vehicle Code, § 402 and subd. (d).

4. Automobiles ⚡197(5)

Where bailee's minor son acted as his agent in driving truck with consent of owner and bailee, statute making parent jointly and severally liable with minor for damages proximately resulting from negligent operation of motor vehicle by a minor was not applicable, and hence owner could not recover thereunder from bailee attorneys' fees expended by owner in defending action for death resulting from negligent operation of truck by bailee's minor son. West's Ann.Vehicle Code, §§ 352, 402 and subd. (d).

5. Subrogation ⚡1, 33(1)

Subrogation is an equitable doctrine and, in accordance with equitable rules, interest will be allowed or denied according to what is just under facts of particular case.

6. Subrogation ⚡41(9)

Reviewing court would not rule on request that subrogee be allowed interest on sum for which she was entitled to subrogation from date of payment thereof, where trial court made no express finding on the matter and no such finding was requested.

7. Indemnity ⚡15(7)

In action against bailee and his minor son to recover under statute amount paid by owner of truck in satisfaction of judgment and costs assessed against her for death of third person resulting from negligent operation of truck by bailee's son, wherein bailee and son filed cross-complaint for judgment over against heirs of deceased victim of negligent operation of truck, evidence warranted inference that son was agent of bailee within provision of covenant not to sue by which heirs had agreed to indemnify bailee and his agents against liability arising out of such death. West's Ann.Vehicle Code, § 402 and subd. (d).

8. Indemnity ⚡6

Where heirs of deceased victim of negligent operation of truck by bailee's agent, by provision in covenant not to sue, agreed to indemnify bailee and his agents against any liability arising out of such death, and bailee and his agent were thereafter held liable for amount paid by owner of truck in satisfaction of judgment and costs assessed against her in action by heirs for such death, heirs were liable to answer over to bailee and his agent for such amount, though covenant not to sue expressly reserved to heirs any cause of action against owner of truck, her agents, etc. West's Ann.Vehicle Code, § 402 and subd. (d).

Leander W. Pitman, Redding, for appellant Robinson.

Lawrence D. Saler, Berkeley, for appellant Byrd.

Fitzwilliam & Memering, and John D. Stumbos, Jr., Sacramento, for respondents.

VAN DYKE, Presiding Justice.

There are two appeals herein presented on a single record. Alby Felch, hereinafter called Alby, was driving a logging truck owned by Grace V. Robinson, hereinafter called Robinson, en route from Hayfork to Redding, California, when, through his negligent driving, it collided with an automobile in which Alice Byrd was riding, causing her death. Cross-appellants herein, hereinafter called Byrd, as heirs of Alice, brought action against Alby, Robinson, and William Felch to recover damages for her death. During the pendency of that action a compromise was effected between Byrd and Felch. Byrd was paid \$10,000 in consideration of a covenant not to sue and not to sue further. The action continued against Robinson and the result was a judgment in favor of Byrd in the sum of \$2,500 and costs. Robinson satisfied this judgment and then began the present action for recoupment against Alby, William and Rita Felch, his wife. We shall refer to William and Rita as Felch

since their interests and liabilities are identical. Her complaint in several counts alleged that: 1. She had placed her truck with Felch for repairs and that during the bailment Felch, with her consent, had permitted Alby to drive it; 2. Alby had driven the truck as agent of Felch, and, 3. Alby had been a minor and that Felch had signed his application for a driver's license. She asked recoupment in the sum of \$2,500, plus her costs in the death action, and also for \$500 attorneys' fees she had expended therein. She was granted recoupment, excluding the attorneys' fees, but against Alby alone. Alby has not appealed.

[1] We shall consider first the appeal of Robinson. She contends that, under the evidence and the findings of fact, the judgment in favor of Felch should be reversed with instructions to enter judgment in her favor. The court found that Felch was bailee of the truck while Alby was driving the same; that Felch permitted Alby to operate the truck with the consent and permission of Robinson; that Felch had signed Alby's minor's application for an operator's license; that Alby was driving Robinson's truck as the agent of Felch. Herein, Robinson sued to recoup moneys she had expended in satisfaction of a judgment against her in the death action, which judgment was based upon findings that Alby drove her truck as Robinson's consent driver. Although Byrd, in the death action, also counted upon Alby's having been Robinson's agent and so alleged, no finding was made upon that issue, the findings reciting that during trial it had been withdrawn. Under Section 402 of the Vehicle Code Robinson was entitled to recover sums she had expended in satisfaction of the judgment in the death action upon findings of the court herein as above recited that Alby had driven the truck with the consent of Felch and of Robinson while the truck was under bailment to Felch. That part of the judgment from which Robinson appeals and which denied to her recovery against Felch must be reversed.

Robinson further contends that the \$500 she expended for attorneys' fees in defend-

ing the death action should be allowed to her as part of the judgment against Felch. Felch argues that Section 402, subdivision (d), of the Vehicle Code creates a new right of action and should be strictly construed; that by its language the recovery therein provided for is limited to the amount of the judgment and costs recovered against an owner. The language of the section reads as follows:

"In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence, such owner * * * may recover from such operator the total amount of any judgment and costs recovered against such owner."

[2] In *Weber v. Pinyan*, 9 Cal.2d 226, 229, 70 P.2d 183, 185, 112 A.L.R. 407, the Supreme Court quoted the following from 59 C.J., page 1129:

"A statute creating a new liability, or increasing an existing liability, or even a remedial statute giving a remedy against a party who would not otherwise be liable, must be strictly construed in favor of persons sought to be subjected to their operation." See, also, 82 C.J.S. Statutes § 394.

[3] The language of the section specifically gives the right to recover the judgment and costs assessed against the owner. Since no other loss or damage which the owner might have suffered is mentioned and since it is hardly likely that the legislature was unaware that costs for attorneys' fees are generally incurred in considerable amounts by an owner in defending against a claim of liability under the section, and yet omitted to provide for their recovery, we think the language of the section cannot be broadened to include attorneys' fees.

[4] Robinson further contends that she may recover attorneys' fees under Section 352 of the Vehicle Code. This contention cannot be sustained. That section expressly provides that the section does not apply if the minor is driving as the agent of "any person". In view of the

finding that Alby was driving as the agent of Felch, the section has no application.

[5,6] Robinson asks this court to order that she have interest on the sum she paid from the date of payment. Subrogation is an equitable doctrine and it has been said that in consonance with equitable rules interest will be allowed or not according as is just under the facts of the particular case. 83 C.J.S. Subrogation § 71, p. 726, citing Fidelity and Cas. Company v. Heitman Trust Company, 317 Ill.App. 256, 46 N.E.2d 155, and other cases. The court having made no express finding on the matter and no such finding having been requested, we think it improper to rule on the request here.

The covenant between Felch and Byrd contained the following language:

"* * * In consideration of the sum of Ten Thousand Dollars (\$10,000.00) to them in hand paid, * * *, the said undersigned parties do hereby promise and agree that they will not hereafter sue, or further sue, or further prosecute any pending litigation against W. M. Felch, * * *, and his agents, servants and employees, * * *, for or on account of any damages arising out of the death of the said Alice Byrd, * * *, and the undersigned do hereby further covenant and agree to fully indemnify and hold * * *, W. M. Felch, * * *, and his agents, servants and employees, and each of them, harmless from any liability, loss, claims, demands, costs, attorneys' fees, charges or expenses incident to any claim, demand, or suit arising out of the death of said Alice Byrd.

"It is further agreed that the undersigned are not hereby in any manner or respect waiving or relinquishing any claim, demand, or cause of action against Grace Robinson, her agents, servants, employees or drivers, or any of them."

Felch and Alby, when sued by Robinson, joined Byrd as cross-defendants, alleging

that if Robinson obtained a judgment against them they were entitled under the indemnity provisions of the covenant to judgment over against Byrd. In this cross-action judgment went for Alby, who alone had been held liable to Robinson for the amount which the judgment ordered that Robinson recover from him. Byrd appeals, asserting (1) that Alby, not named in the covenant, was not within its protective clauses, and (2) that even if he were so protected yet the covenant, by reason of certain reservations contained in it, afforded no protection against the demand of Robinson in the present suit.

[7] Byrd contends that the covenant afforded no right of indemnity to Alby because the indemnity provisions applied only to agents of Felch, and Alby was found to have been a consent driver. In view, however, of the trial court's finding that Alby was also Felch's agent, the point is without materiality. There was evidence sufficient to warrant an inference that Felch was obligated, as a part of his contract of bailment, to deliver the repaired truck to Robinson at Redding; that Robinson had consented that Alby could drive the truck, and that Alby, who was twenty years of age and who had often and intermittently worked in his father's garage, was in law the agent of Felch, as well as the permitted driver of Robinson.

[8] Byrd also contends that the covenant does not indemnify either Felch or Alby because the right to pursue and recover from Robinson was reserved and the reservation would be a nullity if, exercising the reserved rights, the end result for Byrd could be liability as indemnitors in an amount equaling the judgment they procured. Such a result, says Byrd, would leave them worse off than before, the expenses of the suit considered. But at the time the covenant was executed Byrd was seeking to recover from Robinson on the theory that Alby was her agent as well as on the additional theory that he was her consent driver. Under the latter

theory they could recover no more than \$10,000 because of the limitations contained in Section 402 of the Vehicle Code. But their recovery on the theory of agency would be limited only by the total amount of damages they had suffered, which in their pleading they alleged to be the sum of \$150,000 general damages, besides various items of special damage. If they recovered on this theory an amount in excess of \$10,000 they could at least retain the excess, though Robinson might claim and secure a reduction pro tanto on the theory that they had already been paid the sum of \$10,000. Therefore, the reservation of the right to proceed against Robinson was not a futile thing as they claim. In any event, they fully understood the situation and made their contract with the indemnity provisions stipulated therein. These considerations are not affected by the fact that they did recover against Robinson only on the theory that Alby was her consent driver and only recovered a part of the amount they had been paid for the covenant. The risk they ran in proceeding against Robinson was known to them and they became liable to answer over to their covenantees when Robinson sought to recover against them.

The judgment in favor of Alby and against Byrd is affirmed. The judgment in favor of Felch and against Robinson is reversed. The trial court is instructed to consider further the issue as to the right of Robinson to recover against Felch, under equitable principles, interest upon the amount expended by her in satisfaction of the judgment and costs rendered against her in the death action. The trial court is then instructed to enter judgment in favor of Robinson and against Felch in the said amounts with or without interest thereon as the court shall determine. The trial court is then further instructed to enter judgment against Byrd in favor of Felch in the amount of the judgment so obtained by Robinson against Felch.

PEEK and SCHOTTKY, JJ., concur.

Ruth GOTTLIEB, Plaintiff and Appellant,

v.

**Robert J. GOTTLIEB, Eugene I. Gottlieb;
Security-First National Bank of Los Angeles,
Fifth and Spring Street Branch, Defendants,**

Robert J. Gottlieb, Respondent.

Civ. 22332.

**District Court of Appeal, Second District,
Division 3, California.**

Dec. 4, 1957.

Divorce action. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered an order granting husband's motion to dismiss an order directing him to show cause why he should not pay wife's attorneys' fees and costs in action brought against her by him for alleged malicious abuse of process in causing an execution to issue, and wife appealed. The District Court of Appeal, Vallée, J., held that in view of fact action for malicious abuse of process was not related to nor did it grow out of divorce action, but was based solely on alleged tortious conduct of former wife, and in view of fact former wife waived all right to any further allowance of attorneys' fees and costs in settlement agreement incorporated in interlocutory decree, former wife, under such circumstances, was not entitled to attorneys' fees and costs in defending action for malicious abuse of process.

Affirmed.

1. Husband and Wife ⇨205(6), 244

A court may not award attorneys' fees and costs to a former wife who waived all rights to such allowances in a property settlement agreement which has been judicially approved. West's Ann.Civ.Code, § 137.3.

2. Husband and Wife ⇨205(6), 244

In view of fact action by former husband for malicious abuse of process was not related to nor did it grow out of divorce action, but was based solely on al-

leged tortious conduct of former wife, and in view of fact former wife waived all right to any further allowance of attorneys' fees and costs in settlement agreement incorporated in interlocutory decree, former wife, under such circumstances, was not entitled to attorneys' fees and costs in defending action for malicious abuse of process. West's Ann.Civ.Code, § 137.3.

Hahn, Ross & Saunders, Los Angeles, for appellant.

Robert J. Gottlieb, in pro. per.

VALLEE, Justice.

Appeal from an order granting defendant's motion to dismiss an order directing him to show cause why he should not pay plaintiff's attorneys' fees and costs in an action brought against her by defendant for alleged malicious abuse of process.

In this divorce action plaintiff was granted an interlocutory decree on April 24, 1953. A property settlement agreement is set out verbatim in the interlocutory decree. A final decree was entered on May 6, 1954. On July 20, 1956, plaintiff filed in the divorce action an affidavit for a writ of execution in which she stated that \$10,875 had accrued under the provisions of the interlocutory decree, that \$10,500 had been paid, and that "there is still due, owing and unpaid the sum of \$375." An order was made that execution issue in the sum of \$250 in favor of plaintiff. Execution issued and the sheriff took possession of defendant's automobile. Defendant paid the sheriff \$266.69 which included \$14.69 fees and expenses, and on July 27, 1956, the sheriff paid \$252 to plaintiff's attorneys.

On July 25, 1956, defendant filed an action against plaintiff for malicious abuse of process. He alleged that on July 20, 1956, the day plaintiff filed the affidavit for a writ of execution, he was not in arrears in payments to plaintiff in any sum but that in fact he had paid more money to her than he was required to pay under the in-

terlocutory decree; he alleged the issuance of the writ of execution, the levy, that the acts of plaintiff were malicious, and damage.

On July 30, 1956, on application of plaintiff, defendant was ordered to show cause why he should not be required to pay plaintiff's attorneys' fees and costs in defending the action for malicious abuse of process. When the order to show cause came on for hearing, on motion of defendant it was dismissed without a hearing. Plaintiff appeals from the order of dismissal.

The first question is: Did the court have the power under Civil Code, section 137.3, to award plaintiff attorneys' fees and costs for the purpose of defending the action for malicious abuse of process? Section 137.3 in pertinent part reads:

"During the pendency * * * of any action for divorce * * * the court may order the husband * * * to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees * * *; and from time to time and before entry of judgment, the court may augment or modify the original award, if any, for costs and attorney's fees as may be reasonably necessary for the prosecution or defense of the action or any proceeding relating thereto. In respect to services rendered or costs incurred after the entry of judgment, the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, whether or not such relief was requested in the complaint, cross-complaint or answer, and may thereafter augment or modify any award so made. * * *

Section 137.3 distinguishes between services rendered and costs incurred prior to the entry of judgment and services rendered and costs incurred after the entry of judgment. In respect to services rendered and costs incurred prior to the entry of judgment, the court may award such attorney's

fees and costs as may be reasonably necessary for the prosecution or defense of the action "or any proceeding relating thereto." In respect to services rendered and costs incurred after the entry of judgment, the court may award such attorney's fees and costs "as may be reasonably necessary to maintain or defend any subsequent proceeding therein." The proceeding at bar was long after the entry of the final decree of divorce. However, the cases seem to have ignored the distinction made by the statute.

Plaintiff relies on *Lerner v. Superior Court*, 38 Cal.2d 676, 242 P.2d 321, and cases cited therein. That case was a proceeding to prohibit the superior court from modifying a final decree with respect to the custody of a minor in a divorce action. Application was made to the Supreme Court for attorney's fees for services rendered and costs incurred in the prohibition proceeding. The Supreme Court stated (38 Cal.2d at page 685, 242 P.2d at page 326):

"Section 137.3 is a recodification of the first sentence of former Civil Code, § 137. It was settled under section 137 that the phrase therein, 'When an action for divorce is pending,' embraced many diverse proceedings growing out of the divorce action and arising after entry of the final decree. *Wilson v. Wilson*, 33 Cal.2d 107, 115, 199 P.2d 671 (proceeding to enforce distribution of community property); *Reynolds v. Reynolds*, 21 Cal.2d 580, 585, 134 P.2d 251 (modification of allowance for child support); *Lamborn v. Lamborn*, 190 Cal. 794, 796, 214 P. 862 (motion to modify alimony); *Grannis v. Superior Court*, 143 Cal. 630, 633, 77 P. 647 (motion to set aside final decree under Code Civ.Proc., § 473); *Kohn v. Kohn*, 95 Cal.App.2d 722, 724, 214 P.2d 80 (construction of property settlement); *Parker v. Parker*, 22 Cal.App.2d 139, 142, 70 P.2d 1003 (mandamus to enter judgment for delinquent alimony); *Moore v. Gosbey*, 130 Cal.App. 70, 73,

19 P.2d 995 (motion to modify alimony, made ten years after final decree); see cases collected in *McDonald v. McDonald*, [124 Mont. 26] 218 P.2d 929, 15 A.L.R.2d 1270.

"On principle, there is no difference between actions in which a woman is compelled by her former husband to resist by an appeal a proceeding brought by him to modify a custody or alimony award and actions in which she is compelled to seek prohibition to prevent improper modification of such awards. In either case she may be unable to retain counsel to represent her, and the policy underlying section 137.3 and the cases above cited are controlling."

Thus it appears that the prohibition proceeding was directly related to and grew out or arose out of the divorce action in the trial court. *Gantner v. Gantner*, 38 Cal.2d 691, 693, 242 P.2d 329. The former wife was compelled to seek prohibition to prevent improper modification of an award in the divorce action.

The facts in the cases cited in the *Lerner* opinion are not analogous to the facts in the present case. In *Wilson v. Wilson*, 33 Cal.2d 107, 199 P.2d 671, the proceeding for which attorney's fees were awarded was in the divorce action itself. In the divorce action the wife was seeking to compel the husband to comply with an order made to accomplish a division of the property of the parties. In *Reynolds v. Reynolds*, 21 Cal.2d 580, 134 P.2d 251, the former husband appealed from an order modifying a provision of the decree for child support. The trial court then made an order requiring the former husband to pay the former wife costs and attorney's fees on the appeal from the support order. The latter order was affirmed on appeal. The facts in *Lamborn v. Lamborn*, 190 Cal. 794, 214 P. 862, were substantially the same as in the *Reynolds* case. *Grannis v. Superior Court*, 143 Cal. 630, 77 P. 647, held that the superior court had jurisdiction to award a plaintiff in a divorce action attor-

ney's fees for services to be rendered on her behalf on a motion to set aside the decree previously rendered in the action. The proceeding was a direct attack in the divorce action on the judgment therein. In *Kohn v. Kohn*, 95 Cal.App.2d 722, 214 P.2d 80, a property settlement agreement was incorporated into the interlocutory and final decrees. The former wife brought an action for enforcement of the agreement. The former husband appealed from the judgment in that action. In the divorce action the court made an order allowing the former wife attorney's fees and costs to resist the former husband's appeal in the other action. The former husband admitted the former wife was entitled to reasonable counsel fees and costs. On the husband's appeal from the latter order, the question in the present case was not considered. *Parker v. Parker*, 22 Cal.App.2d 139, 70 P.2d 1003, held that the court in the divorce action had jurisdiction after the final decree to make an award in favor of the former wife for attorney's fees and costs to prosecute a writ of mandate to compel the entry of a judgment in her favor for an alimony deficiency which the former husband had been required to pay. The mandate proceeding clearly related to and grew out of the divorce action. In *Moore v. Gosbey*, 130 Cal.App. 70, 19 P.2d 995, the order awarding the former wife attorney's fees and costs was made to resist the defendant's motion in the divorce action to set aside a previous order in that action. None of the foregoing cases bears any factual resemblance to the case at bar.

The action for malicious abuse of process is in tort—the alleged tort of the former wife. Assuming for present purposes only that the allegations of the complaint in the action for malicious abuse of process are true, the former wife, knowing that the former husband was not delinquent in payments under the interlocutory and final decrees, filed an affidavit in which she falsely stated he was in arrears in the sum of \$375. It further appears that at the time the former wife made the affidavit, secured a writ of execution, had it levied on the former husband's automobile, and compelled

him to pay the sheriff \$252 to secure its release, the former husband was not indebted to her at all. It further appears that the acts and conduct of the former wife were done maliciously. Manifestly, the action for malicious abuse of process is not related to nor does it grow out of the divorce action. It is based solely on the alleged tortious conduct of the former wife.

[1] The order appealed from must be sustained on another ground. The court may not award attorney's fees and costs to a former wife who waived all rights to such allowances in a property settlement agreement which has been judicially approved. *Patton v. Patton*, 32 Cal.2d 520, 523-524, 196 P.2d 909; *Walsh v. Walsh*, 108 Cal.App.2d 575, 579, 239 P.2d 472; *Spreckels v. Spreckels*, 111 Cal.App.2d 529, 532, 244 P.2d 917; *Bluhm v. Bluhm*, 129 Cal.App.2d 546, 549, 277 P.2d 421.

[2] The property settlement agreement declares it is the wish and desire of the parties that a full and final adjustment of their respective rights to "costs and counsel fees, suit money, and all other matters, be had, settled and determined by said parties." The parties agreed it was understood the agreement "is intended to settle the rights of the parties hereto in all respects except as hereinafter provided." Defendant agreed to pay plaintiff for the support of two minor children the sum of \$87.50 a month for each child. He agreed to pay plaintiff "as and for and in full settlement of all her community rights" the sum of \$600 on December 31, 1953, and \$75 a month. He agreed to pay directly to plaintiff's attorney in the divorce action "in full payment of any and all attorneys' fees and court costs" the sum of \$175. The divorce action was pending at the time the agreement was entered into. The interlocutory decree ordered defendant to comply with the agreement. Plaintiff waived all right to any further allowance of attorneys' fees and costs.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Matter of the ESTATE of Herbert Edward LAW, Deceased.

WELLS FARGO BANK, as Executor of the Last Will and Testament of Herbert Edward Law, deceased, Appellant, *

v.

Robert C. KIRKWOOD, Controller of the State of California, Respondent.

Civ. 17563.

District Court of Appeal, First District,
Division 2, California.

Dec. 9, 1957.

Hearing Granted Feb. 5, 1958.

Controversy between executor under will and state controller as to proper method of computing marital exemption for separate property under revenue and taxation code. From orders of the Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., overruling executor's objections and fixing amount of exemption as computed by state controller the executor appealed. The District Court of Appeal, Kaufman, P. J., held that under will which left over half of separate property of estate to decedent's wife and directed that all taxes be paid out of residue and not prorated among various legatees, the entire estate, less deductions other than federal estate tax, should be first divided in half to arrive at wife's share and then amount of federal estate tax should be deducted from husband's part of separate property.

Judgment reversed with directions.

1. Internal Revenue ☞1008

Taxation ☞872

The federal marital deduction is designed to fit federal tax which is a tax on the decedent's right to transfer property, while the California marital exemption is part of an inheritance tax imposed on transferee's privilege of succeeding to property. West's Ann.Rev. & Tax.Code, § 13805; 26 U.S.C.A. (I.R.C.1939) § 812(e).

2. Taxation ☞895(7)

Local state law is determinative of question of whether wife's share of sepa-

* Opinion vacated 325 P.2d 449.

rate property exempt from state inheritance tax is or is not subject to reduction by federal estate tax. West's Ann.Rev. & Tax.Code, §§ 13805, 13989; West's Ann. Prob.Code, §§ 970-977.

3. Taxation ☞895(6)

Under statute which defines wife's share of testator's separate property that is not subject to inheritance tax as property equal in amount to clear market value of one half of decedent's separate property and providing that it shall, if transferred to spouse of deceased, be exempt from inheritance tax, the term "clear market value" means market value of property included in all taxable transfers to particular distributees, less any deductions allowable to that distributee. West's Ann. Rev. & Tax.Code, §§ 13312, 13805.

See publication Words and Phrases, for other judicial constructions and definitions of "Clear Market Value".

4. Taxation ☞864, 886½, 893

State inheritance tax is measured by share of decedent's net estate passing to each particular beneficiary, the rates imposed varying according to amount received or succeeded to by beneficiary and his relation to the decedent; tax owed by each beneficiary is computed separately and there are as many computations of state inheritance tax in an estate as there are transfers of decedent's property. West's Ann.Rev. & Tax.Code, §§ 13401-13408, 13601-13723, 13805.

5. Taxation ☞895(7)

Under statute providing for state inheritance tax, each beneficiary whose share in estate is chargeable with part of administration expense giving rise to deductions is entitled to a deduction proportionate to his share of the expense; if his share is not chargeable with an expense of administration he is not entitled to deduct any of that expense in computation of state inheritance tax. West's Ann.Rev. & Tax. Code, § 13981.

6. Taxation ☞895(7)

Under will which left over half of separate property of estate to decedent's

wife and directed that all taxes be paid out of residue and not prorated among various legatees, the entire estate, less deductions other than federal estate tax, should be first divided in half to arrive at wife's share and then amount of federal estate tax deducted only from husband's part of separate property. West's Ann. Rev. & Tax.Code, §§ 13805, 13989.

7. Taxation $\hookrightarrow$ 860

Taxing statutes are in invitum, and provisions of an inheritance tax act are to be construed strictly in favor of taxpayer and against state.

Pillsbury, Madison & Sutro, Harold I. Boucher, W. J. McFarland, Claude H. Hogan, Jr., Willis D. Hannawalt, San Francisco, for appellant.

James W. Hickey, Chief Inheritance Tax Attorney, J. D. Lear, Asst. Chief Inheritance Tax Attorney, Sacramento, Charles J. Barry, Asst. Chief Inheritance Tax Attorney, Milton D. Harris, Asst. Inheritance Tax Attorney, San Francisco, for respondent.

Robert C. Harris, Donald W. Falconer, Heller, Ehrman, White & McAuliffe, San Francisco, Janin & Morgan, Roos, Jennings & Haid, San Francisco, amici curiæ, in support of appellant.

KAUFMAN, Presiding Justice.

Herbert E. Law died testate on June 18, 1952, leaving most of his estate to his wife, Leah L. Law. The state inheritance tax appraiser computed the marital exemption allowed to the wife under Revenue and Taxation Code, section 13805, to be \$1,235,215.52. Appellant, Wells Fargo Bank, the executor of the estate, filed objections, claiming that the correct amount of the marital exemption was \$1,444,666.08. This appeal is taken from the orders of the trial court overruling appellant's objections and fixing the amount of the exemption as computed by the respondent, State Controller.

The controversy between the parties is as to the method of computing the marital

exemption for separate property provided by Revenue and Taxation Code, section 13805. The issue presented is whether in computing the wife's share of the decedent's separate property that is free of the state inheritance tax under Revenue and Taxation Code, section 13805, (1) the amount of the federal estate tax should be first deducted from the entire estate along with the expenses of administration and then the remainder divided in half to arrive at the wife's share, as the respondent contends, or (2) should the entire estate, less deductions other than the federal estate tax, be first divided in half to arrive at the wife's share, and then the amount of the federal estate tax deducted only from the husband's part of his separate property, as the appellant contends.

The appeal comes before this court on an agreed statement. The will left over half of the estate to Leah L. Law and directed that all taxes be paid out of the residue and not prorated among the various legatees, thus excluding the operation of Probate Code, sections 970-977. The entire taxable estate in the amount of \$2,961,436.71 consisted of the decedent's separate property. The debts of the decedent, funeral and administration expenses other than the federal estate tax, amounted to \$72,104.54. The amount of the federal estate tax is \$418,901.13 which is allowed as a deduction from the state inheritance tax. Revenue and Taxation Code, § 13989. In computing amount of the marital exemption, the inheritance tax appraiser took the fair market value of the entire estate (\$2,961,436.71) and deducted therefrom the funeral debts and administration expenses (\$72,104.54) and the federal estate tax (\$418,901.13). Then he divided the remainder (\$2,470,431.04) by two to arrive at the amount of separate property to be received by Mrs. Law free of the inheritance tax (\$1,235,215.52). The practical effect of this method of computation is to reduce the wife's share of separate property by one-half of the amount of the federal estate tax.

Appellant argues that the proper method of computation is to take the value of the entire estate (\$2,961,436.71), deduct therefrom all of the allowable deductions (\$72,104.54) except the federal estate tax, and divide the remainder (\$2,889,332.17) by two to arrive at the wife's exempt share in the amount of \$1,444,666.08. Thus the question is whether, for state inheritance tax purposes, the federal estate tax is a general charge against the entire estate which must be deducted from the entire estate before the marital exemption is computed, or whether the federal estate tax should be deducted only from the husband's portion of his separate property. Or, to put it another way, respondent contends that, for state inheritance tax purposes, the federal estate tax must be treated the same as an ordinary cost of administration, while appellant contends that for inheritance tax purposes the federal estate tax must be treated as a pro-rated charge against only a portion of the estate, just as if the pro-ratio statute, Probate Code, sections 970-977, were applicable here.

Revenue and Taxation Code, section 13989, which provides for a deduction of the amount of federal estate tax for state inheritance tax purposes, reads as follows: "Any amount due or paid the Government of the United States as a Federal inheritance or estate tax in the estate of any decedent is deductible from the appraised value of property included in any transfer subject to this part made by the decedent. The amount deductible is limited to an amount computed by the inheritance tax appraiser upon an application of the Federal inheritance or estate tax exemptions and rates (commencing at the primary rates) in force at the date of decedent's death to that portion of the decedent's property the transfer of which is subject both to the tax imposed by this part, and to any Federal estate tax law, and upon his own valuation of that portion."

The parties agree on the amount of the deduction under Revenue and Taxation Code, section 13989, but disagree as to whether it should be subtracted before or

after the wife's exempt share under Revenue and Taxation Code, section 13805, is computed. This section which defines the wife's share of separate property that is not subject to the inheritance tax, reads as follows: "Property equal in amount to the clear market value of one-half of the decedent's separate property shall, if transferred to the spouse of the deceased, be exempt from the tax imposed by this part. A transfer, for the purpose of this exemption, shall include a transfer of property in trust with a general or limited power of appointment in the surviving spouse. This exemption shall be in addition to all other exemptions under this part." The controversy here is as to the correct interpretation of the words "clear market value of one-half of the decedent's separate property."

Revenue and Taxation Code, section 13805, was modeled after the federal marital deduction statute, Internal Revenue Code of 1939, section 812(e), 26 U.S.C.A. § 812 (e), which reads as follows:

"§ 812. Net estate

"For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

"(a) * * *

"(b) * * *

"(c) * * *

"(d) * * *

"(e) Bequests, etc., to surviving spouse

"(1) Allowance of marital deduction

"(A) In general. An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(B) * * *

"(C) * * *

"(D) * * *

"(E) Valuation of interest passing to surviving spouse. In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

"(i) there shall be taken into account the effect which a tax imposed by this chapter, or any estate, succession, legacy, or inheritance tax, has upon the net value to the surviving spouse of such interest; and

"(ii) * * *

"(F) * * *

"(G) * * *

"(H) Limitation on aggregate of deductions. The aggregate amount of the deductions allowed under this paragraph (computed without regard to this subparagraph) shall not exceed 50 per centum of the value of the adjusted gross estate, as defined in paragraph (2).

"(2) Computation of adjusted gross estate

"(A) General rule. Except as provided in subparagraph (B) of this paragraph the adjusted gross estate shall, for the purposes of paragraph (1) (H), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by subsection (b) of this section."

Revenue and Taxation Code, section 13805, provides for an exemption so that it is a part of the tax computation which decreases the amount taxable in the lower tax brackets (In re Estate of Steehler, 195 Cal. 386, 233 P. 972; In re Estate of Harrison, 110 Cal.App.2d 717, 243 P.2d 528) while the federal provision is a deduction which is subtracted before starting to compute the estate tax. It should be noted that the 1957 Amendment to Revenue and Taxation Code, section 13989 (1957 Reg. Session, Ch. 502) provides that for purposes of Section 13989 the exemption provided by Section 13805 shall be treated as an exclusion.

(Apparently, the purpose of the 1957 Amendment was to put the marital exemption on the same footing as the community property exclusion which comes off the higher tax brackets. See 43 C.L.R. 49 at 58 and 59 for examples.)

[1,2] The difficulty here is caused by the fact that the federal marital deduction is designed to fit the federal tax which is tax on the decedent's right to transfer property, while the California marital exemption is part of an inheritance tax imposed on the transferee's privilege of succeeding to property. Under the rule laid down in *Riggs v. Del Drago*, 317 U.S. 95, 63 S.Ct. 109, 87 L.Ed. 106, and U. S. Treasury Regulation, section 81.47(c), local state law is determinative of the question of whether the wife's share of separate property exempt from the state inheritance tax in the instant case, is or is not subject to reduction by the federal estate tax. There can be no doubt that the State Legislature has the power to provide that the widow's share of separate property, belonging to her free of the inheritance tax, shall be ascertained before the amount of the federal estate tax is deducted. The question here involved is whether the Legislature has so provided by enacting Revenue and Taxation Code, section 13805.

This is a case of first impression in this state on a question of considerable importance. We shall consider first the authorities in our state relating to the computation of the widow's share of community property that is exempt from inheritance tax, as in enacting Revenue and Taxation Code, section 13805, in 1950 after the 1948 Amendments to the Internal Revenue Code, the Legislature intended the same inheritance tax results for widows who take separate property as widows who take community property; second, as the entire estate here consisted of separate property and the provisions of the will excluded the pro-ration statute, it is useful to see how other jurisdictions have solved the problem.

First, as to our own authorities relating to the computation of the wife's share of

community property that is exempt from inheritance tax.

In *Re Estate of Coffee*, 19 Cal.2d 248, 120 P.2d 661, it was held that under Probate Code, section 202, debts of the husband and ordinary costs of administration must be deducted from the entire community before the wife's share which is free from inheritance tax is computed. At the time of the decision in the *Coffee* case (1941), there was no special provision in the Internal Revenue Code relating to the taxation of community property for federal estate tax purposes. Section 811(a) of the Internal Revenue Code provided: "To the extent of the interest therein of the decedent at the time of his death." Under this section it was held that, as to pre-1927 community property, the husband had sufficient interest so as to require taxation of the entire community as part of his gross estate (*Talcott v. United States*, 9 Cir., 23 F.2d 897); while as to post-1927 community property, because of the interest given to the wife by Civil Code, section 161a, it was held that only one-half was taxable to the husband, the other half being taxable to the wife. *United States v. Goodyear*, 9 Cir., 99 F.2d 523; *Crocker First Nat. Bank of San Francisco v. United States*, 9 Cir., 183 F.2d 149.

Subsequently, effective October 21, 1942, Section 811(e) (2) was added to the Internal Revenue Code and other changes made, the net effect of which was to provide that all community property, whenever acquired, except earnings of the wife, was included in and taxable as a part of the community property of the husband upon his death. This section was relied upon in *Re Estate of Atwell*, 85 Cal.App.2d 454, 193 P.2d 519, which held that the federal estate tax should be deducted from the entire community estate before the amount of the widow's exempt one-half for inheritance tax purposes was computed.

In 1948, effective as of January 1, 1948, Section 811(e) (2) and the related provisions were repealed, so that as to post-1927 community property only one-half was again to be included for federal estate tax

purposes in the estate of the first spouse to die. Then in order to equalize the estate tax between residents of community and non-community property states [see H.R. Rep. No. 1274, 80th Cong., 2nd Sess. 21 (1948); Sen. Rep. No. 1013, 80th Cong., 2nd Sess. 22 (1948)], the marital deduction section 812(e) (quoted above) was added. Under this section, pre-1927 community property as well as the husband's separate property is entitled to the marital deduction. The wife's half of post-1927 community property is not included in the adjusted gross estate for the purpose of determining the marital deduction (36 C.L.R. 223). The effect of these changes in the federal law upon the method of computing the widow's exempt share of the community property for inheritance tax purposes was placed before the court in *Re Estate of Cushing*, 113 Cal.App.2d 319, 248 P.2d 482. In an excellent opinion to which we are greatly indebted, the court held: 1) As the wife's share of post-1927 community property is not a part of the husband's gross estate for federal estate tax purposes under the federal statute, the wife's share of post-1927 community property for state inheritance tax purposes should be computed before subtracting the federal estate tax from the entire community; 2) As to the wife's share of pre-1927 community property, In *re Estate of Atwell*, supra, 85 Cal.App.2d 454, 193 P.2d 519, was controlling, so that the amount of the federal estate tax should be deducted from the entire community before the widow's exempt half is computed.

Both appellant and respondent in the instant case rely chiefly on the *Cushing* case. Appellant argues that the wife's share of separate property exempt from state inheritance tax should be computed like post-1927 community property in the *Cushing* case, while respondent argues that the proper method of computation is that applied to pre-1927 community property in the *Cushing* case.

According to respondent, the weakness in appellant's argument is that the conclusion as to post-1927 community property reached by the court in the *Cushing* case was based

on the court's conclusion that under Sections 822, 826 and 827 of the Internal Revenue Code the federal estate tax was a lien only upon the gross estate of the decedent and not upon the probate estate of the decedent. In the Cushing case, the wife's share of post-1927 community property was clearly not in the gross estate of the husband for federal estate tax purposes, and the marital deduction provisions of the federal statute were not involved. In the instant case, the decedent's entire estate consisted of separate property, all of which would be included in his gross estate for federal estate tax purposes, and then the marital deduction allowed, assuming all other qualifications for inclusion and deduction are met, which need not concern us here. Respondent's argument, which is in effect that the Coffee and Atwell cases should be followed, would be a meritorious one even though these cases were decided on the basis of a federal statute different from 812(e), if the State Legislature had not enacted Revenue and Taxation Code, section 13805.

[3] Central to the appellant's case is the argument that the California marital exemption of Section 13805 is measured by the separate property passing to the surviving spouse, rather than by one-half of the decedent's entire net separate estate. The basis of the argument is that the inheritance tax is levied only on the "clear market value" of the share of the estate passing to each beneficiary. Revenue and Taxation Code, section 13312, defines "clear market value" as follows: "'Clear market value' means the market value of any property included in any transfer, less any deductions allowable by this part." California Administrative Code, Title 18, Volume 1, Sections 837 and 848, translate the above to mean the market value of property included in all taxable transfers to particular distributees, less any deductions allowable to that distributee. Therefore, correctly, argues appellant, "clear market value" must have the same meaning in computing the marital exemption of Section 13805.

Respondent argues that the marital exemption under Section 13805 is measured by one-half of the decedent's entire net separate estate, as the section was modeled after the federal marital deduction statute, Internal Revenue Code, section 812(e), quoted above, and operates in the same manner. Internal Revenue Code, section 812(e) (1) (H) limits the amount of the marital deduction to one-half of the "adjusted gross estate" which is defined in paragraph (2) as the net separate property in the decedent's estate. As a result the federal marital deduction is limited to the lesser of two amounts: (1) the value of the property passing to the surviving spouse or (2) one-half of the net separate property in the decedent's estate. (The 1939 and 1948 Internal Revenue Codes are applicable here as the 1954 Internal Revenue Code applies only to decedents dying on or after August 17, 1954.)

As pointed out above, the survivor's half of post-1927 community property is not part of the adjusted gross estate for federal tax purposes, while pre-1927 community property is considered as property passing to the wife to the extent that she takes it. *Talcott v. United States*, supra, 23 F.2d 897. For the purposes of the first limitation on the federal marital deduction, that is, the value of the property passing to the surviving spouse, it matters not whether the surviving spouse takes pre- or post-1927 community property. For the purposes of the second limitation on the federal marital deduction, which is the one in issue here, that is, the one-half of the net separate property in the decedent's estate, there is no requirement that the property pass to the surviving spouse. Section 13805, argues respondent, which operates like the federal provision, limits the amount of the marital exemption for state inheritance tax purposes, to the lesser of two amounts: (1) the value of the property, separate or community, passing to the surviving spouse or (2) one-half of the net separate property in the decedent's estate. Respondent contends that the section therefore means that the exemption extends to any type of

property passing to the spouse, the amount to be limited to one-half of the separate property in the *decedent's entire estate*. (Emphasis supplied.)

[4, 5] The difficulty with this argument of the respondent is that it is attempting to treat the state inheritance tax as if it were a transfer tax, levied on the entire estate of the decedent, like the federal estate tax rather than an inheritance tax levied on the interest of each beneficiary or heir. Revenue and Taxation Code, §§ 13401-13408; 13601-13723; In re Estate of Simpson, 43 Cal.2d 594, 275 P.2d 467, 47 A.L.R.2d 991; In re Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A.L.R. 694. As explained in California Administrative Code, Title 18, at page 89: "Unlike the Federal estate tax, which is a tax on the right of a decedent to transmit property and is measured by the size of the decedent's net estate, the inheritance tax is measured by the share of a decedent's net estate passing to each particular beneficiary the rates imposed varying according to the amount received or succeeded to by the beneficiary and his relationship to the decedent passing to each particular beneficiary, is computed separately and there are as many computations of inheritance tax in an estate as there are transfers of a decedent's property. Cal.Admin.Code, Title 18, § 848. Each beneficiary whose share in the estate is chargeable with part of the administration expense giving rise to the deductions is entitled to a deduction proportionate to his share of the expense; if his share is not chargeable with an expense of administration, he is not entitled to deduct any of that expense. Revenue and Taxation Code, § 13981; Cal.Admin.Code, Title 18, §§ 837, 848, 849.

The language of Section 13805, "*Property equal in amount to the clear market value of one-half of the decedent's separate property shall, if transferred to the spouse of the deceased, be exempt from the tax imposed by this part,*" (Emphasis supplied) also operates against respondent's argument. Under respondent's argument, the language should be read to mean "one-half

of the clear market value of decedent's separate property."

As under Revenue and Taxation Code, section 13989, the federal estate tax is deductible by those beneficiaries whose shares contribute to and are reduced by the federal tax, and the portion of Mr. Law's separate property passing to Mrs. Law did not contribute to the federal tax, appellant next argues, Mrs. Law is not entitled to any federal estate tax deduction in computing the inheritance tax imposed on this share of the estate. For this argument, appellant relies on In re Estate of Buckhantz, 120 Cal.App.2d 92, 260 P.2d 794, in which it was held that the widow is entitled to have her share in the community property under the will computed before the deduction of the federal estate tax. That case, however, was decided on the basis of the pro-ration statute, Probate Code, section 970-977, which is not applicable here as the will has specifically excluded it. Matter of Wolf's Estate, 307 N.Y. 280, 121 N.E.2d 224; In re Campe's Estate, 205 Misc. 699, 129 N.Y.S.2d 362; Id., Sur., 130 N.Y.S.2d 458; In re Mattes' Estate, 205 Misc. 1098, 130 N.Y.S.2d 270, affirmed 285 App.Div. 867, 137 N.Y.S.2d 836, cited by the appellant, were also decided under a pro-ration statute. In the Wolf case, the court said 121 N.E.2d at page 227: "In a situation where taxes *are not to be apportioned*, the formula for determining a widow's intestate share under Section 18, subd. 1, par. (a) is to deduct the total of estate taxes from the net estate and then give the widow one half the balance. * * * Where, however, as here—under section 124 [the N.Y. pro-ration statute]—the taxes *are to be apportioned*, the correct formula is to give the widow one half of the net estate before taxes and then deduct from her share any tax chargeable against that share, see Matter of Peters, 275 App.Div. 950, 89 N.Y.S.2d 651."

The rules outlined above by the New York Court have been followed in most other jurisdictions. Weinberg v. Safe Deposit & Trust Co., 198 Md. 539, 85 A.2d 50, 37 A.L.R.2d 188; Wachovia Bank & Trust

Co. v. Green, 236 N.C. 654, 73 S.E.2d 879; Baylor v. National Bank of Commerce of Norfolk, 194 Va. 1, 72 S.E.2d 282; In re Will of Uihlein, 264 Wis. 362, 59 N.W.2d 641, 38 A.L.R.2d 961; Campbell v. Lloyd, 162 Ohio St. 203, 122 N.E.2d 695; Moorman v. Moorman, 340 Mich. 636, 66 N.W.2d 248. Illinois recently reached the same result in Northern Trust Co. v. Wilson, 344 Ill.App. 508, 101 N.E.2d 604, on the grounds that the federal estate tax constituted a just claim against the estate which must be deducted before apportioning the renouncing widow's share. All of the above were decided in the absence of pro-ration statutes. In Lincoln Bank & Trust Co. v. Huber, Ky., 240 S.W.2d 89, the court reached a different result but relied on its long established judicial pro-ration rule; the same is true of South Carolina. See Pitts v. Hamrick, 4 Cir., 228 F.2d 486.

The same argument made by appellant here, that the wife's share was to be computed before a reduction by the amount of the federal estate tax, as her share did not add anything to the federal tax burden, was placed before the court in Thompson v. Wiseman, 10 Cir., 233 F.2d 734. In rejecting this argument the court said at 738: "Even if we were influenced by the equitable considerations as to the federal tax burden not being increased by giving her this advantage, we find nothing in the will which would support the conclusion that the testator intended the burden of the federal tax to fall only upon the trust for his sons and to be borne entirely by their share of the residue." In Harrison v. Northern Trust Co., 317 U.S. 476, 63 S. Ct. 361, 87 L.Ed. 407 and Rogan v. Taylor, 9 Cir., 136 F.2d 598, it was argued that since the residuary charitable bequests added nothing to the federal estate tax, the amount of such bequests should be calculated without first deducting taxes. (The Senate Committee Report on the marital deduction provision in the Internal Revenue Code points out that this provision is substantially the same as that provided in Section 812(d) of the 1939 Code relating to bequests to charity.) This argument was

rejected because the courts found no basis in the will or state law for calculating the bequests differently from other similar bequests to individuals. The question would then appear to be whether Revenue and Taxation Code, section 13805, provides such a basis.

[6] We think that it does. The statute provides that the widow's share of separate property shall be *exempt* from the inheritance tax. The use of the word "exempt" by the legislature in Revenue and Taxation Code was not an arbitrary choice of language, as the word has a well defined meaning in this state. In Re Estate of Steehler, supra, 195 Cal. 386, at page 399, 233 P. at page 978, the court said: "It is to be clearly kept in mind, however, that exemptions in any event are but deductions from the whole of the estate transferred and are important as affecting the inheritance tax to be computed only when the bases of computation of such tax upon the remainder of such property are to be affected by such deduction."

[7] It is a well settled rule that as taxing statutes are in invitum, the provisions of an inheritance tax act are to be construed strictly in favor of the taxpayer and against the state. In re Estate of Potter, 188 Cal. 55, 204 P. 826. "If the legislative act expresses an intention to exempt certain property judicial construction is not appropriate to defeat the exemption." In re Estate of Bendheim, 100 Cal.App.2d 398, at page 401, 223 P.2d 874, at page 876. Following the above rules, we conclude that the appellant's method is the proper one.

In view of the foregoing the judgment must be reversed with directions to the trial court to make the computation in accordance with this opinion.

Judgment reversed with directions.

DRAPER, J., concurs.

DOOLING, Justice.

I concur. I am personally much impressed by the argument of *amici curiae* that the construction of Revenue and Tax-

ation Code, section 13805 contended for by respondent would result in the widow receiving a greater or smaller marital exemption, depending on the purely fortuitous circumstance of whether the takers of the balance of the estate were, or were not, entitled to Federal Estate Tax deductions. Under that construction, as the total federal estate tax on estates of the same value will vary depending on the existence and amount of deductions to which the various takers are entitled, so would the marital exemption vary accordingly. I agree with the statement in the *amici curiae* brief: "It is unreasonable to suppose that the Legislature intended the amount of marital exemption to be determined by federal deductions available to third party legatees and having no effect on the amount of property actually distributed to the surviving spouse." Since a reasonable construction of a statute is always preferred to an unreasonable one (23 Cal.Jur., Statutes, § 140, p. 766) this furnishes an additional ground favoring the construction which we are placing on the section in question.



Henrietta M. PEISER et al., Plaintiffs and Appellants,

v.

Willie H. METTLER et al., Defendants and Respondents.*

Civ. 22386.

District Court of Appeal, Second District, Division 1, California.

Dec. 3, 1957.

Rehearing Denied Dec. 20, 1957.

Hearing Granted Jan. 28, 1958.

Action against lessee and assignees of lease to recover damages for breach of farm lease by removing irrigation pumps, pipe lines, and buildings from leased prem-

ises, and for conversion, waste and return of such property. The Superior Court, Los Angeles County, Aubrey Irwin, J., entered an order granting defendants' motion to change place of trial to Kern County, and plaintiffs appealed. The District Court of Appeal, Doran, J., held that change of venue to county in which leased premises were located on ground of convenience of witnesses was not abuse of discretion.

Order affirmed.

1. Venue ⇨52(1)

Change of venue for convenience of witnesses rests largely in discretion of trial court.

2. Appeal and Error ⇨965

Exercise of discretion regarding change of venue for convenience of witnesses will not be disturbed on appeal in absence of showing of abuse of discretion.

3. Venue ⇨52(1)

Change of venue of action against lessee and assignees to recover damages for breach of written farm lease, conversion and waste, arising out of removal of property from leased land, on ground of convenience of witnesses, was not abuse of discretion.

4. Appeal and Error ⇨854(1)

Order granting motion for change of venue on all grounds urged therein must be affirmed, if trial court was justified in granting change upon any of the grounds urged.

5. Customs and Usages ⇨10, 15(1)

Evidence of custom or usage generally known in county and presumptively within knowledge of parties may be introduced to explain true character of an act, contract or instrument, where such character is not otherwise plain. West's Ann.Code Civ. Proc. § 1870, subd. 12.

6. Customs and Usages ⇨13

Where parties contract as to subject matter concerning which known usages prevail, such usages are incorporated by implication into agreement, if nothing is said

* Opinion vacated 328 P.2d 953.

to the contrary. West's Ann.Civ.Code, § 1655.

7. Venue ⇨72

In action to recover damages for breach of farm lease by removal of property from leased premises, existence of custom or usage that property such as that removed by defendants was considered movable personalty and not permanently attached to realty and 'lessors' knowledge thereof, express or implied, were questions of fact to be determined upon plenary trial of issues and not at hearing of motion to change place of trial. West's Ann.Civ. Code, § 1655.

8. Venue ⇨52(3)

Residence of witnesses who had examined property at approximately time it was removed from leased premises and therefore had actual knowledge of facts upon which their testimony as to value of property would be based was relevant on motion for change of venue on ground of convenience of witnesses over objection that convenience of expert witnesses should not be considered.

Livingston & Borregard, Lawrence Livingston, Leo E. Borregard, Isabella H. Grant, San Francisco, for appellants.

Vizzard, Baker & Sullivan, Maas & Nairn, Donahue & Goldberg, Bakersfield, for respondents.

DORAN, Justice.

This is an appeal from an order granting defendants' motions to change the place of trial from Los Angeles County to Kern County. Grounds for the motion were (1) residence of defendants, (2) that the action involves damage and injury to real property located in Kern County, and (3) convenience of witnesses and to promote the ends of justice. The court stated that it was making an omnibus order "on all grounds and granting all motions".

The complaint herein is for damages for alleged breach of a written "Farm Lease" executed May 25, 1945, from plaintiffs

Ancker and Peiser to the defendant Willie H. Mettler, assigned by Mettler to defendants Fry on March 15, 1947. The Frys thereafter assigned the lease to defendant Garner as to one-half of the premises, and Garner subsequently assigned a portion of interest to defendant Moore. There are additional causes of action for conversion, waste and return of property.

The lease requires the original lessee, Mettler, to complete two wells, to irrigate the land, and to lay at least two miles of concrete pipe line and pipes for irrigation purposes. It is specified, "That upon the expiration or sooner, or other termination of this lease all of said pipeline and pumps so built and installed as aforesaid, and all other improvements of a substantial or permanent character, or that may be attached to the land, shall revert to and become the absolute property of lessor, free and clear of any and all claims against the same".

Damages are sought for alleged breach of the lease contract in that certain property was removed from the land, namely, one deep well shaft, bowl, pipeline, motor and pump, two tail water pumps and motors and pipelines attached, two dwelling houses, one duplex dwelling house, one general utility building, one shed and other buildings, for which plaintiff seeks damages in the amount of \$31,275.20, and attorney fees provided for in the lease. The counts for conversion, restoration and redelivery relate to the same property, and there is a cause of action for waste to the real property arising out of the removal.

All defendants other than Willie H. Mettler, original lessee, were and are residents of Kern County; Mettler, although residing in Los Angeles County, conducts his business in Kern County and maintains records in the latter county. It is averred that all witnesses to be called by defendants reside in Kern County, and there is no showing that appellants will call any witnesses not residing in Kern County.

It is the respondents' claim that the plaintiff-appellants have joined Mettler as a

defendant for the purpose of fixing venue in Los Angeles County; and that "The principal case involved only a local action and appellants' complaint attempted to join a transitory action therewith merely for the purpose of fixing venue in the county where suit was filed".

Appellants contend that the granting of the motions to change the venue to Kern County constituted reversible error; that the action is transitory and not local, and that the nature of the action is to be determined by the complaint; that all defendants, including Mettler, are liable for performance of the lessee's covenants; that the action was therefore properly brought in Los Angeles County.

Some twenty affidavits were filed in support of the respondents' motions. Appellants filed motions to strike out certain affidavits and parts of other affidavits, but no counter affidavits were filed. After argument, these motions to strike were denied, and the respondents' motions to change the place of trial from Los Angeles to Kern County were granted.

It is appellants' claim that the trial court should not have considered certain affidavits by witnesses who would testify to the existence of a custom and usage that buildings, pumps, etc., placed on land under conditions similar to those here existing, are considered portable and personal property; that testimony in respect thereto and concerning value of the property would be of an expert nature, and that convenience of such witnesses and of the parties should not be considered; that any such custom or usage was not known to appellants, and was not pleaded; and that evidence thereof would tend to vary and contradict the lease.

[1-3] As said in *Wrin v. Ohlandt*, 213 Cal. 158, 159, 1 P.2d 991, and often quoted, "It is well settled that a motion for a change of venue granted upon the convenience of witnesses rests largely in the discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing of its abuse". A

survey of the facts disclosed by the record fails to indicate any such abuse of this discretion.

[4] Grounds for the motion in the instant case include not only the convenience of witnesses, but also residence of the defendants all but one of whom reside in Kern County; and that the action involves damage and injury to real property in Kern County. The motions were granted on all grounds and, if the trial court was justified in granting the change upon any of the grounds urged, the order must be affirmed. It cannot be said that the order made does not find support in the record or that appellants have suffered any prejudice.

[5,6] Many affidavits were filed by the respondents in support of the motions to change the place of trial; the record does not disclose any counter affidavits filed on behalf of appellants. As stated in respondents' brief, there were various affidavits by Kern County residents from which a court could legitimately infer that there was a custom or usage generally known in that county and presumptively within appellants' knowledge, to the effects that pumps, etc., such as those removed by respondents, are considered movable personalty rather than as being permanently attached to the realty. Respondents do not seek to introduce such evidence for the purpose of varying the lease agreement, but as admissible under Code of Civil Procedure, Section 1870(12), "to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain". Respondents also had in mind the rule that "parties who contract as to a subject matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary. See Civil Code Section 1655".

[7] The existence of the custom or usage in question and appellants' knowledge thereof, express or implied, are questions of fact to be determined upon a plenary trial of the issues, rather than at the hearing of a motion to change the place of trial. As

respondents state: "Appellants are not entitled, on a motion for change in venue in which they have made no factual showing whatsoever, by affidavits or otherwise, to have the benefit of what would be in effect a summary judgment".

[8] In respect to affidavits relating to value of the property, objected to by appellants on the ground that convenience of expert witnesses should not be considered, it appears from the respondents' showing, that these witnesses "had actually examined the property at approximately the time it was removed from appellants' property, and therefore had actual knowledge of the facts and circumstances upon which their testimony will be based. Therefore their convenience is relevant on the motion to change venue".

A careful survey of the record indicates that the trial court gave due consideration to the complex facts involved, and committed no abuse of discretion or reversible error in granting a change of venue. All of appellants' contentions are found untenable.

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.



The PEOPLE of the State of California on relation of John AVERNA and Harlan D. Ellmaker, Relators, Plaintiff and Appellant,

v.

CITY OF PALM SPRINGS, a Municipal Corporation in the County of Riverside, State of California, Defendant and Respondent.*

Civ. 5599.

District Court of Appeal, Fourth District, California.

Dec. 11, 1957.

Rehearing Denied Jan. 6, 1958.

Hearing Granted Feb. 5, 1958.

Quo warranto proceedings to test validity of annexation of inhabited territory to

defendant city. The Superior Court of Riverside County, Hilton H. McCabe, J., sustained defendant's demurrer to amended complaint without leave to amend and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that complaint alleging that annexation proceedings conducted by city were null and void and specifically setting forth alleged defects could be amended to state cause of action and therefore court abused its discretion in sustaining demurrer without leave to amend.

Judgment reversed.

1. Quo Warranto ⚡49

In proceeding in quo warranto prosecuted by state, it is sufficient to plead in general terms the ultimate fact of usurpation of office.

2. Pleading ⚡225(2)

It is an abuse of discretion to sustain without leave to amend a demurrer to an original complaint unless complaint shows on its face that it is incapable of amendment.

3. Quo Warranto ⚡52

Complaint in nature of quo warranto charging in general terms that annexation to city was void and also alleging specific grounds or defects relied on to sustain contention was capable of amendment to state cause of action and therefore trial court abused its discretion in sustaining demurrer without leave to amend.

Edmund G. Brown, Atty. Gen., Eugene B. Jacobs and Delbert E. Wong, Deputy Attys. Gen., Joseph A. Lazaroni and E. W. Cunningham, Los Angeles, for appellant.

Jerome J. Bunker, Palm Springs, for respondent.

MUSSELL, Justice.

This is a proceeding in quo warranto brought to test the validity of the annexation of uninhabited territory to the city of Palm Springs. Defendant's demurrer to the amended complaint was sustained without leave to amend and plaintiff appeals from

* Opinion vacated 331 P.2d 4.

the judgment of dismissal thereupon entered.

It is alleged in the complaint that the annexation proceedings conducted by the city of Palm Springs were null and void and many grounds and alleged defects in the proceedings were specifically set forth. It is not necessary to here enumerate all of the said grounds in view of the rules hereinafter announced. The sole question here involved is whether the complaint states, or could be amended to state, facts sufficient to constitute a cause of action in *quo warranto* proceedings.

In *People ex rel. Skelton v. City of Los Angeles*, 133 Cal. 338, 340-341, 65 P. 749, 750, it was held that by modern usage, the proceedings in *quo warranto* must conform to the general principles and rules of pleading which govern in ordinary civil actions; that if a pleader sets out specific facts, those facts must show a cause of action; that "The mode of pleading in such cases is now by no means uniform. It is undoubtedly true that the state may charge a corporation with the usurpation of a franchise in general terms, and call upon it to allege and prove the facts showing its right, and thus place the burden upon the defendant. (*People ex rel. Palmer v. Woodbury*, 14 Cal. 43; *People v. Reclamation District*, 121 Cal. 522, 50 P. 1068, 53 P. 1085.) An information on behalf of the state may, however, allege the specific grounds or defects relied upon to show usurpation, instead of charging usurpation in general terms, and this mode of pleading has become quite common."

[1] In *People ex rel. Stephenson v. Hayden*, 9 Cal.App.2d 312, 313, 49 P.2d 314, 315, a demurrer to the amended complaint in a proceeding to determine defendant's right to hold an office was sustained with leave to amend, but plaintiff declined to amend and judgment went to defendant. Plaintiff appealed from the judgment and the court said:

"The original complaint pleaded grounds upon which the pleader claimed that the defendant was unlawfully

usurping the office. When the demurrer was sustained to this complaint these were all abandoned, and the amended complaint pleaded in general terms that defendant was 'usurping, intruding into, and unlawfully holding and exercising the office of Supervisor.

* * * - The rule seems to be well settled that, in a proceeding of this character prosecuted by the state, it is sufficient to plead in general terms the ultimate fact of usurpation. (Citations.) The theory upon which the rule rests is that in *quo warranto* the state is not required to prove the usurpation or unlawful holding, but the entire proceeding is one in the nature of an order upon the defendant to show that he is lawfully holding and exercising the office. Though the rule of pleading has been often criticized, it has not been rejected by our Supreme Court, and it is therefore binding upon us."

In *People ex rel. Paganini v. Town of Corte Madera*, 97 Cal.App.2d 726, 727-728, 218 P.2d 810, 811, the court, in commenting on *People ex rel. Stephenson v. Hayden*, supra, said:

"This court had occasion in *People ex rel. Stephenson v. Hayden*, 9 Cal. App.2d 312, 49 P.2d 314, 315, to consider the question of pleading in *quo warranto* cases. We held there that a complaint which pleaded in general terms that defendant was 'usurping, intruding into, and unlawfully holding and exercising the office of Supervisor, * * *' was sufficient.

"It was a peculiarity of both the common-law writ of *quo warranto* and information in the nature of *quo warranto* that the ordinary rules of pleading were reversed and the state was bound to show nothing' 22 Cal.Jur., p. 220. It seems to be settled law in this state that a complaint in *quo warranto* may be drawn in either of two ways, i. e., by charging in general terms that an office or franchise is being usurped,

'or by alleging specific grounds or defects relied upon to show usurpation', 22 Cal.Jur. 220-1."

[2] The general rule is that it is an abuse of discretion to sustain without leave to amend a demurrer to an original complaint unless the complaint shows on its face that it is incapable of amendment. *Phillips v. Phillips*, 137 Cal.App.2d 651, 653, 290 P.2d 611. In *Augustine v. Trucco*, 124 Cal.App.2d 229, 236, 268 P.2d 780, 785, the court said:

"All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. *Tristram v. Marques*, 117 Cal.App. 393, 397, 3 P.2d 947. 'In determining whether or not the complaint is sufficient, as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged.' *Matteson v. Wagoner*, 147 Cal. 739, 742, 82 P. 436, 438."

[3] In the instant case the plaintiff has charged in general terms that the annexation was void and has also alleged specific grounds or defects relied upon to sustain its contention. Under the rules announced in the foregoing decisions, it is apparent that the complaint could be amended so as to state a cause of action. It therefore follows that the court abused its discretion in sustaining the demurrer without leave to amend.

The judgment of dismissal is reversed.

BARNARD, P. J., concurs.

The PEOPLE of the State of California,
v.

Earl Henry THOMAS, Defendant and
Plaintiff and Respondent,
Appellant.
Cr. 3365.

District Court of Appeal, First District,
Division 1, California.
Dec. 16, 1957.

Prosecution charging possession of heroin. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered a judgment of conviction, and the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that there was a legal basis for the arrest of defendant and search of his person without a warrant.

Affirmed.

1. Arrest ⇨63(4), 71

Information received by one of arresting officers from an informant and by both arresting officers from hotel clerk and observation which officers made provided reasonable cause for believing that defendant was unlawfully engaged in narcotic traffic, so that officers had legal basis for arresting defendant without a warrant and searching his person. *West's Ann.Health and Safety Code*, § 11500.

2. Arrest ⇨65

The law contemplates that when an arrest is made in obedience to a warrant the officer should have the warrant with him. *West's Ann.Pen.Code*, §§ 816, 842.

3. Criminal Law ⇨395

Where police officers had independent grounds for arrest and search of person of defendant, consisting of reasonable cause to believe defendant was committing a felony, fact that officers did not tell defendant the real cause of the arrest did not destroy evidentiary value of heroin found upon defendant's person at time of his arrest. *West's Ann.Health and Safety Code*, § 11500; *West's Ann.Pen.Code*, § 841.

4. Arrest ⇐68

Where evidence showed that police officers had reasonable cause to believe and did believe that defendant was at very moment of his arrest engaged in commission of a crime, carrying narcotics upon his person, officers were not required to inform defendant as to the real cause of the arrest. West's Ann.Health and Safety Code, § 11500; West's Ann.Pen.Code, § 841.

5. Searches and Seizures ⇐7(28)

Evidence supported an implied finding that defendant at time of his arrest freely consented to search of his hotel room, so that paraphernalia there found and seized was admissible in subsequent prosecution charging possession of heroin. West's Ann. Health and Safety Code, § 11500.

Racanelli, Duvaras & Warren, Sunnyvale, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Tried before the court, without a jury, and convicted of violating section 11500 of the Health and Safety Code (possession of heroin) defendant in support of his appeal claims that certain evidence essential to the conviction was illegally seized and therefore improperly admitted in evidence by the trial court.

He was arrested December 15, 1955, in a public card room in San Jose and immediately taken to the city police detective bureau where he was searched by the arresting officers, McKenzie and Bishop. Fourteen capsules of heroin, a multi-colored balloon and part of an orange colored balloon were found upon his person.

After booking the defendant, these two officers went to defendant's hotel room, where they found a capsule box containing three pieces of rubber band, the tops from two balloons and a piece of cotton; also, a piece of red balloon and five red balloons. There is evidence that rubber bands and

balloons such as these are used by dispensers of heroin, typical paraphernalia of a dealer or seller of narcotics.

[1] (1) *Was there a legal basis for the arrest of defendant and the search of his person without a warrant? Yes.*

The arresting officers worked as a team, pooling their information. In the latter part of September, 1955, an informer who had given reliable information upon previous occasions told Officer Bishop that a person known as "Red" or "Big Red," whom the officers later learned was Frank Lantron, and an associate of "Red," were gamblers and were trafficking in narcotics. The informant described "Red's" associate as a man, 40-45 years old, 5 feet 10 inches, 160-170 pounds, who combed his hair straight back close to his head and never to the informant's knowledge wore a hat, adding that both "Red" and the latter's associate peddled narcotics, in particular heroin, on Post Street from different gambling establishments there. Bishop went to a certain hotel to check on a person who was of Lantron's description, but Lantron was not living there at that time. Bishop had no immediate means of identifying the associate, so he filed the information. Bishop first saw Lantron during the latter part of November, identifying him as "Red" but not knowing his name yet.

On the morning of December 14, McKenzie and Bishop took a point of observation in the second story of a building near the intersection of Post and Lightstone, using binoculars to aid their observations. They saw "Red" walking along the street back and forth from place to place and had him under surveillance for at least half an hour. Upon one occasion "Red" crossed the street and talked to a person who answered the informant's description of "Red's" associate, the defendant in this case.

The officers ascertained the hotel where "Red" was now residing, went to the hotel and made inquiries of the hotel clerk, who told them that Lantron was familiar with Thomas, that they had gone out with each

other, that they were seen in the company of each other, that they both were apparently gamblers, that they had both lived there (occupying separate rooms) and that when defendant moved out Lantron moved into the room defendant had been occupying.

The next morning the officers, informed that Lantron always carried narcotics when he came out of his hotel into the street, arrested Lantron as he left the hotel. They found heroin upon him. They then searched his room, finding marijuana and implements used in dispensing marijuana but no heroin and no implements used in the sale or application of heroin. The officers inferred that Lantron had a partner or associate who kept the supply of heroin and the equipment for its preparation for sale and that defendant was the logical suspect as such partner or associate.

We conclude that from the information received by Bishop in September and by both officers from the hotel clerk in December and the observations which the officers made, they had reasonable cause for believing that defendant was unlawfully engaged in the narcotic traffic and that they thus had a legal basis for arresting him without a warrant and searching his person.

[2-4] (2) *Was the search of defendant's person reasonable and the evidence obtained admissible? Yes.*

There would be no doubt of the legality of the arrest and search without a warrant and the admissibility of the evidence seized if upon arresting him the officers had told defendant the real "cause of the arrest" (Pen.Code, § 841), the officers' belief that he was trafficking in narcotics. Instead,

Officer McKenzie, after identifying himself, told defendant he was wanted in San Luis Obispo, that he should accompany them to headquarters, which he did. Defendant did not ask to see the warrant. The officers had none with them.¹

The law clearly contemplates that when an arrest is made in obedience to a warrant the officer should have the warrant with him. (Pen.Code, § 816, warrant may be executed by any officer to whom it may be "delivered"; § 842, arresting officer "must show the warrant, if required.")²

This presents a situation somewhat like that presented in *People v. Wright*, 153 Cal.App.2d 35, 313 P.2d 868. There, the deputy sheriff was informed of the warrant and of its presence in another branch of the sheriff's office and arrested the defendant without first getting possession of the warrant. However, he had independent grounds for the search of the automobile in which he found the defendant. Through the window of the car he saw clothing which was of such an appearance that, with other observable circumstances, gave him reasonable cause to believe it had been stolen from a haberdashery, and thus legally justified the search.

Here, the officers had independent grounds for the arrest and search of the person,—reasonable cause to believe defendant was committing a felony. The technical shortcoming of the conduct of the arrest should not, under the circumstances of this case, destroy the evidentiary value of the heroin found upon defendant's person. It has been held that opening a door to make an arrest without "having demanded admittance and explained the purpose for which

1. There was outstanding a warrant from the Justice Court, San Luis Obispo, for the arrest of this defendant, for failure to pay a fine that had been imposed in a misdemeanor case. That warrant, upon this occasion, was in the possession of another police officer who was working out of the same office as McKenzie and Bishop.

McKenzie knew about the warrant from a "want card" in the city identification bureau, a card based upon a teletype that had been received which gave

notice of the warrant for defendant's arrest. He received the teletype from the identifying officer shortly before making this arrest. Bishop also knew about the San Luis Obispo warrant and had seen the teletype and the "want card" before the arrest.

2. We find it unnecessary to decide whether an arrest in obedience to a warrant is ineffective, in whole or in part, if the arresting officer lacks possession of the warrant when making the arrest.

admittance is desired" (Pen.Code, § 844) does not render inadmissible the evidence obtained, if otherwise there be a legal basis for the arrest. *People v. Maddox*, 46 Cal.2d 301, 306-307, 294 P.2d 6. See also *People v. King*, 140 Cal.App.2d 1, 9, 294 P.2d 972. The reasoning of those cases persuades us that here the failure to comply with similar provisions of section 841 of the Penal Code did not render the search unreasonable nor the heroin found upon his person inadmissible.

There is an additional reason why this particular arrest should be deemed valid. The defendant was at the very moment of the arrest "engaged in the commission of * * * an offense" (possession of a narcotic, heroin, in violation of § 11500, Health and Safety Code), thus bringing his arrest squarely within the scope of the exception unequivocally declared in section 841, the very section which defendant invokes: "* * * except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense * * *" (As the section read prior to the 1957 amendment; i.e., as enacted in 1872.) Significantly, the evidence shows that the officers had reasonable cause to believe and did believe that defendant was at the very moment of his arrest engaged in the commission of a crime, carrying narcotics upon his person.

A precedent for this interpretation an application of the exception quoted is furnished by *People v. Beard*, 46 Cal.2d 278, 281, 294 P.2d 29. A marijuana cigarette was found concealed in defendant's car and some brown cigarette papers in one of his pockets. It was presumed that the officers had reasonable cause to believe that he was engaged in the commission of a felony, the appeal record being completely silent on that question. These factors brought the case within the scope of the exception declared in section 841 of the Penal Code.

(See also *Willson v. Superior Court*, 46 Cal. 2d 291, 294, 294 P.2d 36 [defendant "taken into custody while apparently engaged in the commission of an offense"]; and *People v. Jaurequi*, 142 Cal.App.2d 555, 562-563, 298 P.2d 896 [arrest of narcotic addict, the officer having reasonable cause to believe him an addict, is within the exception].

We conclude that the heroin found upon defendant's person was legally admitted in evidence.³

[5] (3) *Was there a legal basis for the search of defendant's hotel room and the admission in evidence of the paraphernalia there found and seized? Yes.*

The evidence supports an implied finding that defendant freely consented to the search of his room.

Officer Bishop testified that he got defendant's permission before he went to the room, adding that "we asked the Defendant. In fact, we told him we would like to take a recording of his answers and the questions that we asked in regard to searching of the room, which we did. He was informed of the recording. The disc was placed on the machine at the time in front of the defendant. We asked for his permission, recorded the question and his answer that was given which he agreed to let us search his room." Defendant knew that this conversation was being recorded. He made no objection whatsoever to the making of this search. He had not yet been booked when the officers made this request but he was still in the custody of Bishop and McKenzie at the police station.

Defendant tendered no evidence of any kind on this issue. Moreover, when the prosecution asked and the court granted permission to play the record of the making and granting of the request for permission to search the room, defendant's counsel stipulated "that the records substantiate what the officers testified to concerning this matter of consent." The prosecutor ac-

3. Note is made of the fact that defendant asked the name of Officer Bishop's informant and an objection that such information was confidential was sus-

tained, but that ruling was not made the basis of defendant's motion to exclude or strike any of the evidence from the record.

cepted this stipulation and refrained from playing the record.

Manifestly, there is no basis here for a reviewing court to disturb the trial court's implied finding that defendant freely gave his consent to the search of his room; nor to disturb the ruling that the paraphernalia found in the room was admissible in evidence. See *People v. Michael*, 45 Cal.2d 751, 753-754, 290 P.2d 852; *People v. Gorg*, 45 Cal.2d 776, 782-783, 291 P.2d 469.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



155 Cal.App.2d 781

John G. HERRERA, Alfredo Salazar, Jesus Venegas, Luis Torres, a minor, etc.; and Maria Jesus Leal, Jesus Partida, Maria Partida Figueroa, Heirs at Law of Jose Leal, Deceased, Plaintiffs and Appellants,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.

Civ. 22387.

District Court of Appeal, Second District,
Division 2, California.

Dec. 6, 1957.

Death and personal injury actions arising out of collision at urban crossing. The Superior Court, Ventura County, Charles F. Blackstock, J., rendered judgment upon directed verdicts for defendant, and plaintiffs appealed. The District Court of Appeal, Asburn, J., held that evidence had been sufficient to take to jury questions as to whether trainmen had been negligent with regard to speed and as to whether they had acted as promptly as they should have after discovering stalled truck on track.

Reversed.

1. Appeal and Error ⇨927(7)

Trial ⇨139(1)

The test of power to direct verdict is same as that for nonsuit; and on appeal from judgment entered upon directed verdict for defendant, court would have to accept as true all direct and indirect evidence favorable to plaintiff, and would have to reject that opposed to it.

2. Railroads ⇨309, 312(4)

Train crew cannot assume that a highway crossing in middle of city will be clear, and they must keep a reasonable lookout for presence of intersecting traffic.

3. Railroads ⇨309

Trainmen must have train under such control as is reasonably necessary to deal with situations which an ordinarily prudent operator would anticipate.

4. Negligence ⇨10

Foreseeability is test of responsibility for injuries to another; and this means not the foreseeing of the exact circumstances involved in a particular accident but the probability of some injury to another as a result of conduct under investigation.

5. Negligence ⇨136(14)

Question of whether probability of injury to another is reasonably foreseeable is ordinarily a question of fact.

6. Railroads ⇨312(4)

Installation and maintenance of automatic signals at crossing does not relieve railroad of duty of keeping reasonable lookout for other traffic.

7. Railroads ⇨309

A train cannot be driven through crossing within city regardless of presence of vehicles or pedestrians thereon.

8. Railroads ⇨316(4)

Railroad-imposed maximum speed of 35 miles did not have force of law, but was an admission on part of railroad that any higher speed would be improper.

9. Railroads ⇨350(11, 12)

In death and personal injury actions arising out of collision at urban crossing,

evidence was sufficient to take to jury questions as to whether trainmen had been negligent with regard to speed and as to whether they had acted as promptly as they should have after discovering stalled truck on track.

James D. Garibaldi and Warren J. Lane, Los Angeles, for appellants Herrera, Salazar and Venegas.

Francis Gherini, Oxnard, for appellant Torres.

John B. Marshall, Oxnard, for appellants Leal, Partida and Figueroa.

Griffith & Thornburgh, Santa Barbara, for respondent.

ASHBURN, Justice.

Four personal injury actions and one action for wrongful death were consolidated for trial and are presented together upon appeal. The appeals are taken from judgments entered upon verdicts directed for defendant.

There is no claim here that there was contributory negligence and the sole question is sufficiency of the evidence to warrant a reasonable inference of negligence on defendant's part.

[1] As the test of power to direct a verdict is the same as that for nonsuit, this court must accept as true all direct and indirect evidence favorable to plaintiff and reject that opposed to it. (In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768; 2 Witkin California Procedure, § 125, p. 1857.) Many years ago it ceased to be the rule that a directed verdict was proper if the evidence "is of a character so conclusive that the court should in the exercise of its discretion set aside a verdict not in accord therewith," as stated in *Jacobson v. Northwestern Pac. R. Co.*, 175 Cal. 468, 473, 166 P. 3, 6; In the *Lances* case, *supra*, it is said: "It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. * * * Unless it can be said

as a matter of law that, * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. * * * In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict." 216 Cal. at page 400, 14 P.2d at page 768.

On May 24, 1956, at about 6:30 a. m. and in daylight, plaintiff Herrera was driving his one and one-half ton Ford truck westerly on Third Street in the city of Oxnard and crossing the north-south right-of-way of defendant railroad company. With him were 13 Mexican field laborers whom he was taking to work. As he approached the crossing Herrera stopped the truck at a white line opposite the automatic signaling device on the east side of the tracks. He looked for approaching trains and saw none. The signal was not then in action and did not start until he was on the third track with the truck stalled thereon. Plaintiff had to cross five sets of tracks, the main line being the third or middle one. As he arrived there his engine stalled, he was unable to start it, saw a freight train approaching from the north and then tried to pull the truck off the track by using the starter. He almost succeeded, but the right front of the engine hit the extreme rear end of the truck, the rear 30 inches, injuring plaintiffs Herrera, Salazar, Venegas and Torres, and killing Jose Leal, whose heirs sue for his wrongful death. All occupants of the truck were able to escape in safety except the persons above named.

Because the track curved to the left, or east, and the view was obstructed by an ice company's loading dock and freight cars standing beside it, the view of the engineer and fireman of the southbound freight was obstructed. When about 700

feet north of the crossing¹ the fireman, who was on the east side of the engine and charged with the duty of keeping a lookout, saw plaintiffs' predicament and informed the engineer, who threw on the emergency brake but was unable to stop the train until it was 611 feet past the point of impact,—almost a quarter of a mile from the point where the brake was applied. This train consisted of 49 loaded cars, a caboose and four diesel engines; exclusive of the engines the weight was 2,453 tons; the four diesels weighed slightly less than a million pounds, or 500 tons; total weight, 2,953 tons. At the north city limits of Oxnard was a sign, posted by defendant, setting a speed limit of 35 miles per hour for first class trains and 25 miles for freight trains. For some undisclosed reason the particular freight train was designated by defendant as first class, which meant it could travel the same speed as a passenger train in towns and cities and in outlying country subject to a maximum of 60 miles an hour in the country districts. The engine speed tape showed a rate of 36 miles an hour with speed increasing at the time the brakes were applied; it was claimed by defendant's employee, who interpreted this record, that it was off to the extent of one mile and the correct reading should be 35 miles, the maximum allowed by the company for any train under any circumstances at that place. Third Street was the most heavily traveled of any of the three which crossed the railroad in that city. There were no gates and no flagman but there were automatic signals with flashing lights and ringing bell, which were actuated by a train when 1,419 feet north of the center of Third Street. As the train approached the engine bell rang continuously for a mile before reaching this crossing, the whistle was blown repeatedly and two headlights were burning—one stationary and the other oscillating—though it was daylight.

Respondent argues: "When a railroad installs gates or automatic signals at a crossing and those signals function perfectly, it should be allowed to run its trains

through those crossings at any speed. * * If automatic signals are installed, then the railroad company, if the signals function properly, should be allowed to run trains at any speed through the protected crossing, and in this case, respondent suggests that a speed of 35 miles per hour through the properly protected Third Street crossing could not and did not constitute negligence in the case here." This does not square with modern concepts.

"Generally speaking the duty to exercise reasonable or ordinary care is imposed upon the operator of a railroad at public highway crossings with respect to persons traveling upon the highway and over the crossing, both as to the manner of operating the train and the maintenance of the crossing. The standard of care is that of the man of ordinary prudence under the circumstances. * * * The question of the negligence of the railroad operator is ordinarily one of fact in crossing cases as it is in other negligence cases [citations]. Too frequently appellate courts have ignored those fundamental principles when dealing with railroad crossing accidents, and have arbitrarily substituted their conclusions of law as to the care a man of ordinary prudence would exercise under the circumstances presented to the trier of facts. * * * Where the conditions existing at the crossing create an unusual hazard or danger, the operator of the railroad must exercise care commensurate with those circumstances, and whether he has done so is a question of fact." *Peri v. Los Angeles Junction Ry.*, 22 Cal.2d 111, 120, 123, 137 P.2d 441, 446.

[2-6] The train crew cannot assume that a highway crossing in the middle of a city will be clear and they must keep a reasonable lookout for the presence of intersecting traffic. *Greene v. Atchison, T. & S. F. Ry. Co.*, 120 Cal.App.2d 135, 139, 260 P.2d 834; *Keiper v. Northwestern Pac. R. Co.*, 134 Cal.App.2d 702, 711-712, 286 P.2d 47, 288 P.2d 262; *Staggs v. Atchison, Topeka & S. F. Ry. Co.*, 135 Cal.App.2d

1. The fireman says it was 550 to 600 feet.

492, 500, 287 P.2d 817; Jansen v. Southern Pacific Co., 112 Cal.App.2d 833, 843, 247 P.2d 581; 22 Cal.Jur. § 58, p. 304; 74 C.J.S. Railroads § 738, pages 1379-1380. This implies as a corollary the further obligation to have the train under such control as may be reasonably necessary to deal with situations which an ordinarily prudent operator would anticipate. Foreseeability is the test of responsibility for injuries to another; not the foreseeing of the exact circumstances involved in a particular accident, but the probability of some injury to another as a result of the conduct under investigation. "It is an elementary principle that negligence is gauged by the ability to anticipate danger. '[R]easonable foresight of harm is essential to the concept of negligence, and supplies the criterion for determining whether it exists in a particular case, and reasonable foreseeability of harm is the fundamental basis of the law of negligence.'" Tucker v. Lombardo, 47 Cal.2d 457, 464, 303 P.2d 1041, 1046. "The precise consequence of a wrongful act or omission need not have been foreseeable. The question is not whether defendant did foresee, or by the exercise of ordinary care should have foreseen, the identical consequence that happened, in order that its act or omission be a proximate cause of the injury or damage. The question is whether it was reasonably foreseeable that injury or damage would likely occur. Defendant's duty is measured by the standard of foreseeability of injury or damage to the eyes of a reasonably prudent person having regard for the accompanying circumstances." Osborn v. City of Whittier, 103 Cal.App.2d 609, 615, 616, 230 P.2d 132, 136. To the same effect, see, Mosley v. Arden Farms Co., 26 Cal.2d 213, 216, 157 P.2d 372, 158 A.L.R. 872; Wallack v. Bass, 105 Cal.App.2d 638, 643, 234 P.2d 160. The question of whether probability of injury to another is reasonably foreseeable is ordinarily a question of fact. Mosley v. Arden Farms Co., supra; Osborn v. City of Whittier, supra. The installation and maintenance of automatic signals does not relieve a railroad company of this duty of keeping a reason-

able lookout for other traffic. Peri v. Los Angeles Junction Ry., supra, 22 Cal.2d 111, 126, 137 P.2d 441; Bush v. Southern Pac. Co., 106 Cal.App. 101, 107, 289 P. 190.

[7] A train cannot be driven through the crossing within a city regardless of the presence of vehicles or pedestrians thereon. One whose vision has been obscured and hearing impaired by a passing train on a nearer track may often be led into a perilous position; a heavily laden and slow moving truck which enters the right-of-way just ahead of wigwag activity, one whose vehicle becomes unfortunately stalled on the track, a pedestrian who is old or lame and slow, may be caught in a predicament which needs the help of a train crew to extricate him or it. It is not a question of law whether the train crew should foresee all or any of these eventualities. It is a question of fact for the jury to determine in the light of the particular situation which gave rise to the accident.

The proposition that a railway company may run its trains over street crossings in towns and cities at such speed as it desires is an exploded theory so far as this state is concerned. Young v. Pacific Elec. R. Co., 208 Cal. 568, 572, 573, 283 P. 61, 63: "While it is true that no rate of speed is negligence *per se* in the absence of a statute or ordinance, it does not follow that a railroad company will be permitted to run its trains under all conditions at any rate of speed it may choose. It must regulate its speed with proper regard for the safety of human life and property, especially when running through towns and cities. The character of a crossing, it has been well reasoned, affects the duty of the railroad company toward travelers upon the public highway, and its trains must pass over dangerous crossings at a less rate of speed proportionate to the danger. As previously stated, the scene of the collision was not the ordinary country grade crossing, but a well-traveled, paved avenue within the city limits. * * * As the standard of duty shifts with the circumstances developed in the case, the question whether or not a rate of speed is excessive is one of fact for the jury." Johnson v.

Southern Pac. Co., 105 Cal.App. 340, 350, 351, 288 P. 81, 85: "So far as this case is concerned, there is neither statute nor ordinance limiting the speed of trains. However, that does not open the gates wide for the running of trains through a populous city, or a city no larger than that of Chico, estimated to have a population of about 14,000, at such a high rate as to render it dangerous and a negligent act in and of itself. In some states,² as set forth in Ann. Cas.1914B, page 602, the general rule is that, in the absence of a prohibitory statute or ordinance, a railroad company may ordinarily run its trains at such speed as it sees fit, and that a charge of negligence cannot be predicated on the rate of speed at which a train is run, unless there are attendant circumstances which makes such speed negligence (Citing a long list of cases). Further, on page 603 of the same volume, the modern rule is thus stated: 'The recent cases are in accord with the general rule that while no rate of speed is of itself negligence, it may be negligence to run a train at a high rate of speed through a populous community and over a much-frequented crossing'—Citing a long list of cases. * * * Whether the speed of a train in approaching a crossing is so dangerous or excessive as to constitute negligence is a question for the jury has been likewise held in the following cases: *Badostain v. Pacific Ry. Co.*, 83 Cal.[App.] 290, 256 P. 576; *Bilton v. Southern Pacific Co.*, 148 Cal. 443, 83 P. 440; *Tousley v. Pacific Ry. Co.*, 166 Cal. 457, 137 P. 31. The latest case holding that negligence in relation to the speed is a question for the jury is that of *Young v. Pacific Electric Ry. Co.* [208 Cal. 568, 283 P. 61], where the cases which we have cited are approved and a quotation therefrom is set forth to the effect that whether the rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the circumstances and the conditions involved, etc.,

2. Respondent relies upon two Pennsylvania cases: *Custer v. Baltimore & O. R. Co.*, 1903, 206 Pa. 529, 55 A. 1130; *Central*

which must be determined by the jury."

To the same effect, see, *Dow v. Southern Pacific Co.*, 105 Cal.App. 378, 384, 288 P. 89; *Nelson v. Southern Pacific Co.*, 8 Cal. 2d 648, 652, 67 P.2d 682; *Stout v. Southern Pacific R. Co.*, 127 Cal.App.2d 491, 502, 274 P.2d 194; *Merlino v. Southern Pac. Co.*, 132 Cal.App.2d 58, 66-67, 281 P.2d 583.

[8, 9] The company-imposed maximum speed of 35 miles for the train in question does not have the force of law, but it is a maximum rate and an admission on the part of defendant that any higher speed would be improper in that immediate locality. *Davis v. Johnson*, 128 Cal.App.2d 466, 472, 473, 275 P.2d 563; *Powell v. Pacific Electric Railway Co.*, 35 Cal.2d 40, 46-47, 216 P.2d 448. It was for the jury to say whether the prescribed rate of 35 miles was too high for this busy intersection; whether a 25 mile limit or a ten mile limit would not be the proper maximum, especially for a heavy freight train; whether the accident would not have been obviated had such lower speed been pursued on the occasion in question; whether the obstructions to the fireman's and engineer's view did not demand a substantial reduction below the company prescribed maximum; whether the fireman and engineer did act as promptly as they should have done. In the following cases it was held, under circumstances similar to those at bar, that a question of fact was presented as to the railway company's negligence: *Barton v. New York, New Haven & Hartford R. Co.*, 332 Mass. 345, 125 N.E.2d 124, 125; *Schaaf v. Coen*, 131 Ohio St. 279, 2 N.E.2d 605; *Missouri Pac. R. Co. v. Hanna*, 168 Miss. 867, 152 So. 282; *Broad v. Pennsylvania R. Co.*, 357 Pa. 478, 55 A.2d 359; *Pennsylvania R. Co. v. Ackerson*, 6 Cir., 183 F.2d 662.

We do not suggest that a jury verdict in favor of defendant would not have been sustained by the evidence, but we are compelled to hold that the granting of the mo-

R. Co. of New Jersey v. Hudson, 3 Cir., 1913, 209 F. 176.

tion for directed verdict was prejudicially erroneous.

The judgment in each case is reversed.

FOX, Acting P. J., and RICHARDS, J. pro tem., concur.



156 Cal.App.2d 72

Jimmie T. EDWARDS, also known as James T. Edwards, Plaintiff and Appellant,

v.

Clyde A. PIERSON et al., Defendants and Respondents.

Civ. 22399.

District Court of Appeal, Second District,
Division 2, California.

Dec. 12, 1957.

Action for personal injuries received while plaintiff was a paying guest at defendants' motel on theory defendants negligently failed to maintain swimming pool and walks in a good, safe and proper condition and plaintiff while walking upon walks along side pool fell and injured himself. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., denied plaintiff's motion for change of venue from Santa Barbara County, place where motel was located, to Los Angeles County upon ground of convenience of witnesses and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that where plaintiff's supporting affidavits in respect to motion for change of venue stated subjects upon which plaintiff's witnesses were expected to testify but failed to reveal substance of what any one of them would say and opposing affidavits were not much more informative, merely setting out that trial in Los Angeles County would impose a real inconvenience to defendants themselves, there was not a clear abuse of dis-

cretion in denying plaintiff's motion for change of venue.

Order affirmed.

1. Appeal and Error ⇨1024(3)

Venue ⇨66, 68

Burden rests upon one who seeks change of venue to prove that both convenience of witnesses and ends of justice will be promoted and he must do this through affidavits which contain something more than generalities or conclusions; it is primarily question for trial judge whether burden has been successfully sustained. West's Ann.Code Civ.Proc. § 397, subd. 3.

2. Venue ⇨66

Supporting affidavits in respect to change of venue on ground of convenience of witnesses must set forth names of witnesses, nature of testimony expected from each and the reasons why attendance upon trial would be inconvenient. West's Ann.Code Civ.Proc. § 397.

3. Venue ⇨52(1)

Convenience of party to action may be considered on motion for change of venue on ground of convenience of witnesses, where there are unusual circumstances of hardship. West's Ann.Code Civ.Proc. § 397, subd. 3.

4. Venue ⇨52(1)

The convenience of a former employee of defendant may be considered on motion for change of venue on ground of convenience of witnesses. West's Ann.Code Civ.Proc. § 397, subd. 3.

5. Venue ⇨22(1)

Where plaintiff sustained injuries while walking on walks alongside swimming pool in motel located in Santa Barbara County, and both defendants, owners of motel, resided in Santa Barbara County, Santa Barbara County was proper place for trial unless convenience of witnesses and ends of justice would be promoted by transfer to Los Angeles County. West's Ann.Code Civ.Proc. § 395.

6. Appeal and Error ⇨965**Venue** ⇨52(1)

Change of venue on ground of convenience lies essentially within judicial discretion of judge and his ruling will not be disturbed unless it clearly appears as a matter of law that there has been an abuse of discretion. West's Ann.Code Civ.Proc. § 395.

7. Venue ⇨72

Where plaintiff's supporting affidavits in respect to motion for change of venue to Los Angeles County on ground of convenience of witnesses failed to reveal substance of what plaintiff's witnesses would say and opposing affidavits were not much more informative, there was not clear abuse of discretion in denying motion. West's Ann.Code Civ.Proc. § 395.

Harry Boxer, Los Angeles, for appellant.

Griffith & Thornburgh, Santa Barbara, for respondents.

ASHBURN, Justice.

Appeal from order denying motion for change of venue from Santa Barbara County to Los Angeles County upon the ground of convenience of witnesses. The action seeks recovery of damages for personal injuries received while plaintiff was a paying guest at defendants' motel in Santa Barbara County. The complaint alleges negligent failure to keep the swimming pool and walks in good, safe and proper condition, and that same were in slippery, hazardous, defective, dangerous and unsafe condition, as the proximate result of which plaintiff, while walking upon the walks alongside the pool, slipped and tripped, fell and injured himself. Issue was duly joined upon these allegations by answer filed.

The action was filed in Los Angeles County but the parties stipulated that the case be transferred to Santa Barbara County because the accident occurred there and defendants reside therein, it being understood that such transfer should be without prejudice to a motion by plaintiff under §

397, Code of Civil Procedure, to retransfer the cause to Los Angeles County. The transfer to Santa Barbara having been effected, plaintiff moved for a retransfer to Los Angeles upon the ground that convenience of witnesses and the ends of justice would be promoted by such change of place of trial.

Attached to the notice of motion is the affidavit of plaintiff's attorney who avers that plaintiff, his wife, father and mother, are residents of Los Angeles County and will be necessary witnesses on behalf of plaintiff; that each of said three supporting witnesses would testify that he or she "was personally present and witnessed the happening of the accident which is the subject of said action, the description of the premises, the resultant injuries and damages." Also alleged to be necessary witnesses are two physicians and one dentist who reside and practice in Los Angeles County, each of whom will testify "to his observations made upon examination of the plaintiff following the accident, the care and treatment afforded to plaintiff, prognosis, and reasonable value of the medical [or dental] services rendered to plaintiff"; that in each instance "leaving said county [of Los Angeles] for any length of time will seriously interfere with the practice of his profession, causing great loss." Also averred to be a necessary witness is some representative of San Gabriel Valley Hospital which is situated in Los Angeles County, which said unnamed representative "will testify as to the x-rays taken of plaintiff's injuries, the observations made upon examination of said x-rays, and the reasonable value of said x-ray services, rendered to plaintiff." It is also averred that at defendants' request plaintiff was examined by Dr. Wallace Dodge who maintains his offices in the city of Los Angeles, and "it is presumed that the defendants will wish to call said doctor to testify for and on their behalf." By way of conclusion the affidavit says: "That by reason of the necessary and material evidence that the aforementioned witnesses will testify to, their presence will be required at the trial of the

within action. That the convenience of the aforementioned witnesses would best be served if the action herein was transferred and tried in Los Angeles County." The foregoing discloses the full extent of the showing made by the moving party.

In opposition there was submitted the affidavit of defendants' attorney and one made by the two defendants. The attorney averred that each defendant "will testify concerning the condition of the premises where the accident mentioned in plaintiff's complaint is alleged to have occurred." Also, that "there are also other witnesses residing in Santa Barbara, California, who were employed by the said defendants at the time of said alleged accident and who will be necessary witnesses to testify concerning the condition of said premises around the swimming pool at the time said accident is alleged to have occurred; said witnesses include Charles Black and Douglas Holloway, both of Santa Barbara, California." The defendants' affidavit states that the motel is conducted solely by them, that "it would be extremely inconvenient for your affiants to attend a trial of this action in Los Angeles because it would necessitate either that affiants close the Silver Saddle Motel for a sufficient time to enable them to attend said trial in Los Angeles or it would be necessary for affiants to employ some person or persons to manage and run said motel during said period, and in this connection affiants state that it is difficult and at times impossible to obtain persons with sufficient experience to run such business." They further say that photographs have been made of the premises where the accident occurred by a Santa Barbara photographer whose testimony will be necessary at the trial in order to show the condition of the premises, "and further if said premises are still in their present state, a view thereof by the jury during the trial of the case is reasonably to be expected and desired."

[1] The burden rests upon one who seeks a change of venue under Code of Civil Procedure § 397, subdivision 3, to prove that both the convenience of witnesses and the

ends of justice will be promoted thereby. *Prewitt v. Prewitt*, 128 Cal.App.2d 344, 346, 275 P.2d 63; *City of Stockton v. Ellingwood*, 78 Cal.App. 117, 121, 248 P. 272. This he must do through affidavits which contain something more than generalities and conclusions. *Baird v. Smith*, 21 Cal. App.2d 221, 224, 68 P.2d 979. It is primarily a question for the trial judge whether that burden has been successfully sustained. See 1 Witkin California Procedure, p. 788, § 267.

[2] The supporting affidavits must set forth the names of the witnesses, the nature of the testimony expected from each and the reasons why attendance upon the trial would be inconvenient. *Juneau v. Juneau*, 45 Cal.App.2d 14, 16, 113 P.2d 463; *Art Frost of Glendale v. Hooper*, 130 Cal.App.2d Supp. 903, 905, 280 P.2d 229; *San Jose Hospital v. Etherton*, 84 Cal.App. 516, 518, 258 P. 611. In the present instance the moving affidavits state the subjects upon which the witnesses are expected to testify but fail to reveal the substance of what any of them would say, and it is impossible to tell whether their testimony would be favorable or unfavorable to plaintiff. However, as the object of the stated requirement of the affidavit is to enable the court "to determine the materiality of the evidence or the necessity of testimony from such witnesses" (*Juneau v. Juneau*, supra, 45 Cal. App.2d 14, 16, 113 P.2d 463, 464), the vagueness of the affidavits at bar cannot be said to vitiate although it does present a situation which properly may be considered by the trial judge in exercising his discretion.

[3,4] The opposing affidavits are not much more informative. They do show that a Los Angeles trial would impose a real inconvenience upon defendants themselves because their absence from the motel would require them to close it or to find and employ some qualified person to conduct it in their absence, a difficult and at times impossible thing to arrange. Convenience of a party to the action may be considered where there are unusual circumstances of

hardship (*Rios v. Lacey Trucking Co.*, 123 Cal.App.2d 865, 868, 268 P.2d 160; *Figley v. California Arrow Airlines*, 111 Cal.App.2d 285, 286, 244 P.2d 472; 1 Witkin California Procedure, p. 792, § 271), but it is doubtful whether a showing has been made sufficient to meet the requirement of the cases just cited. It seems that Black and Holloway, who are alleged to be witnesses residing in Santa Barbara and necessary to testify concerning the condition of the premises around the swimming pool at the time of the accident, would be inconvenienced in traveling from Santa Barbara to Los Angeles just as much as plaintiff's relatives would be in making the reverse trip. Whether these persons are presently employed by defendants does not appear; the convenience of a former employee may be considered upon such a motion. *DiGiorgio Fruit Corp. v. Zachary*, 60 Cal.App.2d 560, 562, 141 P.2d 8; *Wood v. Silvers*, 35 Cal. App.2d 604, 611, 96 P.2d 366, 97 P.2d 265.

[5-7] The accident having occurred in Santa Barbara, where both defendants reside, that county is the proper place for trial (Code Civ.Proc. § 395) unless convenience of witnesses and the ends of justice would be promoted by a retransfer to Los Angeles County. Change of venue on the ground of convenience lies essentially within the judicial discretion of the judge and his ruling will not be disturbed unless it clearly appears as a matter of law that there has been an abuse of that discretion. *Rios v. Lacey Trucking Co.*, supra, 123 Cal. App.2d 865, 868, 268 P.2d 160; *First-Trust Joint S. L. Bk. v. Meredith*, 16 Cal.App.2d 504, 508, 60 P.2d 1023, 62 P.2d 369. In this instance the showing presented by each side was so inconclusive as to afford little information upon which to base an exercise of discretion. In the circumstances we cannot say there has been a clear abuse of same.

Order affirmed.

FOX, Acting P. J., and RICHARDS, J. pro tem., concur.

156 Cal.App.2d 52

V. O. MATCHETT, Plaintiff and Appellant,
v.

Thomas L. RYERSON et al., Defendants.

Hansen Heights Land Co., Inc., a California corporation, Shadow Hills Land Co., Inc., a California corporation, and Mildred Biddle, Defendants and Respondents.

Martin WEISEL, doing business as Sunland Lumber Company, Plaintiff and Appellant,

v.

Thomas L. RYERSON et al., Defendants.

Hansen Heights Land Co., Inc., a California corporation, Shadow Hills Land Co., Inc., a California corporation, and Mildred Biddle, Defendants and Respondents.

Civ. 22623.

District Court of Appeal, Second District,
Division 1, California.

Dec. 12, 1957.

Actions to foreclose mechanic's liens. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., dismissed complaints on ground that actions had not been brought to trial within five years after filing of complaints, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that where default judgments had been obtained and set aside period during which default judgments were in existence should not be included in five year period and that time of concealment of defendants as found in orders for constructive service was time during which it was for all practical purposes impossible or futile to go to trial, and such time should not be included in five year period.

Reversed.

I. Dismissal and Nonsuit ⇨60(2)

Period during which default judgment was in existence could not be included in determining whether action was subject to dismissal on ground that it had not been brought to trial within five years after plaintiff had filed action. West's Ann.Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇨71

Attorney's affidavit averring that plaintiff had not called him to obtain address of individual defendant who had been his secretary, and that plaintiff had never contacted attorney to obtain names and addresses of officers and directors of corporate defendants which he had incorporated, was insufficient to support finding that there had been no concealment in view of prior orders for constructive service stating that individual defendant could not be found within state and authorizing service upon Secretary of State upon corporate defendants. West's Ann.Code Civ.Proc. § 583.

3. Judgment ⇨174

Where summons was served by publication upon individual defendant and by service upon Secretary of State upon corporate defendants, and service was never quashed and order permitting service was never set aside, setting aside of default judgment and granting of permission to answer, did not open to question the validity of service, the order as to its method, or the finding that defendants had concealed themselves to evade service upon which that order was based. West's Ann.Code Civ. Proc. § 583.

4. Dismissal and Nonsuit ⇨60(6)

Time that defendants concealed themselves to evade service, as found in orders for constructive service, was time during which it was for all practical purposes impossible or futile to go to trial, and such time would not be included in determining whether action should be dismissed on ground that it had not been brought to trial within five years after plaintiff had filed its action. West's Ann.Code Civ.Proc. § 583.

5. Dismissal and Nonsuit ⇨60(6)

It is not purpose of statute providing that action shall be dismissed unless brought to trial within five years after plaintiff has filed his action to sanction a penalty on innocent plaintiff for delay caused by unfair tactics of defendant who would benefit by dismissal. West's Ann.Code Civ.Proc. § 583.

Jacob U. D'Angelo, Los Angeles, for appellant Matchett.

Benjamin P. Riskin, Los Angeles, for appellant Weisel.

R. Norman Wenzell, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs Matchett and Weisel appeal from the minute order of December 18, 1956, dismissing their respective actions which had been consolidated for trial. The actions were dismissed under the provisions of the Code of Civil Procedure, Section 583, that actions "shall be dismissed * * * unless * * * brought to trial within five years after the plaintiff has filed his action, except * * * where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five year period * * *".

The complaints in both actions are to foreclose mechanics liens on the same lands. All respondents are named as defendants in the complaint wherein it is alleged that the respondent Mildred Biddle and other named defendants are engaged in the real estate business under the "common names and styles of Hidden Hills Land Co. and Hansen Heights Land Co."; that said respondents were at all times (along with the other named and unnamed defendants) the owners of the real property described in the complaint; that the lien recorded named defendant Thomas L. Ryerson as "owners and reputed owners" of said real property; and that the other defendants "have or claim an interest" therein. The prayers are for judgment for the amounts of the materials and labor employed upon the property plus the cost of recording the various liens, for the sale of the property and application of the proceeds to the payment of the judgments. The two actions from which these appeals were taken were consolidated for trial with

other actions also seeking to foreclose liens on the same property.

The Matchett complaint was filed August 20, 1951, 5 years, 3 months and 28 days before it was dismissed. The Weisel complaint was filed May 23, 1951, 5 years, 7 months and 25 days before its dismissal. The respondents' defaults were entered in both actions on March 7, 1955. The defaults were set aside on August 25, 1955, and respondents' answers were, in September, 1955, filed pursuant to stipulation. On April 16, 1956, appellants filed their setting memorandum.

[1] The default judgments against the appellants existed from March 7, 1955, the date of their entry, until August 25, 1955, the date upon which they were set aside, or five months and 18 days. The actions could not have been tried during that time, and therefore it cannot be included in the "five years" pendency requiring their dismissal. *Reeves v. Hutson*, 144 Cal.App.2d 445, 453-454, 301 P.2d 264, not cited by either party; Code of Civil Procedure, Section 583.

The time during which the Matchett action could have been brought to trial before its dismissal, as a matter of law, was at least one month and 28 days short of five years, and the order dismissing it must, therefore, be reversed.

The Weisel complaint having been filed May 23, 1951, excluding the time during which it was impossible to try it because of the existence of the default judgment, had been pending five years, two months and seven days when it was dismissed.

The order granting the motion for dismissal from which the instant appeals are taken includes findings "that there has been no absence from the state, no concealment and no stipulation in writing as required by Section 583 of the Code of Civil Procedure to prevent dismissal", and that "there are no circumstances to warrant a holding that proceeding to trial would have been impossible, impracticable or futile". Those findings not only disregard the impossi-

bility of proceeding to trial during the existence of the default judgment, but also completely ignore the previous findings of the court to the contrary.

On July 1, 1954, the court made and filed its Order for Publication of 2nd Alias Summons on Amended Complaint, stating therein "it satisfactorily appearing" from certain affidavits that respondent Mildred Biddle "cannot after due diligence be found within this State" and that personal service cannot be made upon said respondent "for the reasons hereinbefore contained, and by said affidavit made to appear". The affidavits supporting said order for publication show diligence in searching for said respondent from the filing of the action on August 20, 1951 to and including July 1, 1954, or a period of two years, ten months and 20 days and support the finding that said respondent was concealing her whereabouts in order to evade service of summons.

Summons was served by publication upon respondent Biddle and by service upon the Secretary of State upon the corporate respondents. Their defaults were entered March 7, 1955. Those services were never quashed. Nor were the orders permitting them ever set aside. On August 25, 1955, motion of respondents to set aside their defaults was granted "as per stipulation".

Notice of motion to dismiss filed October 15, 1956, stated that the motion would be based upon "the ground that plaintiff has failed for five years after the action was filed to bring the action to trial" and that the motion was based upon the pleadings, papers, records and files in the action. The notice is accompanied by "points and authorities" but no affidavit.

October 22, 1956, affidavit in opposition to said motion was filed by appellant V. O. Matchett and stated that upon the hearing of motion to vacate default "it was stipulated in court that answers might be filed" for respondents. He further avers "that for a period of two or more years, the exact periods of time being unknown to affiant the addresses or whereabouts of

many of the defendants" including the respondents "were unknown to plaintiff and could not be discovered with due diligence. Affiant alleges that these defendants concealed themselves within the state to avoid service of process. That the details of such concealment and the efforts to locate said defendants are set out more particularly in affiant's affidavit of August 23, 1955, affidavits of Benjamin P. Riskin of March 31, 1955, and affidavits filed upon motion for leave to serve said corporations by serving the secretary of state and for leave to serve the other defendants by publication, all filed in the above entitled action".

"Counter Affidavit in Support of Motion for Dismissal" of R. Norman Wenzel, attorney for respondents, was filed October 24, 1956. It includes the averment "that defendant Mildred Biddle was my secretary for two or three years; that the attorney for plaintiffs at no time ever called me to obtain her address; * * * that he (affiant) was the attorney who incorporated said corporations; that at no time was he ever contacted to obtain the names and addresses of the officers and directors, and your affiant positively denies that said corporations, or Mildred Biddle, ever concealed themselves to avoid service of summons".

[2] Keeping in mind the findings to the contrary contained in the orders for service of summons by publication and upon the Secretary of State, and also the fact that one's attorney (or employer) may know his whereabouts when he is concealing himself to avoid service of process, we consider Attorney Wenzel's affidavit insufficient to support the finding included in the order of dismissal from which this appeal was taken.

[3,4] The setting aside of the default judgment and granting of permission to respondents to answer, under the facts of the instant action, did not open to question the validity of the service, the order as to its method, or the finding that respondents concealed themselves to evade service upon which that order was based. The time of concealment of respondents so found in

the orders for constructive service is time during which it was "for all practical purposes" impossible or futile to go to trial. *Christin v. Superior Court*, 9 Cal.2d 526, 533, 71 P.2d 205, 112 A.L.R. 1153; *Judson v. Superior Court*, 21 Cal.2d 11, 14, 129 P.2d 361.

[5] It is not the purpose of the statute to sanction a penalty on the innocent plaintiff for delay caused by the unfair tactics of the defendant who would benefit by dismissal. *Christin v. Superior Court*, supra, 9 Cal.2d 532, 71 P.2d 205.

The orders are reversed.

FOURT, J., and DRAPEAU, Justice pro tem., concur.



155 Cal.App.2d 789

Myrtle May DUNN, Alvin D. Dunn and Citizens National Trust & Savings Bank of Los Angeles, Executors of the Estate of A. M. Dunn, Deceased, and Myrtle M. Dunn, Plaintiffs and Appellants,

v.

COUNTY OF LOS ANGELES, a Body Corporate and Politic, and the Texas Company, a corporation, Defendants and Respondents.

Civ. 22043.

District Court of Appeal, Second District,
Division 3, California

Dec. 6, 1957.

Rehearing Denied Jan. 3, 1958.

Hearing Denied Jan. 28, 1958.

Action for declaratory relief, to quiet title, for damages for inverse condemnation and for an accounting. From adverse judgment of the Superior Court, Los Angeles County, Walter R. Evans, J., the plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that where oil was discovered in 1950 on land conveyed to county for prison farm purposes in 1939, action filed in 1955 by former property

owners was barred by five-year statute of limitations if the action was regarded as one to recover oil rights and by three-year statute of limitations if it was regarded as an action to recover for trespass upon or injury to real property or for fraud or mistake.

Judgment affirmed.

1. Counties ⚭104

Under statute authorizing county to condemn or purchase land for industrial farm and under statute providing that a county acquires a fee simple when land is taken for public use for public buildings or grounds or for permanent buildings and an easement, when taken for any other use, deed to land purchased by county for prison farm conveyed fee title to land and not only an easement. West's Ann.Code Civ.Proc. § 1239; West's Ann.Pen.Code, §§ 4100-4135.

2. Mines and Minerals ⚭47

A fee title to property includes the oil rights.

3. Mines and Minerals ⚭48

"Oil rights" are the exclusive right to drill for and produce oil from the land.

See publication Words and Phrases, for other judicial constructions and definitions of "Oil Rights".

4. Deeds ⚭70(3)

Statement by county agent, that property owners could not reserve mineral rights under any conditions for reason that property was to be used as prison farm and that in order to protect property for that purpose, no prospecting or drilling for oil could be made thereon, made, at time when condemnation proceedings and establishment of prison farm were being discussed, was only an opinion and could not be considered a misstatement of law, and deed conveying land was not void by reason of such representation. West's Ann.Pen.Code, §§ 4100-4135.

5. Mines and Minerals ⚭48

Oil rights are an interest in real property.

6. Limitation of Actions ⚭19(1), 32(1), 37(2)

Where oil was discovered in 1950 on land conveyed to county for prison farm purposes in 1939, action filed in 1955 by property owners seeking declaratory relief, to quiet title, for damages for inverse condemnation and for an accounting, was barred by five-year statute of limitations if action was regarded as one to recover oil rights and by three-year statute of limitations if it was regarded as an action to recover for trespass upon or injury to real property or for fraud or mistake. West's Ann.Pen.Code, §§ 4100-4135; West's Ann.Code Civ.Proc. §§ 319, 338, subds. 2, 4.

7. Limitation of Actions ⚭16

The nature of the right sued upon and not form of action nor relief demanded determines applicability of statute of limitations. West's Ann.Code Civ.Proc. §§ 319, 338, subds. 2, 4.

8. Limitation of Actions ⚭18

Period of limitations applicable to ordinary actions should be applied in like manner to actions for declaratory relief. West's Ann.Code Civ.Proc. §§ 319, 338, subds. 2, 4.

9. Pleading ⚭291(2)

Where plaintiffs did not file an affidavit denying genuineness and due execution of oil lease between plaintiffs and one of defendants, attached to answer, genuineness and due execution of oil lease were admitted. West's Ann.Code Civ.Proc. § 448.

10. Mines and Minerals ⚭54(1)

Fact that county agent informed property owners that county had right to maintain a condemnation proceeding to acquire their land for a prison farm and that such a proceeding would be costly did not constitute a ground for declaring the deed void as a conveyance of the oil rights. West's Ann.Pen.Code, §§ 4100-4135.

11. Limitation of Actions ⚭39(7)

In action by property owners for declaratory and other relief in connection with purchase by county of farm owned by plaintiffs, who contended that they sold

under threat or coercion of costly condemnation proceedings, action commenced about sixteen years later was barred by four-year period of limitation. West's Ann. Code Civ.Proc. § 343.

12. Mines and Minerals ⚡54(1)

Deed conveying land to county for prison farm purposes for price based on value of land for agricultural purposes was not void as a conveyance of oil rights. West's Ann.Pen.Code, §§ 4100-4135.

13. Estoppel ⚡78(3)

Where oil and gas lease between property owners and oil company covering 150 foot strip of land referred in several places to oil and gas lease between oil company and county, which had purchased tract of land from property owners for prison farm purposes, and royalty payable to property owners under lease with oil company was based upon production of oil and gas from such strip and from land leased by county to oil company, property owners were estopped to claim as against oil company that deed to county did not convey oil rights. West's Ann.Pen.Code, §§ 4100-4135.

Courtney L. Moore, San Francisco, for appellants.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent Los Angeles County.

J. A. Tucker, Buford W. Max and R. K. Barrows, Los Angeles, for respondent the Texas Co.

PARKER WOOD, Justice.

Appeal by plaintiffs from a judgment for defendants in an action for declaratory relief, to quiet title, for damages for inverse condemnation, and for an accounting.

On July 7, 1939, plaintiffs A. M. Dunn and Myrtle M. Dunn, husband and wife, executed a deed which recited that they granted to the county of Los Angeles certain real property. On July 11, 1939, the board of supervisors of said county accepted the

deed and on July 20, 1939, the deed was recorded in the office of the county recorder. On April 20, 1950, the county, as lessor, and the Texas Company, as lessee, executed an oil and gas lease which contained a provision that the Texas Company had the exclusive right to drill for and produce oil upon the property. About August 22, 1950, oil was discovered by the Texas Company and since said date oil has been produced from wells upon said property in large quantities. On August 19, 1955, Mr. Dunn and Mrs. Dunn commenced this action. Defendants are the County of Los Angeles and the Texas Company. In various places in the complaint the word "plaintiff" appears without any designation as to which plaintiff is referred to. (Apparently that word was intended to refer to plaintiff Mr. Dunn.)

The allegations of the first cause of action (for declaratory relief) were, in part, as follows: Plaintiff A. M. Dunn was the owner of a 1400-acre ranch situated near Newhall. About 1937 the board of supervisors of said county voted to acquire land for a prison farm. The ranch of said plaintiff was selected by the county as the best site for the prison. In 1937, appraisers employed by the county appraised the ranch, for agricultural purposes, at approximately \$100 per acre. The county, through its agents, demanded that plaintiff sell his property to the county upon the basis of the appraisal of \$148,000. The county, through its agents, "threatened the said plaintiff that unless said sale was made they would condemn said property, which condemnation would be costly to said plaintiff" and "would unquestionably result in the plaintiff receiving less for his property than the amount offered." At the time of the negotiations between plaintiff and the agents of the county there had been some exploration for oil and gas several miles north of plaintiff's property, but there had been no exploration for oil upon plaintiff's land, and no oil or gas had been developed on plaintiff's land or in the vicinity thereof. Plaintiff advised the county that the price offered by the county was solely upon an agri-

cultural basis and did not include the oil potential, and he believed that oil and gas were on his said property even though no oil had been developed at that time. Plaintiff repeatedly requested that the county permit him to retain the mineral rights, but the county refused such requests. Plaintiff then proposed that he be permitted to retain one-half of the mineral rights with the stipulation that he be permitted to drill upon the land "only with the written permission of the defendant county at locations to be designated by said county." The county would not agree to the proposals and refused to offer the plaintiff additional compensation for his property, other than the price based on agricultural use. The "agents of defendant county" advised plaintiff that he could not reserve the mineral rights under any conditions for the reason that the property was to be used as a prison farm and that in order to protect the property for that purpose that no prospecting or drilling for oil could be made thereon." Such representations were false, and the county and its agents knew that such representations were false at the time they were made. Plaintiff relied upon said representations. Shortly after the county acquired the property of the plaintiff, the county entered into oil and gas leases with various oil companies, whereby exploration for oil, including drilling operations, was conducted at various places upon the ranch. Plaintiff was unable to obtain the agreement of the agents of the county that he retain the oil and gas rights or any portion of same under any terms or conditions. "[R]elying upon the false and fraudulent representations that a prison farm could not be conducted if the exploration for oil was conducted thereon, and by reason of the threats made by the agents of the defendant county that they could force him to convey his land by condemnation action, plaintiff by reason of the fraudulent misstatements and threats of condemnation, entered into a lease and option agreement, whereby defendant county was given a lease for a period of five years of the following described property: * * [legal description of property stated in

complaint]." Said lease and option agreement provided that the county would have the option to purchase the land at any time within such five year period for the agricultural evaluation of the land in the amount of \$148,000. The county thereafter exercised such option and "purchased such property by a deed dated July 7, 1939," which deed was accepted by the board of supervisors on July 11, 1939, and was recorded July 20, 1939. The county was not authorized by any of the general provisions of the law of the State of California to acquire land for a prison farm. It was necessary for the county to obtain special legislation in order to acquire land for such purpose. A special statute, Chapter 843 of the Statutes of 1921 (a copy of which is attached to the complaint), was passed, which statute created the sole authority for the board of supervisors to acquire the land for the prison farm. Such statute specifically and solely authorized the board of supervisors to acquire land solely for the purpose of a prison farm and only so many acres of land suitable for agricultural purposes as should be necessary for such farm "as set forth in the statute" and for no other purpose. No part of the gas or oil underlying said property was necessary or appropriate for the purposes of said prison farm or for the purpose of any other legitimate public use, and the county was without any right to acquire rights to said oil and gas. Since the acquisition of said property from plaintiff, the county has received bonuses of approximately \$500,000 from oil companies for oil and gas leases. About August 22, 1950, oil was first discovered on said land by the defendant the Texas Company under an oil and gas lease between said company and the county, under which lease the Texas Company had the exclusive right to drill for and produce oil upon said land, and under which lease the county received one-sixth of the gas and oil produced therefrom. Since August 22, 1950, oil has been produced from said land in large quantities. The total compensation paid by the county for the land was \$148,000. The reasonable value of such property, including oil, gas and

other hydrocarbons and minerals underlying the land at the time of acquisition by the county, was in excess of \$100,000,000.

Further allegations of the first cause of action were: Plaintiff A. M. Dunn is informed and believes that the value of the oil taken from said property to date by the Texas Company exceeds \$21,000,000; the amount of royalties paid to the county is in excess of \$3,500,000; and defendants continue to produce oil from said land and will continue to do so for many years at the rate of approximately \$4,500,000 "worth of oil" per year.

Further allegations of the first cause of action were: An actual controversy exists between plaintiff and defendants in that: (a) Plaintiff contends that the county was without any right to take any interest in plaintiff's land beyond that necessary for the use of said land for agricultural purposes, and the county had no right to acquire any of the oil and gas underlying said land, whereas the defendants contend that the county had a right to acquire by purchase or otherwise the entire fee, including the oil and gas. (b) Plaintiff contends that he has at all times been the owner of the minerals, including oil, gas and other hydrocarbons underlying said land, and that the county was without right to enter into a lease respecting such minerals with the Texas Company, whereas the defendants contend that said oil and gas lease is valid and that the Texas Company has all the rights of a lessee under the lease. (c) Plaintiff contends that the Texas Company and other defendants at all times have been and now are without any right in taking oil from the land. (d) Plaintiff contends that the county had no right to enter into any lease with the Texas Company, and that the Texas Company could not and did not obtain any right in connection with the property or the oil and gas by virtue of a lease from the county "which had no right or authority to execute such lease," and the defendants hold any profits taken from said land as constructive trustees for plaintiff and are obligated to account to plaintiff for the reasonable value of all such oil that has

been taken, whereas the defendants contend that they are entitled to all oil taken from the land and are under no obligation to account for its value. (e) Plaintiff contends that the county is obligated to account to plaintiff for all purported royalties received by it for oil produced from the land, and that the county holds purported title to the oil and gas underlying such land as constructive trustee for plaintiff and that the county is obligated to reconvey such oil and gas rights to plaintiff, whereas the county contends that it is entitled to all such royalties and is not obligated to account to plaintiff or to reconvey such oil and gas rights.

A further allegation of the first cause of action was: About August 18, 1955 (the day preceding the filing of the complaint) plaintiffs filed a claim in writing with the board of supervisors for the damages and demands set forth in the complaint.

The second cause of action (to quiet title) incorporated, by reference, the allegations of the first cause of action (declaratory relief), except the allegations as to the controversy between plaintiffs and defendants. The second cause of action alleged further: Plaintiff is and at all times mentioned in the complaint was the owner and entitled to the possession of all the oil and gas underlying the land. Defendants claim an interest therein adverse to the plaintiff; the claims of the defendants are without right; and that the defendants have no right or interest in the oil and gas underlying said premises.

The third cause of action (for damages for inverse condemnation) incorporated, by reference, the allegations of the first cause of action, except the allegations as to the controversy between plaintiffs and defendants. The third cause of action alleged further: The county has taken property of plaintiff, namely, the oil and gas underlying the land, without just compensation having first been made or paid into court for plaintiff. The value of the oil and gas and other hydrocarbons underlying said land was not included in the price established by the appraisers, and such price included only the

value of the property for agricultural purposes. The value of such oil and gas, including the oil and gas heretofore produced from said land, is in excess of \$100,000,000.

The fourth cause of action (for an accounting) incorporated, by reference, the allegations of the first cause of action, except the allegations as to the controversy between plaintiffs and defendants. The fourth cause of action alleged further: The defendants have acquired and hold the rights to the oil and gas underlying said property and all income derived from the exploitation of such oil and gas rights and the development thereof in trust as constructive trustees for the use and benefit of plaintiff and are obligated to account to plaintiff for the value of all the oil and gas taken from the land by the defendants.

The prayer was for a declaration of the rights of the parties; an accounting for the oil and gas taken from the property, and for the proceeds therefrom; a decree quieting plaintiffs' title to the oil and gas and other minerals underlying the property; and for \$50,000,000 damages.

The county demurred to the complaint upon the following grounds: the complaint did not state facts sufficient to state a cause of action; and each cause of action stated is barred by sections 318, 319, 338 (subdivisions 2 and 4), and 343 of the Code of Civil Procedure. The demurrer was sustained without leave to amend as to the second, third and fourth causes of action, but was overruled as to the first cause of action (declaratory relief).

The answer of the county alleged, among other things, that the cause of action for declaratory relief was barred by certain sections of the Code of Civil Procedure (being the same sections which are designated in its demurrer); that plaintiffs had been guilty of laches and unreasonable delay in bringing the action; and that plaintiffs are estopped to prosecute the action.

The answer of the Texas Company alleged, among other things, as follows: Each of the causes of action set forth in the complaint is barred by sections 336 and

338, subdivisions 2 and 4, of the Code of Civil Procedure, and by laches. Plaintiffs are estopped "from making" the claims set forth in the complaint as against said defendant in that about June 7, 1950, plaintiffs, in consideration of \$3,614.73 paid to them by said defendant, executed and delivered to said defendant a written instrument (a copy of which was attached to the answer) whereby plaintiffs leased to said defendant the exclusive right to explore for and take oil, gas and other hydrocarbons from a 150-foot strip of land referred to in the complaint and excluded from the land description in the complaint; in the written instrument (lease of the strip) reference was expressly made to the oil and gas lease, dated April 20, 1950, between the county and the Texas Company; plaintiffs knew at the time of leasing the strip that the only method by which the strip could be developed for oil was by drilling wells on the land leased by the county to the Texas Company; the lease of the strip provided that the term of the lease granted therein was for 20 years and so long thereafter as oil or gas or other hydrocarbons are produced from the strip or from the land leased by the county to the Texas Company; the lease of the strip also provided that the Texas Company should pay to plaintiffs .297 of one per cent of the market value of all oil, gas, or other hydrocarbons produced from the land leased by the county to the Texas Company and from said 150-foot strip.

The Texas Company filed an amendment to its answer and attached thereto a copy of a grant deed from plaintiffs to the county. The amendment alleged that the copy of the deed attached was a copy of the deed referred to in the complaint, and that plaintiffs executed and delivered said deed to the county on or about the day of its date (July 7, 1939).

The county made a motion (1) for a judgment of dismissal under section 1061 of Code of Civil Procedure (which section provides that the court may refuse to declare rights); (2) for judgment on the pleadings; and (3) for a summary judgment. The county filed, with its notice of said mo-

tion, an affidavit of James S. Allison. Copies of the following documents were attached to the affidavit: a notice of intention of the board of supervisors (dated June 6, 1939) to purchase the property described in the complaint; an affidavit of publication of such notice; a deed dated July 7, 1939, executed by Mr. Dunn and Mrs. Dunn which recited that they granted to the county the property described in the complaint; and an order of the board of supervisors accepting the deed. The affidavit states that Mr. Allison is the chief clerk of the board of supervisors, and that the copies of the documents attached to the affidavit are copies of the originals of said documents which are on file with said board.

The Texas Company made a motion for judgment on the pleadings.

The motion of the county for judgment on the pleadings and for a summary judgment, and the motion of the Texas Company for judgment on the pleadings, were granted. A document entitled, "Judgment of Dismissal and Declaratory Judgment," was entered on March 30, 1956. The judgment, after reciting that the demurrer of the county had been previously sustained without leave to amend as to the second, third, and fourth causes of action, stated that plaintiffs take nothing as against the county or the Texas Company on the second, third and fourth causes of action; "that the plaintiffs are not, and neither of them is, the owner of or has any right in or to the oil, gas, or other hydrocarbons underlying the land described in plaintiffs' complaint"; and that neither the county nor the Texas Company holds or has held any of the profits from the land for or on behalf of the plaintiffs or either of them. Plaintiffs appeal from the judgment.

Mr. Dunn died on January 21, 1957, and Myrtle May Dunn, Alvin D. Dunn and Citizens National Trust and Savings Bank of Los Angeles, as "Executors" of the Estate of Alvin M. Dunn, were substituted "as plaintiffs and appellants" in place of A. M. Dunn.

Appellants contend (1) that the deed from the Dunns to the county conveyed

no more than the county could condemn, that is, the deed conveyed an easement for use of the surface only and did not convey the fee title including the oil rights; and (2) that "if the deed actually conveyed the fee simple, including the oil rights, then it was of no effect and invalid for it was obtained by a mutual misunderstanding of the law, coupled with coercion practiced by the county and, in addition, was invalid because of constitutional prohibitions."

The oil, gas, and other hydrocarbons and minerals underlying the land will be referred to as the oil rights.

With reference to their contention that the deed to the county conveyed an easement for the use of the surface only and did not convey the fee title, appellants argue that the county in obtaining the deed acted under the Industrial Farm Act, and under that act the only interest the county could acquire by purchase or condemnation was an easement for use of the surface for farming (and jail) purposes; and that the deed did not convey a greater estate than the act authorized the county to acquire.

[1] The act, referred to by appellants as "Industrial Farm Act" (Stats.1921, ch. 843, p. 1615; now Pen.Code, §§ 4100-4135), in effect at the time plaintiffs executed the deed, was entitled, "An act providing for the establishment and administration of industrial farms or industrial road camps in the counties of the state and the commitment thereto and discipline of persons charged with or convicted of public offenses." The act provided, in part, as follows: "Section 1. In each county of this state an industrial farm * * * may be established under the provisions of this act. * * * Sec. 4. * * * For the purpose of establishing such farm the board of supervisors may acquire by condemnation, purchase, lease or donation as many acres of land suitable for agriculture as may be necessary for the purposes of such farm. * * * The board of supervisors shall erect on such land such buildings and structures and make such improvements

* * * as may be necessary or convenient to carry out the purposes of this act. * * *

Sec. 5. When said land has been acquired and such buildings and structures erected and improvements made * * * the board of supervisors shall adopt a resolution proclaiming that an industrial farm * * * has been established in the county * * *."

In *People v. Cockrill*, 62 Cal.App. 22, at page 33, 216 P. 78, at page 83, the court said: "The word 'purchase' has a definite and well-understood juridical meaning. * * * and, when used for the purpose of characterizing a transaction involving property of any kind, it is readily to be understood therefrom that there has been an acquisition by one or more parties of the title to such property." In *McCarty v. Southern Pacific Co.*, 148 Cal. 211 at page 221, 82 P. 615, at page 617, the court said: "It may be granted that where the statute in terms provides for the condemnation of the 'land' or of 'lands' for the public uses and purposes, or where any equivalent term is used, it will usually be construed to authorize the taking of the fee." In *Crockett Land & Cattle Co. v. American Toll Bridge Co.*, 211 Cal. 361, 295 P. 328, plaintiff's land had been taken by condemnation for an approach to a toll bridge, and the bridge company had built houses under the floor level of the bridge and used them in connection with the operation of the bridge. About three years after the condemnation decree, the plaintiff commenced an action to recover possession of the land (and claimed the right to occupy the houses), on the theory that the condemnation did not vest the fee title of the land in the condemner, and that the bridge company acquired only an easement in the land—that the bridge company did not have the right to condemn the fee but had the right to condemn only an easement. In that case the court said 211 Cal. 364, 295 P. at page 329: "The law is that, where the statute in terms provides for the condemnation of lands for public use, it will be construed to authorize the taking of the fee." It was held therein that the fee title was condemned and that plaintiff was not entitled to occupy the houses. The

act, referred to as the Industrial Farm Act, authorized the board of supervisors to acquire by purchase or condemnation "as many acres of land suitable for agriculture as may be necessary for the purposes of such farm." (Appellants do not contend that the land was not suitable for agriculture.) Appellants argue further to the effect that the condemnation provisions of said act are to be considered in connection with the provisions of section 1239 of the Code of Civil Procedure which relates to condemnation generally; that under said section 1239 (as it read in 1921, when it was adopted, and in 1939, when negotiations were had with the Dunns) the county could not acquire the fee title to the property for a prison farm but could acquire only an easement for that purpose. Section 1239 of the Code of Civil Procedure, as it read in 1921 and in 1939, was in part, as follows: "The following is a classification of the estates and rights in land subject to be taken for public use: 1. A fee simple, when taken for public buildings or grounds, or for permanent buildings * * * or when the property is taken by any * * * county, * * * 2. An easement, when taken for any other use * * *." Section 1239 of the Code of Civil Procedure did not limit the interest the county could acquire in land for a prison farm to an easement. The county was empowered to acquire the fee title to the land by condemnation. There was no condemnation proceeding herein, but reference is made to condemnation for the reason appellants argue that the county could not acquire more by the deed than it could by condemnation, and that by condemnation it could acquire only an easement. Appellants' contention that the deed conveyed only an easement is not sustainable.

[2-4] With reference to appellants' contention to the effect that the deed was void as a conveyance of the oil rights, appellants argue that oil rights are separate and distinct property from the surface of the land and have no public use, and therefore the county could not have taken the oil rights by condemnation or purchase. They argue further that the representation that the

Dunns could not under any conditions reserve the oil rights was a misstatement of law, and since the Dunns executed the deed in reliance upon such representation, the deed was void as a conveyance of the oil rights. As above stated the county was empowered to acquire the fee title by condemnation or purchase. A fee title to property includes the oil rights. Oil rights are defined as the exclusive right to drill for and produce oil from the land. See *Bernstein v. Bush*, 29 Cal.2d 773, 778, 177 P.2d 913; *Delaney v. Lowery*, 25 Cal.2d 561, 571, 154 P.2d 674. The representation to the effect that appellants could not under any circumstances reserve the oil rights was susceptible of various interpretations. The whole representation, according to the complaint, was that the Dunns could not reserve the mineral rights under any conditions *for the reason that the property was to be used as a prison farm* and that *in order to protect the property for that purpose* no prospecting or drilling for oil could be made thereon. The representation should not necessarily be interpreted to mean that as a matter of law the oil rights could not be reserved. It might be interpreted as meaning that as a matter of policy or efficiency in operating a prison farm reservation of oil rights, which might interfere with the security of the prison, should not be allowed. In any event the statement was an opinion given at a time when a condemnation proceeding and the establishment of a prison farm were being discussed. If it was an opinion of law that the county was empowered to acquire the fee title (which would include the oil rights) the opinion was correct. If it was an opinion of law that even though the county could take the fee title by condemnation it was also required as a matter of law to take the oil rights, the opinion was not correct. Even though the county could have taken the fee by condemnation, it was not required as a matter of law to take the oil rights, and it could have allowed a reservation of the rights. However, as a matter of policy or efficiency in preventing the escape of prisoners, the county might have considered that it should not allow a

reservation of oil rights which might interfere with the security of the prison. The reason stated by the county agents (as the reason for not allowing the reservation) indicates that the agents were not giving an opinion as to the law. It cannot properly be concluded that the representation was a misstatement of law or that by reason of such representation the deed was void.

[5-8] Appellants argue further that the taking of the oil rights was not necessary in order to protect the property for use as a prison farm, and that the representation by the county's agents that the taking of the rights was necessary for such protection was false. The county alleged in its answer that the action, insofar as it is based on fraud and mistake, is barred by section 338, subdivision 4, of the Code of Civil Procedure. That section provides that an action for relief on the ground of fraud or mistake must be commenced within three years from the date the cause of action accrued and that the cause of action shall not be deemed to have accrued until discovery by the aggrieved party of the facts constituting the fraud or mistake. In *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, at page 437, 159 P.2d 958, at page 972, the court said: "The provision tolling operation of the statute until discovery of the fraud has long been treated as an exception and, accordingly, this court has held that if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint." See also *English v. City of Long Beach*, 126 Cal.App.2d 414, 421, 272 P.2d 875. The same rule applies to actions for relief on the ground of mistake. See *Goodfellow v. Barritt*, 130 Cal.App. 548, 559, 20 P.2d 740. In the present action, plaintiffs allege, in effect, that in July, 1939, they made and delivered the deed to the county; that about August, 1950, the Texas Company, while acting under an oil lease made by the county, discovered oil on the property, and since that time oil has been produced therefrom. The complaint was filed in August, 1955,

which was more than three years after oil was discovered on the property. Plaintiffs did not allege when they discovered that the county had executed the lease with the Texas Company, or when they discovered that the Texas Company commenced drilling operations on the property, or when they discovered that the Texas Company had found oil thereon. Appellants assert, however, that oil rights are regarded as an interest or estate in real property, and that "an action for recovery of real property must be commenced within five years, even though possession was obtained by fraud or undue influence"; and since the first invasion of plaintiffs' property rights in the oil, through the medium of production of oil, occurred August 22, 1950, and since the complaint was filed August 18, 1955, it was filed within five years after the original trespass. As above stated, the county also pleaded that the action is barred by sections 318, 319, and 338, subdivision 2, of the Code of Civil Procedure. Section 318 provides: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action." Section 319 provides: "No cause of action, or defense to an action arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question within five years before the commencement of the Act in respect to which such action is prosecuted or defense made." Section 338, subdivision 2 (when read in connection with section 335) provides that an action for trespass upon or injury to real property must be commenced within three years. As asserted by appellants oil rights are regarded as an interest in real property. See *Bernstein v. Bush*, 29 Cal.2d 773, 778, 177

P.2d 913; *Standard Oil Co. of California v. J. P. Mills Organization*, 3 Cal.2d 128, 132-133, 43 P.2d 797; *Carlson v. Lindauer*, 119 Cal.App.2d 292, 302, 259 P.2d 925. The complaint alleges that the Dunns executed the deed in July, 1939; and that oil was discovered by the Texas Company about August 22, 1950. The action was commenced August 19, 1955, which was more than sixteen years after the Dunns executed the deed, and about five years after the discovery of oil. If the action be regarded as one to recover oil rights (an interest in real property) it is barred by section 319 of the Code of Civil Procedure (5 years); if it be regarded as one to recover for trespass upon or injury to real property it is barred by said section 338, subdivision 2, (3 years); if it is based on fraud or mistake it is barred by said section 338, subdivision 4, (3 years). "[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations." *Maguire v. Hibernia S. & L. Soc.*, 23 Cal.2d 719, 733, 146 P.2d 673, 680, 151 A.L.R. 1062. "[T]he period of limitations applicable to ordinary actions * * * should be applied in like manner to actions for declaratory relief." *Maguire v. Hibernia S. & P. Soc.*, supra, 23 Cal.2d at page 734, 146 P.2d at page 681.

[9] The Texas Company attached to its answer a copy of the oil lease which said company and the Dunns entered into on June 7, 1950, and in which lease reference was expressly made to the oil lease which the county and said company entered into on April 20, 1950. Section 448 of the Code of Civil Procedure provides: "When the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file * * * an affidavit denying the same * * *." Plaintiffs did not file such an affidavit, and therefore the genuineness and due execution of oil lease (between the Texas Company and the Dunns) were admitted. It appears from

that lease that Mr. and Mrs. Dunn knew on June 7, 1950, that the county and the Texas Company had entered into an oil lease on April 20, 1950, whereby the county had granted the Texas Company the right to drill for and produce oil from the property. It therefore appears that Mr. and Mrs. Dunn knew on June 7, 1950, which was more than five years before the action was commenced on August 19, 1955, that the county was not adhering to its alleged representation "that in order to protect the property for use" as a prison farm no drilling for oil could be made thereon. If the Dunns considered that such representation was fraudulent or was a mistake and that, by reason thereof, they had a cause of action for relief on the ground of fraud or mistake, it appears that they discovered the facts constituting the fraud or mistake more than five years before the action was commenced (i.e., they discovered the facts on June 7, 1950, and the action was commenced on August 19, 1955).

Appellants assert that they could have obviated the contentions as to the statute of limitations, laches, and estoppel by amending the complaint. They state that the amendment would have been to the effect that the plaintiffs continued to rely on the false representations of the county agents, regarding the reservation of oil rights, until about June 6, 1955, when an attorney (not present counsel) informed them that "misrepresentations as to the existing law had been made to them" when the agents said that plaintiffs could not under any condition retain the mineral rights. As above stated, the whole representation, already alleged in the complaint, includes a statement of the reason the oil rights could not be reserved. That reason indicates that the agents were not making a representation as to the law but were stating a matter of policy in operating a secure prison farm. The proposed amendment would merely add to the existing allegations a statement that plaintiffs relied on the presently alleged representation until an attorney informed them to the effect that the representation was a misrepresentation

as to law. The trial court, in determining the matter of an amendment, could consider the statements in the lease between plaintiffs and the Texas Company which established that plaintiffs knew on June 7, 1950 (more than five years before the commencement of the action) that the county had entered into an oil lease with the Texas Company. In view of such knowledge by the plaintiffs, an amendment to the effect that plaintiffs continued thereafter (for more than five years) to rely on the representation that the oil rights could not be reserved would not materially change plaintiffs' position with respect to the issues. During the period of eleven years following the making of the deed by plaintiffs and preceding the making of the oil lease by the county, the plaintiffs apparently did not seek information as to the accuracy of the alleged legal opinion given by the county agents. Also, during a period of approximately five years after plaintiffs knew that the oil lease had been made by the county, they apparently did not seek information as to the accuracy of the alleged legal opinion. It appears that it was after oil was produced in large quantities that plaintiffs received information that there was an alleged misrepresentation as to law.

[10, 11] Appellants contend further that the deed was void as a conveyance of the oil rights because the Dunns executed the deed under threats by the county agents of "costly condemnation proceedings," which threats were a "form of coercion." This contention is not sustainable. The county had the right to maintain a condemnation proceeding, and the fact that the agents said that such a proceeding would be costly would not constitute a ground for declaring the deed void as a conveyance of the oil rights. Furthermore, the county pleaded that the action was barred by section 343 of the Code of Civil Procedure. That section provides that an action for relief not otherwise provided for must be commenced within four years after the cause of action accrued. In *Wade v. Busby*, 66 Cal. App.2d 700 at page 702, 152 P.2d 754, it was said that an action to set aside a deed upon

the ground of undue influence was governed by the four-year period of limitation prescribed in section 343 of the Code of Civil Procedure. In the present case the claim regarding coercion was barred by said section.

[12] Appellants contend further that the deed was void as a conveyance of the oil rights because the purchase price was based on the value of the land for agricultural purposes. The complaint alleged that the option agreement between plaintiffs and the county provided that the county would have the option to purchase the land "for the agricultural evaluation of the land in the amount of \$148,000." This contention is not sustainable.

[13] The Texas Company pleaded: (1) that plaintiffs are estopped to claim as against it that the deed to the county did not convey the oil rights; and (2) that any such claim as against it is barred by laches. It argues, in effect, that plaintiffs acknowledged the validity of the lease between the Texas Company and the county by execution of the lease between plaintiffs and the Texas Company covering the 150-foot strip; that plaintiffs thereby induced the Texas Company to carry on the development of the property in the belief that it held a valid lease; that plaintiffs may not now take a contrary position; and that since it appears from the allegations of the complaint that oil was discovered on the property by the Texas Company about August 22, 1950, plaintiffs' claim is barred by laches. On June 7, 1950, the Dunns and the Texas Company executed an oil and gas lease covering the 150-foot strip, which lease refers in several places to the oil and gas lease between the county and the Texas Company. The royalty payable to the Dunns under the 150-foot strip lease is based upon production of oil and gas from the 150-foot strip and from the land leased by the county to the Texas Company. Appellants are estopped to claim as against the Texas Company that the deed to the county did not convey the oil rights. In view of that conclusion, it is not necessary

to determine whether the claim of appellants against the Texas Company is barred by laches.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.



156 Cal.App.2d 177

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Amella Veronica STEWARD, Defendant
and Appellant.

Cr. 1324.

District Court of Appeal, Fourth District,
California.

Dec. 16, 1957.

Defendant was convicted of murder in the first degree and from a judgment of the Superior Court of San Diego County and from an order denying a new trial, Arthur L. Mundo, J., the defendant appealed. The District Court of Appeal, Waite, J. pro tem., held, inter alia, that evidence supported conviction of murder of the first degree and hence reduction in degree should not be ordered.

Judgment affirmed.

1. Homicide ⚔22(1)

A homicide is murder of the first degree when accused as result of deliberation and premeditation, intended to take unlawfully the life of another. West's Ann. Pen.Code, § 189.

2. Homicide ⚔17

Where person purposely and with deliberate and premeditated malice intends to kill one person but, by mistake or inadvertence, kills another instead, law transfers the felonious intent from object of his

assault, and homicide so committed constitutes first degree murder. West's Ann.Pen. Code, § 189.

3. Homicide Ⓒ269

In prosecution for murder of accused's two and a half year old child, whether killing was the willful, deliberate and premeditated act of accused was for jury. West's Ann.Pen.Code, § 189.

4. Criminal Law Ⓒ1159(2)

To justify reversal of a judgment of conviction the record must clearly show that evidence could not be interpreted as supporting the verdict.

5. Criminal Law Ⓒ1159(2)

While as to all factual issues resolved by jury evidence upon which determination is made is subject to review on question of its legal sufficiency to support the verdict, appellate court may not, in reviewing the evidence, substitute its judgment for that of jury and where there is substantial evidence in support of jury's verdict its determination must be upheld.

6. Homicide Ⓒ22(1), 161

Evidence justifies conviction of murder of first degree if it shows that killing was result of a clear, deliberate and premeditated intent to kill, and in determining that question court is entitled to consider what occurred at time of killing, if indicated by the evidence, as well as what was done before and after that time. West's Ann.Pen. Code, § 189.

7. Homicide Ⓒ156(1), 171(1), 173

In prosecution for first degree murder for killing of accused's two and a half year old child, circumstances justifying inference that accused was possessed of a willful, deliberate and premeditated purpose to kill deceased, the vicious form of assault, the type of weapon employed and manner of its use, the nature of multiple wounds inflicted and fact that attack was unprovoked were matters which could be considered by jury. West's Ann.Pen.Code, § 189.

8. Homicide Ⓒ21

The absence of motive of killing of accused's child did not require reduction in

degree of murder since the presence or absence of a motive is only one factor to be considered by jury in connection with other factors. West's Ann.Pen.Code, § 189.

9. Homicide Ⓒ145

Evidence that accused without cause or provocation inflicted 38 separate stab wounds upon her two and a half year old child, ranging from the forehead to abdomen, including wounds on face, upper lip, chin, both sides of neck and numerous deep and severe cuts in the chest over the heart, was sufficient to bring case within rule that where one assaults another violently with a dangerous weapon and takes his life presumption is that he intended to cause death or great bodily harm. West's Ann.Pen. Code, § 189.

10. Homicide Ⓒ145

Where assault was made in a manner that was reasonably certain to produce death, and which actually did cause death, the only rational presumption to be drawn therefrom is that assailant intended to take the life of person attacked. West's Ann.Pen. Code, § 189.

11. Homicide Ⓒ146, 152

When a killing is proved to have been committed by defendant, and nothing further is shown, presumption of law is that it was malicious and an act of murder, but in such case verdict should be murder of the second degree and not murder of the first degree. West's Ann.Pen.Code, § 189.

12. Homicide Ⓒ253(1)

Evidence supported conviction of murder of the first degree and hence reduction in degree should not be ordered. West's Ann.Pen.Code, §§ 189, 1181, subd. 6.

John R. Sorbo, San Diego, for appellant.
Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WAITE, Justice pro tem.

Appellant was charged with murder, the information alleging that she did "willfully, unlawfully, feloniously and with mal-

ice aforethought, kill and murder one Carol Steward, a human being." The victim was the appellant's daughter, and was two and a half years of age at the time of her death. Pleas of not guilty and not guilty by reason of insanity were entered, the latter plea being withdrawn before trial. A jury found appellant guilty of murder as charged in the information, determined the degree thereof as murder of the first degree and fixed the penalty at life imprisonment. This appeal is from the judgment and from an order denying a motion for a new trial.

In his opening brief appellant's counsel concedes that substantial evidence supports the jury's conclusion that appellant committed the killing and the only contentions raised on appeal are: (1) That the evidence is insufficient to support the conviction of first degree murder in that no substantial evidence of deliberation or premeditation appears in the record. (2) That because of such insufficiency a reduction of degree should be ordered pursuant to Penal Code, Section 1181, subsection 6.

Although there is considerable conflict in the evidence the salient facts are as follows: Appellant and Mrs. Agnes Hosford had been acquainted for approximately three years from the time they first met in Bremerton, Washington, and after they had moved to the National City area in San Diego County where they lived together. The two women had many differences and on occasion appellant had struck Mrs. Hosford. Mr. James Auerbach, operator of a bar, had frequently seen appellant and Mrs. Hosford in his establishment. The pair argued constantly while in said bar and once in December, 1956, appellant resorted to physical violence against Mrs. Hosford. At that time Mr. Auerbach heard appellant say: "I will kill the Lesbian son-of-a-bitch." Mr. Auerbach never saw Mrs. Hosford attack appellant and it was generally appellant who was the aggressor in the quarrels between the two.

On February 18, 1957, appellant, Mrs. Hosford and three of appellant's children, Carol, aged 2½ years, Sheryl, aged 18 months and Merrill, aged 5 months, were

living together in a house in National City. On that date at about 10:30 p.m. appellant left the house, leaving Mrs. Hosford and the children behind. Appellant went to the Corral, a National City beer bar, where she remained long enough to become acquainted with two sailors in whose company she consumed some beer. Shortly after midnight appellant and the sailors went across the street to the Brown Bear, a bar which served hard liquor, and there appellant consumed some drinks of vodka and orange juice, commonly known as "screw-drivers". The group then returned to the Corral where they remained until shortly before 2 a. m. Appellant meanwhile consumed some more beer. Upon leaving the Corral one of the sailors purchased a bottle of vodka and the three drove together to appellant's house.

When the group arrived at the house Mrs. Hosford was sleeping on a couch in the front room and appellant aroused her, using considerable profanity in doing so. At that time appellant was "probably a little drunk" but she was not staggering and she spoke clearly. After a few minutes one of the sailors left the house went to his car and did not return. Appellant opened the bottle of vodka using a heavy-handed jack-knife type of knife and poured drinks for the group, after which she went into the bedroom and returned with Carol, her daughter, who was wearing a yellow nightgown. Appellant stood Carol on a kitchen chair, lighted a cigarette and placed it in Carol's mouth, forcing her to puff the cigarette by squeezing the back of the child's neck. Immediately after doing this appellant accused Mrs. Hosford of having taught the child to smoke and to indulge in other bad habits, and seizing the knife which she had used to open the bottle of vodka, appellant began jabbing Mrs. Hosford in the chest pulling her hair and cutting her about the face and body. Appellant said: "I am going to cut your heart out and make you eat it" and "You old whore, I ought to kill you" and "I am going to kill you", whereupon the sailor who had remained after the departure of his comrade said: "Oh, oh, I got

in the wrong place". He thereupon retrieved the bottle of vodka and departed to join his colleague in the car and the two of them drove away. Meanwhile Mrs. Hosford had managed to free herself from appellant's grasp, retreated from the house and did not return until about 2 o'clock the following afternoon.

Shortly after 4:45 a. m. on the morning of February 19, 1957, Mrs. Freda Horner, appellant's neighbor, arose to go to work but first went outside to dispose of some garbage. She heard loud sounds from a radio emanating from appellant's house and saw a woman clad in a light colored duster sitting in the kitchen. At about 8 a. m. on the same day appellant went to the house of Mrs. Bonnie Underwood, her next-door neighbor, and said to Mrs. Underwood: "Bonnie, I can't get my baby awake". At the time appellant was wearing a blue duster and her hair was combed. Mr. and Mrs. Underwood accompanied appellant to her house and into the bedroom. Two of appellant's children were in cribs and Carol, the third child, lay in a bed with the bed covers pulled up around her. Carol's eyes were open and there was a gash in her forehead. Mrs. Underwood immediately telephoned Dr. Jacob Teske, a medical practitioner, who arrived at appellant's house shortly after 8 a. m. Dr. Teske went into the bedroom and uncovered Carol, noting that she had a large irregular wound in her left chest, that her face had been slashed and that she was dead. Dr. Teske noticed further that there was not a very heavy concentration of blood either on Carol's "shirt or on the bed sheets". Also there were no noticeable blood stains or spatters on the body and the various wounds were fairly clean. Considering the type of wounds Dr. Teske's opinion was that there should have been more blood.

Officers Owen and Monteer, both of the National City Police Department, arrived at appellant's residence shortly after 8:30 a. m. the same morning. In the kitchen Officer Owen noticed a white cabinet on which there was considerable blood-colored

discoloration which appeared to have been wiped and cleaned. Officer Monteer observed what appeared to be blood stains above the sink, on the walls and on the floor and it appeared that an attempt had been made to clean the area by wiping it. On a shelf were four knives, including a jack-knife type which appeared to have been washed; it was damp inside where the blades closed and near the large blade was a small piece of meaty tissue. The police criminologist later tested the knife and found there was blood on it. Officers Owen and Monteer found on the floor of the bathroom sheets, slips and skirts all with discolorations and stains on them which appeared to be blood and Officer Monteer noticed a large spot of blood in the shower. On the toilet stool they found some garments for a small child and these also were stained and damp and appeared to have been soaked in water. One of the garments was a child's yellow nightgown.

On February 19, 1957, Dr. James Weston, pathologist for the coroner of San Diego County, conducted an autopsy on the body of the dead child. His examination revealed that the body was marked externally by lacerations, scratches and deep and penetrating wounds varying in size from about one-half inch in diameter up to about six inches in diameter and covering an area extending from the forehead over the face, upper lip, chin, both sides of the neck, the medial portion of the chest immediately over the heart and the upper abdomen. The chest wound was in the left chest over the heart where there was a large gaping rent. This wound had penetrated through the cartilage which attaches the ribs to the sternum, had separated the several ribs from the sternum and then extended into the underlying pulmonary tissue or lung and into the heart. It had penetrated the chest cavity and windpipe and the resulting hemorrhage had completely collapsed the left lung. Dr. Weston counted 38 distinct wounds and it was his opinion that the large hole in the left chest represented a series of blows in one area rather than one separate wound. It was further his opinion

that all the wounds were probably caused by a blade-like weapon and that they could have been caused by a knife such as the one found in appellant's kitchen.

On February 19th and the following day Officer Monteer interrogated appellant at the National City Police Station, at which time she told him that she had gone to bed with Carol at approximately 10 or 10:30 on the preceding evening; that she had not gone out that night, had had no visitors and had not awakened until 8 a. m. She said that a cut which appeared on one of her thumbs must have been caused by a pair of scissors while cleaning the cuticle of her nails. When informed that a murder complaint would be lodged against her appellant said nothing and showed no emotion.

At the trial appellant testified that she went to the Corral about 10 or 10:30 on the evening of February 18th where she met two sailors and accompanied them to her home where they talked to Mrs. Hosford. Appellant testified that she and Mrs. Hosford did not argue that night although they had disagreed during the day. According to appellant Mrs. Hosford suddenly started screaming and ran out of the house whereupon one of the sailors said "Oh my God" and both sailors left. Appellant claims that the next thing she remembered was regaining consciousness in the kitchen and seeing two hands holding the end of a knife. She could not see the blade but she grasped the hands and tried to get the knife at which time Carol fell between the white cabinet and the wall. Appellant claims to have picked up the child, taken her into the bedroom and placed her on the bed. Later appellant noticed that the sheets on the bed were wet so she changed the sheets and also changed her clothes and Carol's clothes. Then appellant, according to her testimony, found a knife on the floor so she picked it up and noting that the kitchen was "all messed up" she proceeded to clean it. Appellant testified that she believed she passed out because she was hit on the back of the head and that she did not learn that her daughter was dead until the morning of

February 19th when someone at the National City Police Station told her that fact.

[1, 2] A homicide is murder of the first degree when the accused, as the result of deliberation and premeditation, intended to take unlawfully the life of another. Penal Code, Sec. 189; *People v. Sutic*, 41 Cal. 2d 483, 491, 261 P.2d 241. Appellant concedes that there is ample evidence of deliberation and premeditation here if the victim had been Agnes Hosford and admits that the record would support a conviction of first degree murder if Mrs. Hosford had been killed instead of Carol Steward. But appellant contends that in order to support such a conviction based on the death of Carol Steward it is necessary to resort to the doctrine of transferred intent and that such doctrine does not apply to the facts of this case. The law on the subject of transferred intent is that:

"Where a person purposely and of his deliberate and premeditated malice attempts to kill one person, but by mistake or inadvertence kills another instead, the law transfers the felonious intent from the object of his assault, and the homicide so committed is murder in the first degree." *People v. Suesser*, 142 Cal. 354, 367, 75 P. 1093, 1098; *People v. Sutic*, supra, 41 Cal.2d at pages 491-492, 261 P.2d at pages 245-246.

It is contended that if, for example, appellant had lunged at Mrs. Hosford with the knife and had stabbed Carol inadvertently when Mrs. Hosford stepped aside, the doctrine would apply but that the record is barren of such evidence. We agree with appellant that the facts before us do not warrant the application of the doctrine but we further agree with the respondent that it is unnecessary to resort to such theory and that the rule of transferred intent has no bearing on this case.

[3, 4] Here the jury was fully justified in believing that appellant had deliberately formed an intent to kill and that once Mrs. Hosford had escaped from her grasp appellant then directed her murderous assault

against the child. It is the exclusive province of the jury to determine whether the killing was the wilful, deliberate and premeditated act of the defendant (*People v. Wells*, 10 Cal.2d 610, 624, 76 P.2d 493), and to justify the reversal of a judgment of conviction the record must clearly show that the evidence could not be interpreted as supporting the verdict (*People v. Tedesco*, 1 Cal.2d 211, 219, 34 P.2d 467; *People v. Eggers*, 30 Cal.2d 676, 685, 185 P.2d 1).

[5, 6] While it is true that as to all factual issues resolved by a jury the evidence upon which the determination is made is subject to review on the question of its legal sufficiency to support the verdict (*People v. Holt*, 25 Cal.2d 59, 90, 153 P.2d 21), nevertheless this court may not, in reviewing the evidence, substitute its judgment for that of the jury and where there is substantial evidence in support of the jury's verdict its determination must be upheld (*People v. Smith*, 15 Cal.2d 640, 104 P.2d 510; *People v. Holt*, *supra*; *People v. Eggers*, *supra*). Applying these rules, the evidence justifies the conviction of appellant for murder of the first degree if it shows that the killing was the result of a clear, deliberate and premeditated intent to kill. In determining this question we are entitled to consider what occurred at the time of the killing, if indicated by the evidence, as well as what was done before and after that time (*People v. Eggers*, *supra*, 30 Cal.2d at page 686, 85 P.2d at page 6).

[7, 8] The circumstances of the instant case amply justify the inference drawn by the jury that appellant was possessed of a wilful, deliberate and premeditated purpose to kill the deceased. The vicious form of the assault, the type of weapon employed and the manner of its use, the nature of the multiple wounds inflicted and the fact that the attack was unprovoked all are matters which properly could be considered by the jury. *People v. Isby*, 30 Cal.2d 879, 888, 186 P.2d 405, 411. Also, as the court said in the *Isby* case: "It does not aid defendants * * * to argue that there was no proof of a motive for the killing. The

presence or absence of a motive is only one factor to be considered by the jury in connection with the other factors in the case." This rule applies with equal force in the matter before us and disposes of appellant's contention that absence of motive in the killing of her child requires a reduction in the degree of murder.

[9, 10] Here the evidence conclusively shows that appellant without cause or provocation inflicted 38 separate and distinct stab wounds upon her victim, ranging from the forehead to the abdomen, including wounds on the face, upper lip, chin, both sides of the neck and the numerous deep and severe cuts in the chest over the heart. This evidence is sufficient to bring the case within the rule that "where one assaults another violently with a dangerous weapon and takes his life, the presumption is that he intended to cause death or great bodily harm." 25 Cal.Jur.2d Sec. 29, p. 519. And where, as here, the assault was made in a manner that was reasonably certain to produce death, and which actually did cause death, the only rational presumption to be drawn therefrom is that the assailant intended to take the life of the person attacked. *People v. Isby*, *supra*, 30 Cal.2d at page 889, 186 P.2d at page 410.

[11, 12] It is true that "'when a killing is proved to have been committed by the defendant, and *nothing further is shown*, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree'". (Emphasis ours.) *People v. Wells*, 10 Cal.2d 610, 616-617, 76 P.2d 493, 498. In the instant case, however, *much more* appears than the isolated fact that the deceased was unlawfully killed by appellant, and considering the law, together with the evidence hereinbefore summarized, the conclusion is inescapable that the jury was warranted in its implied finding that appellant committed a wilful, deliberate and premeditated killing within the statutory definition of murder of the first degree.

We conclude that the evidence before us is more than ample to support the conviction of murder of the first degree and that a reduction in degree pursuant to Penal Code, section 1181, subsection 6, should not be ordered.

The judgment and order are affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



155 Cal.App.2d 755

Martin W. LAWSON, Petitioner,

v.

SUPERIOR COURT of the State of California
IN AND FOR the COUNTY OF LOS
ANGELES, Lina W. Rosenbaum, by her
Guardian ad Litem, Sophia Ryno, and
Sophia Ryno, Respondents.

Civ. 22693.

District Court of Appeal, Second District,
Division 2, California.
Dec. 5, 1957.

Proceedings on petition for writ of prohibition (1) to restrain respondent court from proceeding further to enforce an order directing petitioner, under penalty of contempt, to appear and give his deposition in a proceeding for perpetuation of his testimony, and (2) to restrain respondent court from finding petitioner in contempt or punishing him for contempt. The District Court of Appeal, Richards, J. pro tem., held, inter alia, that having been so notified to appear, and having appeared at time originally fixed for taking of his deposition, petitioner could not now be heard to complain of insufficiency of order as to time and manner of giving notice.

Peremptory writ denied and alternative writ discharged.

1. Depositions ⚡32

If application for order to allow examination to perpetuate testimony complies

with civil procedure code section, nothing more is ordinarily required. West's Ann. Code Civ.Proc. § 2084, subd. 3.

2. Depositions ⚡32

Construed as a whole, application to perpetuate testimony of expected adverse party in action to be brought by applicant sufficiently stated a general outline of facts expected to be proved; namely, that intended witness had received various sums of money from applicant, that intended witness held money in trust for applicant, that intended witness was indebted to applicant, et cetera. West's Ann.Code Civ. Proc. § 2084, subd. 3.

3. Depositions ⚡32

Rule of liberal construction applies to application for perpetuation of testimony. West's Ann.Code Civ.Proc. § 2084, subd. 3.

4. Prohibition ⚡11

Having been so notified to appear, and having appeared at time originally fixed for taking of his deposition, petitioner could not be heard to complain, in prohibition proceeding brought to restrain taking of his deposition of insufficiency of order as to time and manner of giving notice. West's Ann.Code Civ.Proc. § 2084.1.

5. Mandamus ⚡26

Prohibition ⚡10(1)

Where a court has no jurisdiction to act except in a particular manner, it may be restrained by prohibition from acting in a different, unauthorized manner, or may be compelled by mandate to act in a particular manner; but for purposes of this rule not every provision of a statute can be considered as jurisdictional rather than merely procedural.

6. Prohibition ⚡11

Prohibition will not lie upon showing of mere procedural error.

7. Depositions ⚡2

Statute invests court with jurisdiction to make order allowing examination for perpetuation of testimony upon presentation to it of an application complying with certain requirements, and further detailed provisions of statute, such as requirement

that order designate clerk of county to whom deposition must be returned when taken, are purely procedural requirements rather than jurisdictional requirements.

8. Prohibition ☞11

Prohibition would not lie to restrain enforcement of order directing petitioner to appear and give his deposition in a proceeding for the perpetuation of his testimony merely because order allowing examination allegedly failed to designate "the clerk of the county to whom the deposition must be returned when taken." West's Ann.Code Civ.Proc. §§ 2084, 2084.1.

9. Prohibition ☞19

Where writ seeks to review, prohibit or compel action by tribunal, respondent is the tribunal as such, and not the judge as a person.

Horrigan & McKnight, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent Superior Court.

RICHARDS, Justice pro tem.

Petition for a writ of prohibition to restrain the respondent court from proceeding further to enforce an order directing petitioner, under penalty of contempt, to appear and give his deposition in a proceeding for the perpetuation of his testimony, and to restrain respondent court from finding petitioner in contempt or punishing him for contempt.

Pursuant to the provisions of section 2084, subsds. 1 and 3, Code of Civil Procedure, Lina W. Rosenbaum, by Sophia Ryno, her guardian ad litem, the real party in interest and erroneously named herein as a respondent, presented to the respondent court her "Application for Order to Perpetuate Testimony," wherein she sought an order directing the examination of petitioner as provided for in section 2084.1, Code of Civil Procedure.

The application states that the applicant expects to be a party plaintiff in an action

to be brought in respondent court and that applicant expects that Martin Lawson, petitioner herein, will be an adverse party in said action.

Petitioner contends that said application is fatally deficient in failing to state, as required by the provisions of said section 2084, subd. 3, "a general outline of the facts expected to be proved"; and that therefore the application was insufficient to confer jurisdiction on the respondent court to make its order directing his examination and its subsequent order that he appear and give his deposition under penalty of contempt.

Whether said application sets forth "a general outline of the facts expected to be proved" must be gleaned, if at all, from paragraphs III and IV of said application, which read as follows:

"III That said action will involve the following issues: (a) Whether expectant adverse party received various sums of money, directly and through his agents, from your applicant. (b) Whether any consideration was given or received for said sums of money. (c) Whether expectant adverse party holds monies in trust for your applicant. (d) Whether expectant adverse party is indebted to your applicant for money had and received. (e) Whether expectant adverse party perpetuated a fraud upon your applicant either directly or by fraudulently obtaining funds and monies from applicant. (f) Whether expectant adverse party conspired with others to do any of the acts or obtain any of the monies enumerated above. (g) Whether expectant adverse party was guilty of malice or oppression in the doing of any of the acts or obtaining of any of the monies enumerated above.

"IV That the expectant adverse party will be a necessary and material witness for your applicant on the trial of said expected action and that his testimony will be material in the following particulars: That the said Martin Lawson has first hand knowledge concerning the various sums of money obtained by him and belonging to your applicant, the circumstances surround-

ing the obtaining of the various sums, the time of obtaining the various sums, and the bailees for applicant from whom said funds were obtained. That he further has knowledge as to the present whereabouts of said funds and disposition thereof, and the persons who are now in receipt of same. He also has first hand knowledge concerning his written admission of the taking of said funds. It is expected that the testimony of the expectant adverse party will prove all of the matters enumerated in paragraph III above."

[1] It has been repeatedly pointed out that the requirements of an application to perpetuate testimony under section 2084 of the Code of Civil Procedure have been greatly simplified in comparison with the former requirements therefor in a bill under the old equity practice; and that, if the application for the order to allow an examination to perpetuate testimony complies with said section 2084, nothing more is ordinarily required. *Kutner-Goldstein Co. v. Superior Court*, 212 Cal. 341, 345, 298 P. 1001; *Strauss v. Superior Court*, 36 Cal.2d 396, 224 P.2d 726; *MacLeod v. Superior Court*, 115 Cal.App.2d 180, 184-185, 251 P.2d 728.

[2] While the application herein is artificially drawn and is not a model of perfection, it cannot be said that the allegations thereof are so wholly deficient that they fail to state "a general outline of the facts expected to be proved" as required under said section 2084, subd. 3.

It is alleged in paragraph IV of said application, as hereinbefore set forth, that: "It is expected that the testimony of the expectant adverse party will prove all of the matters enumerated in paragraph III [of the application]." "To prove" means "to establish or make certain; to establish a fact or hypothesis as true by satisfactory and sufficient evidence" (*Black's Law Dictionary*, Third Edition); and, among the matters enumerated in paragraph III of the application (which applicant so alleges it is expected that the testimony of the expectant adverse party will "prove") are whether

expectant adverse party received various sums of money from the applicant, whether expectant adverse party holds monies in trust for the applicant, whether expectant adverse party is indebted to the applicant, whether expectant adverse party perpetuated a fraud upon the applicant by fraudulently obtaining funds and monies from the applicant, etc.

One of the meanings of the word "whether" is "if it be true" (*Webster's New International Dictionary*, Second Edition), and, as previously pointed out, the word "prove" means "to establish a fact * * * as true." If the allegation "It is expected that the testimony of the expectant adverse party will prove all of the matters enumerated in paragraph III" is to be given any meaning, said allegation can only mean that it is expected that said testimony will prove that it is true that the expectant adverse party received various sums of money from the applicant, that the expectant adverse party holds monies in trust for the applicant, that the expectant adverse party is indebted to the applicant, etc. Although imperfectly stated, we conclude that the allegations of the application construed together as a whole sufficiently state "a general outline of the facts expected to be proved"; namely, that the intended witness received various sums of money from applicant, that the intended witness holds monies in trust for applicant, that the intended witness is indebted to applicant, etc.

[3] The rule of liberal construction of proceedings such as the perpetuation of testimony is well-established. In *Union Trust Co. of San Diego v. Superior Court*, 11 Cal.2d 449, at page 462, 81 P.2d 150, at page 157, 118 A.L.R. 259, it is said: "That the trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method, to the end that the trial of actions may be expedited and justice be more efficaciously and speedily administered, is reflected in many modern decisions, some of which are here noted." In the same opinion

the court, 11 Cal.2d at pages 462-463, 81 P.2d at page 157 quotes with approval from *Main v. Ring*, 219 Iowa 1270, 260 N.W. 859, as follows: “* * * in the consideration of the question (of jurisdiction of the court to make the order) * * * a broad and liberal construction of the pleadings must be adopted and all allegations of the petition must be considered.”

[4] Petitioner additionally contends that the order allowing the examination failed to prescribe “the time and manner of giving notice” as required by the provisions of section 2084.1 of the Code of Civil Procedure; and that, by reason thereof, the said order was and is, and all subsequent proceedings predicated thereon were and are, in excess of jurisdiction and void. It appears however that petitioner was in fact served with subpoena commanding him to appear and give his deposition; that he appeared at said time and place so fixed for the taking of his deposition; and that, on said occasion, he was duly instructed to return on a designated date to which the taking of his deposition was continued, but that thereafter he failed and refused to appear and to give his deposition. Having been so notified to appear and having appeared at the time originally fixed for the taking of his deposition, petitioner cannot now be heard to complain of the insufficiency of the order as to the time and manner of giving notice. *De Luca v. Board of Supervisors*, 134 Cal.App.2d 606, 609-610, 286 P.2d 395.

[5-8] Petitioner finally contends that the order allowing the examination failed to designate “the clerk of the county to whom the deposition must be returned when taken” as also required by the provisions of section 2084.1 of the Code of Civil Procedure; and that, by reason thereof, the said order was and is in excess of jurisdiction and void. Where a court has no jurisdiction to act except in a particular manner, it may be restrained by prohibition from acting in a different, unauthorized manner or may be compelled by mandate to act in a particular manner. *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 109 P.2d

942, 132 A.L.R. 715; *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 171 P.2d 8. However, the rule enunciated in the cited cases cannot reasonably be understood as holding that every detailed provision of a given statute is a jurisdictional rather than a procedural requirement. Accordingly where the statute as herein invested the court with jurisdiction to make an order allowing the examination upon the presentation to it of an application complying with the requirements of said section 2084, the further detailed provisions of said statute, such as the requirement that said order designate the clerk of the county to whom the deposition must be returned when taken, are purely procedural requirements rather than jurisdictional requirements; and prohibition will not lie upon a mere showing of procedural error. Illustrative of this is *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15, wherein a writ of prohibition was sought to restrain the superior court from proceeding in an action in eminent domain in which the petitioner had voluntarily appeared. The asserted lack of jurisdiction was predicated upon the failure to issue a summons upon the filing of the complaint as required by section 1243 of the Code of Civil Procedure. It was held that the trial court acquired jurisdiction of the subject matter by the filing of the complaint and of the person by the appearance of the petitioner and that the failure to issue the summons was not a jurisdictional defect. In the instant matter, the omission in the order of a designation of the clerk of the county to whom the deposition should be returned was subject to correction by amendment and the petitioner herein can show no resulting injury from such omission. In *Marvin v. Eng-Skell Company*, 33 Cal.App. 42, 164 P. 332, it appears that the commission to take a deposition was issued without the seal of the court as provided by section 2024 of the Code of Civil Procedure. The deposition was taken and thereafter a motion was granted to amend the commission by affixing the omitted seal. This was held not to be error and at page 44 of 33 Cal.App., at

page 333 of 164 P. the court said: "The court has control over its process, and it should permit an amendment to the same in the interest of justice, especially when, as in this case, the party complaining can show no resulting injury."

[9] In this proceeding one of the judges of the respondent court was named as a party respondent. Where the writ seeks to review, prohibit or compel action by a tribunal, the respondent is the tribunal as such, and not the judge as a person. We have accordingly omitted his name from the title on this opinion and the petition as to the judge named is dismissed. *Alexander v. Superior Court*, 91 Cal.App. 312, 266 P. 993; *Neblett v. Superior Court*, 86 Cal. App.2d 64, 194 P.2d 22.

The peremptory writ is denied and the alternative writ is discharged.

FOX, Acting P. J., and ASHBURN, J., concur.



155 Cal.App.2d 705

**Application of Charles C. FINN on behalf of
George C. Finn for a Writ of
Habeas Corpus.**

Cr. 6090.

District Court of Appeal, Second District,
Division 2, California.
Dec. 3, 1957

Habeas corpus proceeding for release of one imprisoned under contempt adjudication. The District Court of Appeal, Richards, J. pro tempore, held that in action to foreclose chattel mortgage on aircraft which was in custody of United States government, superior court had authority to order person claiming an interest in the aircraft to execute a letter authorizing the government to surrender the airplane.

Writ discharged and prisoner remanded.

1. Habeas Corpus ⇨83

Where no traverse to return was filed in habeas corpus proceeding, but at hearing on return it was stipulated that petition be treated as a traverse, the return should be considered as a complaint and the petition as an answer, and new matter set up in petition which tends to invalidate apparent effect of the process set forth in the return is deemed denied and must be proved by the petitioner.

2. Chattel Mortgages ⇨273

In action to foreclose chattel mortgage on aircraft which was in custody of United States government, superior court had authority to order person claiming an interest in the aircraft to execute a letter authorizing the government to surrender the airplane.

3. Action ⇨25(2)

Chattel mortgage foreclosure action is an equitable proceeding.

4. Equity ⇨35

In an equitable proceeding, court has inherent power to make supplemental orders affecting only the details of performance of its decree.

5. Contempt ⇨21

Habeas Corpus ⇨22(2)

Where court has jurisdiction over subject matter and parties and authority to render order, disobedience of which is basis of contempt charge, fact that such order is erroneous or improvidently rendered does not justify failure to comply and order cannot be attacked collaterally upon application for habeas corpus to be released from imprisonment for contempt, but must be obeyed until dissolved or reversed.

6. Habeas Corpus ⇨85.1(2)

In habeas corpus proceeding by one found guilty of contempt in violation of order in chattel mortgage foreclosure proceeding, court must assume in absence of evidence to contrary that foreclosure judgment complied with statute. *West's Ann.Code Civ.Proc. § 726.*

7. Execution ⇨358

Supplementary proceedings are designed to provide a summary method to discover assets of a judgment debtor and subject them to satisfaction of judgment.

8. Execution ⇨360

Supplementary proceedings are not applicable to enforcement of a decree for foreclosure of a chattel mortgage unless and until deficiency judgment is entered against mortgagee. West's Ann.Code Civ.Proc. § 726.

9. Constitutional Law ⇨278(1)

Where federal district court's judgment was reversed insofar as it decreed that particular persons were entitled to possession of airplane in custody of United States government, order requiring such person to sign letter authorizing government to surrender the airplane did not deprive him of property without due process of law.

10. Habeas Corpus ⇨85.4(5)

Record in habeas corpus proceeding did not support contention that petitioner had been adjudged in contempt without a trial.

11. Habeas Corpus ⇨85.1(2), 85.2(1)

Petitioner has burden of establishing essential allegations of petition for habeas corpus and presumption of regularity of proceedings in support of a judgment prevails in absence of evidence to contrary.

George C. Finn, in pro. per.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

RICHARDS, Justice pro tem.

A petition for writ of habeas corpus was filed by Charles C. Finn alleging that George C. Finn was unlawfully imprisoned by the Sheriff of Los Angeles County. The petition alleged that George C. Finn was adjudged in contempt of the superior court of said county as a consequence of his refusal to comply with an order of said court directing him to sign a letter authorizing

the United States Attorney General to surrender a certain aircraft to International Airports, Inc., to satisfy a foreclosure judgment previously obtained by said International Airports, Inc. and that George C. Finn had been adjudged in contempt without a trial or legal counsel.

[1] This Court issued a writ of habeas corpus. In response thereto the sheriff filed a return which alleged that George C. Finn was ordered incarcerated for a period of five days pursuant to an order of commitment, a copy of which was attached to the return. The return also incorporated by reference a certified record of the order directing him to execute the document together with the affidavits and orders with respect to the contempt proceeding. No traverse to the return was filed but at the hearing on the return it was stipulated that the petition be treated as a traverse to the return. "Accordingly, the return is to be considered as a complaint and the petition as an answer, and new matter set up in the petition which tends to invalidate the apparent effect of the process set forth in the return is deemed denied and must be proved by the party alleging it, namely, the petitioner." In re Masching, 41 Cal.2d 530, 533, 261 P.2d 251, 253. No evidence was offered at the hearing on the return of the writ by or on behalf of George C. Finn.

Summarized, the facts are: On May 28, 1952, International Airports, Inc., filed an action against Charles C. Finn and George C. Finn in the Superior Court of Los Angeles County to recover possession of a certain aircraft. On June 9, 1952, International Airports, Inc., filed another action in the same county and against the same defendants to foreclose a chattel mortgage upon said aircraft. On February 7, 1953, the actions having been consolidated, the court entered its judgment against the defendants for the possession of the plane or in the alternative the sum of \$10,014.43 and for the foreclosure of the chattel mortgage upon the aircraft covered thereby. This judgment was affirmed on appeal. International Airports, Inc. v. Finn, 132 Cal.App.2d 293, 282 P.2d 102.

It appears that the plane was in the custody of the United States Government and that the government was prepared to surrender it upon the written authorization of the persons, including George C. Finn, claiming an interest therein. On June 24, 1957, upon the duly noticed motion of International Airports, Inc., an order was made by said court requiring Charles C. Finn and George C. Finn to execute a letter directed to the government authorizing the surrender of possession of the plane to International Airports, Inc. A copy of the order was duly served upon them and upon their failure to comply therewith they were duly cited for contempt and upon their continued refusal to comply with the order each of them was found in contempt. The sentence of contempt imposed a fine of \$500 upon George C. Finn or in default thereof that he serve one day in the county jail for each \$100 not paid and upon his failure to pay the fine within the time fixed by the court he was committed to the county jail for five days.

[2-4] At the hearing before us George C. Finn argued on his own behalf. In his argument and brief he contends that the superior court lacked authority to order him to execute the letter authorizing the government to surrender the airplane and consequently he may not be found in contempt for refusal to comply with such order. His contention is untenable. The chattel mortgage foreclosure action in which International Airports, Inc., secured the judgment of foreclosure is an equitable proceeding. *Elmore Jameson Co. v. Smith*, 34 Cal.App.2d 609, 93 P.2d 1053; *Bush v. Bank of America etc. Ass'n*, 1 Cal.App.2d 588, 592, 37 P.2d 168; *J. I. Case Threshing Machine Co. v. Copren Bros.*, 45 Cal.App. 159, 167, 187 P. 772. In an equitable proceeding the court has inherent power to make supplemental orders affecting only the details of the performance of its decree. *Hercules Glue Co. v. Littooy*, 45 Cal.App.2d 42, 45, 113 P.2d 490; *Vallelunga v. Gomes*, 102 Cal.App.2d 374, 382, 227 P.2d 550. It is clear that the order directing the execution of the letter authorizing the govern-

ment to surrender possession of the plane was an order made within the inherent power of the court in aid of the execution of the foreclosure judgment. See *Crouse v. Superior Court*, 28 Cal.App. 625, 153 P. 723.

[5] Where the court has jurisdiction over the subject matter and the parties and has authority to render the particular order, the fact that such order, disobedience of which is made the basis of the contempt charge, is erroneous or improvidently rendered, does not justify the failure to comply therewith and the order cannot be attacked collaterally upon an application for habeas corpus to be released from imprisonment for contempt but it must be obeyed until dissolved by the court issuing it or reversed on appeal. In *re Brambini*, 192 Cal. 19, 31, 218 P. 569; In *re Valterza*, 37 Cal.App.2d 682, 684, 100 P.2d 337.

[6-8] He contends that the court was not authorized to make the order for the reason that no proceedings supplemental to execution under the provisions of section 714 et seq., Code of Civil Procedure, had been taken before the questioned order was made. Contemner relies on *McCutcheon v. Superior Court*, 134 Cal.App. 5, 24 P.2d 911, but the cited case furnishes no support for his contention as it holds that if the statutory proceedings supplemental to execution furnish an adequate remedy to enforce a money judgment they are exclusive of the equitable remedy afforded by means of a creditor's suit. In the absence of evidence to the contrary, we must assume that the foreclosure judgment complied with the provisions of Code of Civil Procedure, section 726, requiring the creditor to exhaust his security before obtaining a personal judgment against the debtor. *Haas v. Palace Hotel Co. of San Francisco*, 101 Cal.App. 2d 108, 121, 224 P.2d 783. Supplementary proceedings are designed to provide a summary method to discover assets of a judgment debtor and subject them to the satisfaction of a judgment. 19 Cal.Jur.2d, p. 679; *Smith v. Smith*, 51 Cal.App.2d 29, 31-32, 124 P.2d 117. These proceedings

are not applicable to the enforcement of a decree for the foreclosure of a chattel mortgage unless and until a deficiency judgment is entered against the mortgagee. In *re Braun*, 51 Cal.App. 202, 204, 196 P. 499.

[9] It is further contended that the order of the trial court was void in that it would have the effect of depriving George C. Finn of his property without due process of law. He argues that as against the government he is entitled to the possession of the plane in the same order and condition as when seized by the government or in lieu thereof that he is entitled to payment from the government of \$50,000 and that by signing the authorization he would waive his rights against the government. On July 3, 1952, the government filed an action against International Airports, Inc., Charles C. Finn, George C. Finn and others claiming the title and right to possession of the aircraft. On February 8, 1955, the United States District Court entered its judgment in that action that the government take nothing thereby and that the defendants Finn were entitled upon their counterclaim to possession of the aircraft in the same order and condition as when seized or to the payment of \$50,000 as the value thereof. Subsequently the District Court made an order which, in effect, amended its judgment so as to provide that if the government elected to surrender the plane, delivery thereof should be made to International Airports, Inc., instead of to the Finns. Upon appeal it was held that the District Court erred in granting any affirmative relief to the Finns and the judgment was ordered modified so as to decree that the government take nothing by the action and that the counterclaim of the Finns be dismissed thereby reversing so much of the District Court judgment as decreed that the Finns were entitled to possession of the plane in the same order and condition as when seized or to the payment of

\$50,000. *United States v. Finn*, 9 Cir., 239 F.2d 679. Consequently, the order of the superior court requiring the contemner to sign the letter of authority did not deprive him of any money or property to which he was entitled by the judgment of the federal court.

[10, 11] The allegation in the petition that petitioner was adjudged in contempt without a trial is without any support in the record which discloses that he was present in court when the questioned order was made and that a copy of the written order requiring him to execute the letter of authorization was regularly served upon him. The record also discloses that he was present in court on September 18, 1957, in response to an order to show cause why he should not be found in contempt for his refusal to execute said letter. He was advised by the court of his right to decline to testify; of his right to appear by counsel and of his right to argue if he chose not to testify. It further appears that at said hearing the court noted the filing of a notice of appeal from its order of June 24, 1957, requiring the execution of the letter and read section 944 of the Code of Civil Procedure¹ in open court. The court thereupon, in open court, ordered him to sign the letter and upon his failure so to do he was found in direct contempt for his refusal to execute the document before the court and in contempt for his failure to comply with the previous order of June 24, 1957. No evidence was offered at the hearing before us nor is any argument made in his brief that he was found in contempt without a hearing. "The burden is on the petitioner to establish the essential allegations of his petition for a writ of habeas corpus. The presumption of the regularity of proceedings in support of a judgment prevails in the absence of evidence to the contrary." In *re Staser* (In *re Hynes*), 84 Cal.App.2d 746, 749, 191 P.2d 791, 793.

1. Code of Civil Procedure, § 944. "If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by appeal un-

til the instrument is executed and deposited with the Clerk with whom the judgment or order is entered, to abide the judgment of the appellate Court."

Accord: In re Bell, 19 Cal.2d 488, 500, 122 P.2d 22; In re Oxman, 100 Cal.App.2d 148, 151, 223 P.2d 66.

The writ is discharged and George C. Finn is remanded.

FOX, Acting P. J., and ASHBURN, J., concur.



155 Cal.App.2d 748

5501 HOLLYWOOD, Inc., doing business as Peacock Lane, a corporation, Petitioner and Respondent,
v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California, Russell S. Munro, Director of the Department of Alcoholic Beverage Control of the State of California, Philip E. Davis, Area Administrator, Department of Alcoholic Beverage Control of the State of California, and Alcoholic Beverage Control Appeals Board of the State of California, Defendants and Appellants.

Civ. 22569.

District Court of Appeal, Second District, Division 2, California.

Nov. 1, 1957.

Proceeding by tavern owners for writ of mandate requiring Department of Alcoholic Beverage Control to annul its decision suspending owners' license and commanding Appeals Board to set aside and annul its order affirming decision of the Department. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment ordering issuance of writ and Department and Appeals Board appealed. The District Court of Appeal, Ashburn, J., held that finding that minor was served alcoholic beverages prohibited by statute and that in serving same upon presentation of driver's license as proof of age, licensee's agent did not act

as a reasonably prudent person, was supported by substantial evidence.

Reversed.

1. Intoxicating Liquors ⇨72, 74

As Department of Alcoholic Beverage Control and the Appeals Board are constitutional agencies, scope of review of their decisions is limited to determining whether they are supported by substantial evidence, and both the superior court in a mandate proceeding and an appellate court upon appeal therefrom are without authority to reweigh evidence. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 25660.

2. Mandamus ⇨168(4)

In proceeding for mandate to require Alcoholic Beverage Control Department to rescind order suspending liquor license because of licensee's serving of a minor, there was substantial evidence to support finding that minor ordering a coke and whiskey, was in fact served drink that she ordered. West's Ann.Bus. & Prof.Code, §§ 25658(a-c), 25660.

3. Intoxicating Liquors ⇨103(1)

Statute providing that in proceeding for suspension of liquor license based upon violation of statute prohibiting serving of liquor to minors, proof that licensee or his agent demanded and was shown certain enumerated documents or other bona fide evidence of majority is a defense to proceeding, requires documentary evidence of majority and identity which is intrinsically bona fide and mere fact of production of a vehicle operator's license does not make a case. West's Ann.Bus. & Prof.Code, § 25660.

4. Intoxicating Liquors ⇨159(2)

Although in respect to serving minors, liquor licensee is not required to act at his peril, he must exercise caution which would be shown by a reasonable and prudent person in the same circumstances. West's Ann.Bus. & Prof.Code, § 25660.

5. Intoxicating Liquors ⇨198(1)

It is essential to a successful defense in proceeding to suspend a liquor license be-

cause of service of alcoholic beverage to minor, that operator's license or other evidence of majority presented by person be presented by one whose appearance indicates that he or she could be 21 years of age, and a reasonable inspection of the document must be made by the licensee or his agent. West's Ann.Bus. & Prof.Code, § 25660.

6. Intoxicating Liquors ⇨108(9)

In proceeding to suspend liquor license because of alleged service of alcoholic beverages to minor who presented documentary evidence of majority to licensee or his agent, whether licensee acted as a reasonable and prudent man under the circumstances is ordinarily a question of fact for the board to determine. West's Ann.Bus. & Prof.Code, § 25660.

7. Intoxicating Liquors ⇨168

If liquor licensee delegates task of inspecting documentary proof of majority of person asking for liquor to an employee such as a waitress, licensee is as bound by her conduct as if he had acted in person. West's Ann.Bus. & Prof.Code, § 25660.

8. Intoxicating Liquors ⇨108(5)

In proceeding for mandate to require Board of Alcoholic Beverage Control to rescind order suspending liquor license because of alleged service to a minor, burden of proving defense that acceptable documentary proof of majority had been presented, rested upon licensee and when employee who served beverage did not testify, presumption arose that such evidence, if produced, would have been unfavorable to licensee. West's Ann.Bus. & Prof.Code, § 25660.

9. Evidence ⇨75, 87

When person having burden of proving fact does not produce evidence in his command, presumption arises that if produced

the evidence would have been unfavorable to his contentions, and while presumption does not amount to affirmative evidence of facts shown in testimony produced by other side, it does add emphasis to adverse inferences flowing therefrom.

10. Intoxicating Liquors ⇨108(5)

In proceedings for mandate to compel Department of Alcoholic Beverage Control to rescind order suspending liquor license because of service to a minor, finding that licensee's waitress in examining documentary proof of majority presented by minor, did not act as a reasonably prudent person under the same circumstances, was supported by substantial evidence. West's Ann.Bus. & Prof.Code, §§ 25658(a-c), 25660.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for appellants.

Albert E. Isenberg and Ronald H. Freedmond, Beverly Hills, for respondent.

ASHBURN, Justice.

Defendants appeal from a judgment ordering issuance of a writ of mandate commanding defendant Department of Alcoholic Beverage Control (hereinafter designated as "Department") to set aside and annul its decision of May 24, 1956, suspending respondent's liquor license, and also commanding the defendant Alcoholic Beverage Control Appeals Board (hereinafter referred to as "Appeals Board") to set aside and annul its order affirming the decision of the Department.

The Department had charged respondent, as the holder of a general on-sale liquor license, with violations of subdivisions (a) and (b) of § 25658,¹ Business & Profes-

1. Bus. & Prof.Code § 25658.

"(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

"(b) Any person under the age of 21

years who purchases any alcoholic beverage, or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises, is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100).

sions Code, in that it did sell whiskey to a minor 18 years of age and permitted said minor to consume the same upon the licensed premises. A hearing officer found both charges to be true and the Department ordered the license suspended for a period of 15 days on each charge, said suspensions to run concurrently. Respondent herein filed an appeal with the Appeals Board which affirmed the decision of the Department. Thereupon respondent petitioned the superior court for a writ of mandate to vacate and set aside the orders of the Department and the Appeals Board and the superior court, after hearing, found and adjudged that there was no substantial evidence to sustain the findings of fact and the writ of mandate should issue as prayed.

Petitioner, engaged in conducting an establishment known as Peacock Lane, is the owner of an on-sale general license for sale of alcoholic beverages at 5501-5 Hollywood Boulevard, in the city of Los Angeles. On October 23, 1955, Peggy Joanne Michele, who was 18 years old, arrived at said establishment about 1:30 a. m. in the company of three boys and two girls. They occupied a booth and, after dancing, drinks were ordered from a waitress. Peggy called for a coke and whiskey. Upon being served she drank a little of it, whereupon the police interfered. When the order was given the waitress asked for proof of her age and Peggy produced a driver's license which she had found, one issued in the name of Patricia Jean Meyer. What, if any, examination the waitress made of same does not appear. The license itself was placed in evidence. The age shown is 18 but the date is August 7, 1952, indicating the licensee's age to be 21 at the time of the incident in question. The height of the licensee as given is five feet three inches and Peggy was three inches taller than that. The weight is stated at 102 pounds and Peggy then weighed 19 pounds more, 121 pounds. Her eyes were blue, whereas the

license gives color of eyes as hazel. Peggy appeared as a witness at the hearing before the referee on April 6, 1956, less than six months after the incident, and the referee observed that "although she is fairly tall her general figure appeared immature, her voice, poise, and manner that of a girl not older than 19 years and in general her appearance is clearly that of a girl between 18 and 19 years of age." Petitioner produced no evidence at the hearing.

The referee found: "(d) That the discrepancies between the actual description and appearance of said Peggy Jeanne Michele and the description on the said driver's license shown Respondent's said waitress were such that a reasonable prudent licensee or employee in a premises licensed for the sale of alcoholic beverages would not in good faith accept said driver's license as a bona fide documentary evidence of the identity of or of the majority of said Peggy Jeanne Michele. (e) That after having been shown the above-described driver's license Respondent Licensee's said waitress made no further inquiry or investigation into either the identity or majority of said Peggy Jeanne Michele. (f) That the personal appearance of Peggy Jeanne Michele at the above time and place was such that Respondent Licensee's waitress did not act with reasonable prudence or in good faith in accepting said license as bona fide documentary evidence of either the identity or majority of the said Peggy Jeanne Michele."

[1] As the Department and the Appeals Board are constitutional agencies created by Article XX, § 22, as amended in November, 1956, the scope of review of their decisions is limited to determining whether they are supported by substantial evidence, and both the superior court in a mandate proceeding and an appellate court upon appeal therefrom are without authority to reweigh the evidence. *Marcucci v. Board of Equalization*, 138 Cal.App.2d 605,

"(c) Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether

or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor."

608, 292 P.2d 264; *Griswold v. Dept. of Alcoholic Beverage Control*, 141 Cal.App.2d 807, 810, 297 P.2d 762; *Maxwell Cafe v. Dept. of Alcoholic Beverage Control*, 142 Cal.App.2d 73, 77, 298 P.2d 64.

Respondent makes two points, (1) that there was no proof that Peggy was served an alcoholic beverage prohibited by the statute, and (2) that a defense was proved without contradiction under § 25660, Business & Professions Code, quoted *infra*.

[2] As to the first point, Peggy ordered coke and whiskey. Without comment the waitress served her a drink which, according to the police officer, was an amber-colored fluid smelling of alcohol. When asked what type of alcohol, he replied: "I would say bourbon." There being no evidence to the contrary there arose a fair inference (or perhaps presumption) that she was served the drink she had ordered. *Griswold v. Dept. of Alcoholic Beverage Control*, *supra*, 141 Cal.App.2d 807, 811, 297 P.2d 762; *Wright v. Munro*, 144 Cal.App.2d 843, 847, 301 P.2d 997; *Mercurio v. Dept. of Alcoholic Beverage Control*, 144 Cal. App.2d 626, 634, 301 P.2d 474. This state of the record was clearly sufficient to support the challenged finding.

[3] The defense which petitioner claims to have established without substantial contradiction is that of compliance with § 25660, Business & Professions Code, which says: "In any criminal prosecution or proceeding for the suspension or revocation of any license based upon violation of Section 25658, proof that the defendant licensee, or his agent or employee, demanded and was shown, immediately prior to furnishing any alcoholic beverage to a person under 21 years of age, bona fide documentary evidence of majority and identity of the person issued by a federal, state, county,

or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the Federal Selective Service Act, or an identification card issued to a member of the armed forces, is a defense to the prosecution or proceeding for the suspension or revocation of any license." When introduced into the code in 1953² its phrasing was such as to indicate "that such a registration certificate is bona fide documentary evidence of majority and identity." *Young v. State Board of Equalization*, 90 Cal.App.2d 256, 258, 202 P.2d 587, 588. But the substitution of the phrase "bona fide documentary evidence of majority and identity of the person issued * * * including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the Federal Selective Service Act [50 U.S.C.A. Appendix, § 451 et seq.], or an identification card issued to a member of the armed forces," carries a different significance. The statute now demands documentary evidence of majority and identity which is intrinsically bona fide and the mere fact of production of a vehicle operator's license does not make a case. "Under this last-quoted section a licensee does not establish an absolute defense by evidence that the minor produced an identification card purporting to show that the person in possession of the card is 21. The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent man would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on such card. In such a case the defense permitted by section 61.2(b)

2. "In any criminal prosecution or proceeding for the suspension or revocation of any license based upon violation of Section 25658, proof that the defendant licensee, or his agent or employee, demanded and was shown, before furnishing any alcoholic beverage to a minor, a motor vehicle operator's license or a

registration certificate issued under the Federal Selective Service Act or other bona fide documentary evidence of majority and identity of the person, is a defense to the prosecution or proceeding for the suspension or revocation of any license."

could not successfully be urged." *Keane v. Reilly*, 130 Cal.App.2d 407, 410, 279 P.2d 152, 154.

[4] Although the licensee is not required to act at his peril, he must exercise the caution which would be shown by a reasonable and prudent man in the same circumstances. *Keane v. Reilly*, supra, 130 Cal.App.2d at page 410, 279 P.2d at page 154. He has an active duty in that respect. "A licentiate conducting the sale of beverages under an on sale license is charged with an active duty to prevent minors from consuming intoxicating liquor on the licensed premises and if the licentiate, through an employee, has knowledge that such consumption is taking place there arises immediately an active duty to prevent its continuance. A failure to prevent it is within the meaning of the statute a permitting of that unlawful consumption." *Marcucci v. Board of Equalization*, supra, 138 Cal.App.2d 605, 610, 292 P.2d 264, 266. To the same effect, see, *Cornell v. Reilly*, 127 Cal.App.2d 178, 187, 273 P.2d 572.

[5-7] It is essential to a successful defense that the operator's license or other evidence of majority be presented by one whose appearance indicates that he or she could be 21 years of age, and a reasonable inspection of the document must be made by the licensee or his agent. "Obviously, to protect a vendor such evidence of majority and identity would have to be presented by a person whose appearance was such as to make it doubtful on which side of the line dividing minority from majority the purchaser was. When a doubt as to that would arise in good faith, it was intended that the vendor could rely upon documentary evidence of majority and identity such as motor vehicle operators' licenses and draft board certificates, but the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered." *Dethlefsen v. State Board of Equalization*, 145 Cal.App.2d 561, 567, 303 P.2d 7, 12. That process must do more than raise a mere suspicion (*Keane*

v. Reilly, supra, 130 Cal.App.2d 407, 411, 279 P.2d 152; *Conti v. State Board of Equalization*, 113 Cal.App.2d 465, 466, 248 P.2d 31); but whether it does so ordinarily is a question of fact for the Board to determine. If the licensee delegates that task to an employee, such as a waitress, he is bound by her conduct as if he had acted in person. *Cornell v. Reilly*, supra, 127 Cal.App.2d 178, 186, 273 P.2d 572.

In this instance Peggy had been on the dance floor; she was too young in appearance to be 21 (as the referee observed to be the case some six months later); she weighed 19 pounds more than the person to whom the license was issued; she was three and one-half years younger and had blue eyes instead of hazel. Whether a reasonably careful inspection of the license and comparison with Peggy's appearance would have done something more than raise a suspicion in the mind of a reasonably prudent man, whether it would prompt him to require something additional by way of evidence of bona fides of the license or to refuse altogether to serve her was a question for the trier of fact. The referee, in paragraph (d) above quoted, found that the discrepancies between the license and the appearance of Peggy "were such that a reasonable prudent licensee or employee in a premises licensed for the sale of alcoholic beverages would not in good faith accept said driver's license as a bona fide documentary evidence of the identity of or of the majority of said Peggy Jeanne Michele," and the Appeals Board said: "The apparent discrepancies between the driver's license presented and the minor presenting it were sufficient to put appellant's employee on guard and to indicate that further inquiry was in order."

[8,9] Drawing of inferences is a major portion of the fact finding process. Petitioner, who was the employer of the waitress and presumptively in command of any evidence tending to show bona fides on her part or that of her employer, offered no evidence whatever. As the burden of proving the special defense of § 25660 rested upon petitioner, a presumption arose that

that evidence, if produced would have been unfavorable to its contentions. *Bone v. Hayes*, 154 Cal. 759, 765, 99 P. 172. While this is a presumption which does not amount to affirmative evidence of the facts shown in the testimony produced by the other side, it does add emphasis to the adverse inferences flowing therefrom. *Talbert v. Ostergaard*, 129 Cal.App.2d 222, 230, 276 P.2d 880; *In re Estate of Bould*, 135 Cal.App.2d 260, 265, 287 P.2d 8, 289 P.2d 15.

[10] There was substantial evidence before the Board to warrant the findings made and it was reversible error for the superior court to hold otherwise.

The judgment is reversed, with instructions to the trial court to enter judgment denying the peremptory writ.

FOX, Acting P. J., and RICHARDS, Justice pro tem., concur.



156 Cal.App.2d 138

Jean C. FLAGSTAD, Plaintiff, Respondent
and Cross-Appellant,
v.

CITY OF SAN MATEO et al., Defendants,
Harry Regan, General Petroleum Corpora-
tion, a corporation, Defendants, Appellants
and Cross-Respondents.

Civ. 17311.

District Court of Appeal, First District,
Division 2, California.

Dec. 16, 1957.

Rehearing Denied Jan. 15, 1958.

Hearing Denied Feb. 11, 1958.

Proceeding for a zoning variance to permit construction and operation of a service station on a lot located on corner of one of busiest intersections in city but zoned for multi-family residences although it was not adjoined by any single family residential use or zone. The application

was heard by the city council, which granted the variance in modified form, and an adjoining property owner brought an action seeking writ of mandate or of review. From a judgment of the Superior Court, San Mateo County, Louis B. Dematteis, J., invalidating the grant of variance and directing further hearings by the city council, both parties appealed. The District Court of Appeal, Draper, J., held that the city council did not abuse its discretion in granting a zoning variance.

Judgment reversed with directions.

1. Constitutional Law  93(1)

Municipal Corporations  621.2

The granting or denial of a zoning variance rests largely in discretion of body designated by the ordinance for that purpose, and no vested right is affected by either denial or grant of zoning variance.

2. Evidence  83(2)

Where zoning variance is granted, it is presumed that official duty was performed in the making of the required investigation, and that existence of necessary facts was found.

3. Municipal Corporations  621.53

Decision of municipal body to grant or deny a zoning variance will not be disturbed by courts in absence of a clear and convincing showing of an abuse of discretion.

4. Municipal Corporations  621.43

Witnesses at a hearing before city council on application for zoning ordinance need not be sworn and although procedure before council might lack formality observed by judicial tribunals, its decision is nonetheless vital and effective.

5. Municipal Corporations  621.43

In passing on an application for zoning variance, city planning commission did not act improperly in making a personal investigation to inform themselves of the facts.

6. Automobiles  395

In proceeding for zoning variance to permit construction and operation of serv-

ice station on a lot located on corner of one of busiest intersections in city but zoned for multi-family residences although it was not adjoined by any single family residential use or zone, city council did not abuse its discretion in permitting construction and operation of a service station on the lot.

Anderson & McMillan, Burlingame, for Harry Regan.

P. E. Bermingham, W. A. Henderson, S. Hamilton, Los Angeles, Edward R. Fitz-Simmons, San Mateo, for General Petroleum.

O'Gara, McGuire & Speirs, San Francisco, for Jean C. Flagstad.

DRAPER, Justice.

Defendants Regan and General Petroleum Corporation, as lessor and lessee, applied for a zoning variance permitting construction and operation of a service station. After a tie vote in the city planning commission, the application was heard by the city council, which granted the variance in modified form. Plaintiff, owner of adjoining property, brought this action seeking writ of mandate or of review. Upon return to the alternative writ and after full hearing, the trial court issued writ of mandate invalidating the grant of variance and directing further hearing by the city council. Defendants lessor and lessee appeal from the judgment. Plaintiff appeals from that portion of the judgment which directs further hearing by the council.

Under the San Mateo zoning ordinance, a variance may be granted "provided that the Council, after a full investigation and public hearing, * * * shall have found all of the following to be true:

"a. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved, or the intended use thereof, which do not apply generally to the property or class of uses in the district, so that a denial of the application would result in undue property loss;

"b. That such variance would be necessary for the preservation and enjoyment of a property right of the owner of the property involved;

"c. That the granting of such variance would not be materially detrimental to the public health, safety or welfare, or injurious to the property or improvements of other property owners, or the quiet enjoyment of such property or improvements."

At the hearing before the council defendants produced detailed plans of the proposed installations, together with a drawing showing the front elevation of the completed building as planned, and a planting plan. Two employees of defendant lessee, its division attorney and its real estate division manager, made unsworn oral statements. Like statements were made by five protestants. In the course of these statements, references were made to existing uses and zoning in the neighborhood. These references are confirmed by a land use map and a zoning map here in evidence.

From all these it appears that: the property is in an R-3 zone, which permits multi-family residences, but not commercial use; it is located at the northwest corner of El Camino Real and Third Avenue, one of the busiest intersections of the City of San Mateo; the property on the easterly side of El Camino along the two blocks to the north and a like distance south of applicants' property is zoned and almost wholly used for commercial purposes; service stations are located on the southeast and northeast corners of Third and El Camino, and two more are one block away; the "central business district" of San Mateo is separated from applicants' property only by El Camino; no single family residential use or zone adjoins this land. The property is 90 feet on El Camino by 127 feet on Third. There were flatly contradictory opinions as to whether the size of this parcel would permit construction, under existing setback requirements, of an apartment house which would yield a return commensurate with the value of the land.

No expert evidence as to value was offered. At the outset of the hearing (held on Monday evening), the mayor, in suggesting a continuance, said we "do not get the agenda until Friday night, and it takes Saturday and Sunday to run around and have a look." Members of the council, in expressing views and asking questions during the hearing, displayed familiarity with the physical facts. On the same evening as the hearing in this matter, the council had, by a like 4 to 1 vote, granted a variance for construction of an office building at the southwest corner of El Camino Real and Fifth Avenue. The council restricted the variance here in issue by making it non-transferable, prohibiting a proposed car-washing operation at the service station, and requiring that the landscaping and its maintenance accord with plans to be approved by the council.

[1] The granting or denial of a variance rests largely in the discretion of the body designated by the zoning ordinance for that purpose (*County of San Diego v. McClurken*, 37 Cal.2d 683, 691, 234 P.2d 972; *Otis v. City of Los Angeles*, 52 Cal. App.2d 605, 613, 126 P.2d 954). No vested right is affected by either the denial (*Rubin v. Board of Directors*, 16 Cal.2d 119, 126, 104 P.2d 1041) or the grant (*Steiger v. Board of Supervisors*, 143 Cal.App.2d 352, 358, 300 P.2d 210) of a zoning variance.

[2] Where a variance is granted, it is presumed that official duty was performed in the making of the required investigation, and that the existence of the necessary facts was found (*Miller v. Planning Commission*, 138 Cal.App.2d 598, 602-603, 292 P.2d 278; *Bartholomae Oil Corp. v. Seager*, 35 Cal.App.2d 77, 80, 94 P.2d 614; *Wheeler v. Gregg*, 90 Cal.App.2d 348, 360, 203 P.2d 37; see also *Bailey v. County of Los Angeles*, 46 Cal.2d 132, 293 P.2d 449; *North Side Property Owners' Ass'n v. County of Los Angeles*, 70 Cal.App.2d 598, 161 P.2d 613).

[3] The decision of the municipal body to grant or deny a variance will not be disturbed by the courts in the absence of a

clear and convincing showing of an abuse of discretion (*Childs v. City Planning Comm.*, 79 Cal.App.2d 808, 812, 180 P.2d 433; *Otis v. City of Los Angeles*, supra, 52 Cal.App.2d 605, 613, 126 P.2d 954).

A variance provides the opportunity for amelioration of unnecessary hardships resulting from the rigid enforcement of a broad zoning ordinance, and thus avoids the acknowledged evils of "spot zoning" (*Rubin v. Board of Directors*, supra, 16 Cal.2d 119, 124, 104 P.2d 1041).

[4, 5] Plaintiff argues that the documents and statements before the council do not constitute "evidence." But it is clear that witnesses in a council proceeding of this sort need not be sworn (*Jackson v. City of San Mateo*, 148 Cal.App.2d 667, 307 P.2d 451). "If perchance the procedure before the council lacked some of the formality observed by judicial tribunals their decision is nonetheless vital and effective" (*Bradbeer v. England*, 104 Cal.App.2d 704, 710, 232 P.2d 308, 311, see also *Bartholomae Oil Corp. v. Seager*, supra, 35 Cal.App.2d 77, 94 P.2d 614; *Cantrell v. Board of Supervisors*, 87 Cal.App.2d 471, 197 P.2d 218). Plaintiff complains that defendants rely upon information acquired by the council members other than at the hearing. The ordinance specifically contemplates "a full investigation and public hearing" by the council. Personal investigation by members of a city planning commission has been relied upon to establish facts required to be shown upon application for a variance (*Miller v. Planning Commission*, supra, 138 Cal.App.2d 598, 292 P.2d 278; *Bartholomae Oil Corp. v. Seager*, supra, 35 Cal.App.2d 77, 94 P.2d 614). Here the mayor stated at the outset of the hearing that the councilmen had "had a look" at the property. Members of the council asked questions and expressed views at the public hearing which quite fully revealed their investigation. There was no concealment. Those protesting the variance were free to challenge any views so expressed, and took frequent advantage of this opportunity. The elements of council investigation principally relied upon by

defendants are matters which would be revealed by observation, such as the fact that defendants' land was unimproved, the nature of the surrounding uses, the fact that traffic at the intersection is heavy. These matters were stated by those who spoke for and against the variance at the hearing. The observation and the common knowledge of the council members could serve only to confirm or reject these statements. It must be remembered that no vested right is here involved (*Rubin v. Board of Directors*, supra, 16 Cal.2d 119, 104 P.2d 1041; *Steiger v. Board of Supervisors*, supra, 143 Cal.App.2d 352, 300 P.2d 210) and that this distinguishes the authorities principally relied upon by plaintiff. The decision in *Desert Turf Club v. Board of Supervisors*, 141 Cal.App.2d 446, 452, 296 P.2d 882, 886, is based upon the fact that the board "on moral grounds, contrary to the legislative fiat of the people, has in effect excluded all horse racing from all parts of the county." The language relied upon by plaintiff is mere dicta.

The facts of this case bring it fairly within the rule laid down in *Miller v. Planning Commission*, supra, 138 Cal.App.2d 598, 292 P.2d 278; *Bradbeer v. England*, supra, 104 Cal.App.2d 704, 232 P.2d 308; and *Jackson v. City of San Mateo*, supra, 148 Cal.App.2d 667, 307 P.2d 451. Upon the authority of these decisions, the action of the city council must be upheld.

[6] Courts must curb carefully the temptation to make policy in the field of zoning variance. The point of view to be satisfied is that of the city council. The courts inquire only whether the decision of the council is arbitrary or capricious, whether it is an abuse of discretion or is without any reasonable justification. Unless so proscribed, the council's determination must stand, regardless of the court's view as to its wisdom. In 1937 the council determined that a service station should not be permitted upon this same property. This court affirmed the city's right to make that determination (*Regan v.*

Council of City of San Mateo, 42 Cal. App.2d 801, 110 P.2d 95). Likewise, the decision whether the intervening years have so altered circumstances as to warrant the present use of the land for such a purpose is for the city council. We find no abuse of discretion by that body, and thus have no occasion to interfere with its decision.

Judgment reversed, with directions to the trial court to enter judgment for defendants. Defendants to recover costs on appeal.

KAUFMAN, P. J., and DOOLING, J., concur.



156 Cal.App.2d 128

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Raymond VILLA, Defendant and Appellant.
Cr. 3405.

District Court of Appeal, First District,
Division 1, California.

Dec. 16, 1957.

Defendant was convicted of violation of Penal Code, section 288a, and of robbery. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., rendered judgment, and defendant appealed. The District Court of Appeal, Peters, P. J., held that although defendant had been charged with rape, conspiracy, violation of Penal Code § 288a and robbery, acquittal on first two charges did not affect validity of conviction on other two charges, although rape and conspiracy charges involved some of same acts as were involved in other charges, and that evidence sustained conviction.

Affirmed.

1. Criminal Law ⚭59(5)

The crime of aiding and abetting is a separate and distinct offense from that of conspiracy.

2. Criminal Law ⚭878(3)

Where defendant was charged with rape, conspiracy, violation of Penal Code § 288a and robbery, acquittal on first two charges did not affect validity of conviction on other two charges although rape and conspiracy charges involved some of same acts as were involved in other charges. West's Ann.Pen.Code, §§ 288a, 954.

3. Criminal Law ⚭878(4)

Under section of Penal Code providing that an acquittal of one or more counts shall not be deemed an acquittal of any other count, each count charging a separate and distinct offense must stand or fall on its own merits, and disposition of one count has no effect or bearing upon other counts, even though respective verdicts in various counts may be logically inconsistent. West's Ann.Pen.Code, § 954.

4. Criminal Law ⚭1134(2)

In prosecution for rape, conspiracy, violation of Penal Code § 288a and robbery, jury was obliged to treat each count separately, and reviewing court in considering sufficiency of evidence to sustain conviction on violation of § 288a and robbery would consider all evidence, including relevant portions of evidence relating to rape and conspiracy charges. West's Ann.Pen.Code, §§ 288a, 954.

5. Criminal Law ⚭878(3)

In prosecution for rape, conspiracy, violation of Penal Code § 288a, and robbery, jury was entitled, and obliged, to treat each count separately. West's Ann.Pen.Code, §§ 288a, 954.

6. Criminal Law ⚭59(3, 4, 5)

To be an abettor, the accused must have instigated or advised commission of crime or been present for purpose of assisting in its commission, he must share criminal intent with which crime was committed, and mere presence of accused at scene of crime does not alone establish that accused was an abettor.

7. Criminal Law ⚭347

While mere presence alone at scene of crime is not sufficient to make accused a participant, and while he is not necessarily guilty if he does not attempt to prevent crime through fear, such factors may be circumstances that can be considered by jury with other evidence in passing on his guilt or innocence.

8. Criminal Law ⚭59(5)

One may aid or abet in commission of a crime without having previously entered into conspiracy to commit it.

9. Criminal Law ⚭59(5), 737(1)

The aider and abettor of a crime is not only guilty of particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for natural and reasonable or probable consequences of any act that he knowingly aided or encouraged, and whether act committed was natural and probable consequence of act encouraged and extent of defendant's knowledge are questions of fact for jury.

10. Criminal Law ⚭59(5)

If accused in any way, directly or indirectly aided perpetrator by acts or encouraged him by words or gestures, he is an "aider" and "abettor".

See publication Words and Phrases, for other judicial constructions and definitions of "Abettor" and "Aider".

11. Robbery ⚭24(1)

Sodomy ⚭6

In prosecution for rape, conspiracy, robbery and violation of Penal Code § 288a, evidence was sufficient to sustain conviction of having aided and abetted robbery and Penal Code section 288a, although defendant had been acquitted of rape and conspiracy charges. West's Ann.Pen.Code, §§ 288a, 954.

12. Criminal Law ⚭347

In prosecution for rape, robbery, violation of Penal Code § 288a, and conspiracy to commit such crimes, defendant's presence at scene of crime, his knowledge that crime was being committed, and his failure to prevent it, were factors jury could consider

along with other evidence, although they could not alone support conviction. West's Ann.Pen.Code § 288a.

13. Robbery ☞26

Sodomy ☞7

In prosecution for rape, robbery, violation of Penal Code § 288a, and conspiracy to commit such crimes, even though jury acquitted defendant of rape and conspiracy charges, question whether defendant had forced complaining witness into his automobile, beat her, and forced her to submit, and then turned her over to his friends for their pleasure, and drove get-away vehicle to destinations desired by his confederates, were for jury. West's Ann.Pen.Code, §§ 288a, 954.

14. Criminal Law ☞556

Where, unknown to defendant, extrajudicial statement made by defendant to district attorney at time of his arrest was tape recorded, even if extrajudicial statement which was introduced into evidence by prosecution, contained statements irreconcilable with guilt, prosecution was not bound by the extrajudicial statement in view of other evidence tending to show criminality.

15. Criminal Law ☞556, 741(3)

The concept that the prosecution is bound by extrajudicial statements, introduced by prosecution, which are irreconcilable with guilt is applicable only where there is no other evidence which supports the finding of guilt, and where there is prosecution evidence which tends to show criminality, it is function of jury to determine whether to believe that evidence or the extrajudicial statement.

Rhein, Levin & Jackson, Edward Levin, Jay Jackson, Jr., San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., City and County of San Francisco, Francis Mayer, Asst. Dist. Atty., San Francisco, for respondent.

PETERS, Presiding Justice.

Raymond Villa, Matteo Accetta and Salvador Rizzo were charged with rape, with a violation of section 288a of the Penal Code, with robbery, and with conspiracy to commit those crimes. All of the crimes were alleged to have been committed on August 1, 1956, against the same complaining witness, an adult woman. They were jointly tried. All were convicted of some of the offenses. So far as Villa is concerned, the jury acquitted him of rape and of conspiracy, but found him guilty of a violation of section 288a and of robbery. Villa appeals.

On the night of August 1, 1956, the three defendants, all of whom are over 21, and two male companions, Larry Palermo and Larry Pera, visited a bar in the Fillmore district to celebrate the fact that Palermo was leaving for army service the next day. They drove to the bar in Palermo's car from a gasoline service station operated by Pera and located some distance away from the bar, leaving Pera's car at the service station. This was about 9 p. m. At the bar was the complaining witness. She lived with her husband about a half block from the bar. She went down to the bar, alone, about 9 p. m. There she met one of the part-time bartenders whom she knew, had a drink with him, and he left. During the evening and up to about 11 p. m. she consumed about seven or eight Seven-Up Bourbon highballs. She testified that during the evening she danced with some sailors, and did not dance with appellant or with any of the men in his party. Several of the defendants testified that the complaining witness danced with several of the men in appellant's party, and this was corroborated by the bartender and the son of the owner of the tavern.

Sometime during the evening Rizzo went back to the gasoline station and got Pera's Plymouth automobile, a four-door sedan, and drove it to an alley near the bar. He gave the keys to Pera, who, in turn, gave them to appellant.

During the evening appellant conversed with the complaining witness and finally asked if he could take her home. The complaining witness testified that she refused the invitation. Appellant testified that she first agreed to his proposition, then changed her mind, then consented to it. From this point on the stories of the involved persons are widely divergent. The complaining witness testified that after she refused appellant's proposition, appellant left the bar, and a short time later, about 11 p. m., she left, intending to walk the short distance to her apartment. Outside the bar Villa accosted her, repeated his offer, and, when she refused, seized her by the arm and started to pull her toward Pera's car that was parked in a nearby alley. When she screamed and tried to pull away he struck her in the face and in the back of her neck. These blows partially stunned her and appellant threw her into the car. Appellant then drove to Aquatic Park and parked the automobile. During the ride to the park she testified that appellant was slapping and holding her to prevent her from getting out. After he parked, according to the complaining witness, appellant pulled off parts of her clothing and then forced her to have intercourse with him.

Appellant told a different story. He testified that after the complaining witness had agreed to go out with him, the two left the bar together and got in the Plymouth; that the car's battery was dead so he got out of the car, leaving the complaining witness alone, and went back in the bar and asked his friends to give him a push, which they did. This story about a dead battery and the push by his friends was corroborated by the appellant's companions. Some doubt is cast upon this story not only by the testimony of the complaining witness, but also because when the car was seized by the police the next morning the car started without difficulty and the owner of the car admitted that the battery had not been touched in the past several days.

Appellant, in addition to testifying that the complaining witness went with him voluntarily to Aquatic Park, testified that dur-

ing the ride she stated that someone was following them, and that he then successfully got away from the car that was following them by taking several detours. He also testified that at Aquatic Park the complaining witness voluntarily consented to have intercourse with him. After this act of intercourse had been completed, appellant prepared to get out of the car to rearrange his clothing when another car containing the other two defendants and Palermo and Pera drove into the parking lot and parked about 50 to 75 feet behind the Plymouth. At the trial appellant testified that defendant Rizzo then came up and asked about his chances. Appellant told him that the complaining witness had been "easy" with him, and for Rizzo to go ahead and try if the woman was willing. Appellant then walked back to and got in the other car. A short time later Accetta got out and went over to and got in the Plymouth with Rizzo and the woman. In a short time the door of the Plymouth opened and appellant saw the complaining witness' bare legs fly out and he heard her screaming. Appellant then went over to the Plymouth, looked in, and said "What's going on in here? No need for that. Crazy or something?" Appellant saw that the woman had almost all of her clothes off, that Accetta had forced her head down and was forcing her to orally copulate while Rizzo was having intercourse with her from the rear. The complaining witness was not sure whether appellant was in the Plymouth while these acts were going on, while Accetta testified that all three defendants were in the back seat with the woman and that appellant had intercourse with her from the rear.

At any rate, appellant testified that he then got into the front seat of the Plymouth and started to drive towards the service station operated by Pera. He heard the complaining witness several times beg Accetta "Please don't hit me anymore. Leave me alone," but did nothing about it. He knew that the act of oral copulation was still going on, but did nothing about it. Defendant Rizzo then asked to be let out of the car so that he could walk to his automobile. Ap-

pellant stopped the Plymouth in an alley, and the other car stopped behind him. Appellant got out of the Plymouth and walked over to the other car. During this interval, defendant Rizzo, in front of appellant, took all the money from the complaining witness' purse, and dumped its other contents in the street. Appellant testified that he picked up these articles, returned them to the purse, and returned the purse to the car. He did not suggest to Rizzo that he should return the money taken from the purse.

Next, according to appellant, he drove to Pera's gasoline service station. The complaining witness was screaming and yelling. Accetta had taken her dentures and refused to return them. Appellant did nothing about this controversy. When the Plymouth arrived at the gasoline station the complaining witness was making so much noise that Accetta threatened to throw her in the bay. Appellant testified that he and Palermo restrained Accetta while the complaining witness escaped from the car, ran across the street to the entrance of a night club nearby, and asked some people to help her, declaring that she had been raped. They sent her to the police. The evidence of these people and of the police indicates that the complaining witness had been brutally beaten.

When appellant was first picked up for questioning he walked out of the district attorney's office without permission and drove away before he could be questioned, and when the police went to the home where he was staying, he ran out the back door and hid in the basement in an attempt to avoid arrest.

Appellant was acquitted of the rape and conspiracy charges but found guilty of a violation of section 288a of the Penal Code and of robbery. Admittedly, appellant did not directly participate in the commission of either of these crimes. He can be held, if at all, as a principal only as an aider and abettor. It is appellant's major claim that he in no way aided and abetted the criminal acts of his co-defendants. He contends that the evidence shows that he disapproved

of their acts. He asserts that his cowardice in failing to prevent or restrain these men from doing what they did cannot support a finding that he aided or abetted them.

[1-5] Before directly discussing the evidence something should be said about how this evidence must be reviewed in view of the fact that appellant was acquitted of the rape and conspiracy charges. The crime of aiding and abetting is a separate and distinct offense from that of conspiracy. *People v. Huling*, 71 Cal.App. 144, 234 P. 924. Although the rape and conspiracy charges involved some of the same acts as were involved in the section 288a Penal Code and robbery charges, the acquittal on the first two charges does not affect the validity of the conviction on the other two charges. *People v. Stangler*, 18 Cal.2d 688, 117 P.2d 321; *People v. Amick*, 20 Cal.2d 247, 125 P.2d 25. Section 954 of the Penal Code provides, in its last sentence: "An acquittal of one or more counts shall not be deemed an acquittal of any other count." Under this section, each count charging a separate and distinct offense must stand or fall on its own merits. The disposition of one count has no effect or bearing upon the other counts. This is so even though the respective verdicts in the various counts may be logically inconsistent. *People v. McCree*, 128 Cal.App.2d 196, 275 P.2d 95; *People v. Codina*, 30 Cal.2d 356, 181 P.2d 881; *People v. Ranney*, 123 Cal.App. 403, 11 P.2d 405. Thus, in considering the sufficiency of the evidence to sustain the conviction on the section 288a of the Penal Code and robbery counts the court must consider all of the evidence, including the relevant portions of the evidence relating to the rape and conspiracy charges. The jury was entitled, indeed obliged, to treat each count separately.

[6] To be an abettor the accused must have instigated or advised the commission of the crime or been present for the purpose of assisting in its commission. He must share the criminal intent with which the crime was committed. The mere presence of the accused at the scene of the crime

does not alone establish that the accused was an abettor. *People v. Hill*, 77 Cal.App.2d 287, 175 P.2d 45. In that case it was held that the driver of the car that conveyed certain robbers to and away from the scene of the crime, was not an abettor, where the evidence showed that he had no knowledge of his companions' felonious intent, was asleep in the car while the crime was committed, did not participate in the fruits of the robbery, and did not willfully aid the perpetrators in their attempt to escape detection.

[7-9] But while mere presence alone at the scene of the crime is not sufficient to make the accused a participant, and while he is not necessarily guilty if he does not attempt to prevent the crime through fear, such factors may be circumstances that can be considered by the jury with the other evidence in passing on his guilt or innocence. One may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit it. *People v. Turner*, 86 Cal.App.2d 791, 195 P.2d 809; *People v. Le Grant*, 76 Cal.App.2d 148, 172 P.2d 554; *People v. Weber*, 84 Cal.App.2d 126, 190 P.2d 46. Moreover, the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged. Whether the act committed was the natural and probable consequence of the act encouraged and the extent of defendant's knowledge are questions of fact for the jury. *People v. Goldstein*, 146 Cal.App.2d 268, 303 P.2d 892; *People v. Beltran*, 94 Cal.App.2d 197, 210 P.2d 238.

[10] In order to hold the accused as an aider and abettor the test is whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures. In *People v. Luna*, 140 Cal.App.2d 662, 295 P.2d 457, the defendant was held to have aided and abetted his co-defendant in making an as-

sault on the prosecuting witness where he entered into an altercation which reasonably could lead to trouble, stood by while his co-defendant committed the assault, prepared to enter the fight if necessary, and finally entered the fight. The court pointed out that while one who merely stands by watching an assault is not guilty of aiding or abetting, and while the defendant was acquitted of the charge of assault on the person with whom he fought, the evidence sustained his conviction for aiding and abetting his companion's assault.

It has been held that the person who furnishes a room with knowledge that a statutory rape is to be committed there is guilty as an aider and abettor. *People v. Wood*, 56 Cal.App. 431, 205 P. 698. And a person used as a lookout is an aider and abettor. *People v. Silva*, 143 Cal.App.2d 162, 300 P.2d 25. In *People v. Marshall*, 132 Cal.App.2d 18, 281 P.2d 260, the accused was acquitted of rape and kidnapping, but was found guilty of a violation of section 288a of the Penal Code. The evidence showed that he had not participated in compelling the complaining witness to commit the act, but it also showed that he was the driver of the car, that he and other defendants had forced the victim into the car, and that he had had intercourse with her. This was held sufficient to sustain the conviction of aiding and abetting a violation of section 288a of the Penal Code committed by one of his companions.

A case somewhat similar to the instant one is *People v. Mummert*, 57 Cal.App.2d 849, 135 P.2d 665. There the appellants stood by while their companions committed a rape. At page 855, of 57 Cal.App.2d, at page 668 of 135 P.2d, the court, in affirming the conviction for having aided and abetted the offense, stated: "From the first exhibition of a criminal intent toward her they had demonstrated perfect harmony and fraternal cooperation among themselves. For any man to stand by serenely and sympathetically in the presence of an act of rape by his associate is itself proof of his approval of and cooperation with the criminal act. * * * They aided and abet-

ted by their actual presence, and by their acts they rendered actual assistance to the perpetrator. [Citing a case.] At the time of the rape by each of the men the other three stood near by and abetted the perpetrator by presenting a show of force and by keeping watch against intrusion. As each without resentment toward his acting confederate and without concern for the girl permitted the outrage, they exemplified a united and single purpose which would brook no interference. Each thus encouraged and aided his several companions and was therefore a principal in each of the crimes."

[11-13] Tested by the standards announced in these cases we think that although acquitted of the rape and conspiracy charges, the evidence is sufficient to sustain the conviction of having aided and abetted the robbery and section 288a Penal Code offenses. Of course, the appellant's presence at the scene of the crime, his knowledge that a crime was being committed, and his failure to prevent it, alone could not support the conviction. But these are factors the jury could consider along with the other evidence. Under rules already discussed, the jury, although it acquitted appellant of the rape and conspiracy charges, could find that appellant forced the complaining witness in his car, beat her, and forced her to submit. It could also find that he then turned the victim over to his friends for their pleasure, and then drove the get-away car to the destinations desired by his confederates. Moreover, it is a reasonable inference from the evidence that the Palermo car followed appellant to Aquatic Park as part of a preconceived plan. The driving to the bar in one automobile, then, after seeing and talking with the complaining witness, going out and getting another car and turning over the keys to appellant, and then arriving so fortuitously at Aquatic Park, certainly supports that inference. But even if that were not sufficient there is other evidence. The jury was not bound by appellant's version of what happened at Aquatic Park. They could have believed

Accetta or parts of the testimony of the complaining witness that indicated that appellant took a more or less active part in the section 288a offense and certainly aided and abetted it. It is a reasonable inference from the evidence that when he allowed first Rizzo and then Accetta to enter the Plymouth with the girl, he knew that they intended to have intercourse with the victim whether she consented or not. He is, of course, liable for the consequences that followed. Then appellant admittedly drove the automobile to the destinations desired by his co-defendants while the act of oral copulation was taking place. He knew that the act was taking place, but did nothing to stop it. He knew that Accetta was beating the woman, but did nothing to stop it. At one place on the return trip he stopped the car in an alley and knew that Rizzo stole the money from the complaining witness' purse, and did nothing to stop it. It is a reasonable inference that he drove away from Aquatic Park because of fear that the victim's screams would attract attention. Thus, under the evidence, he induced the complaining witness to go with him in his borrowed car and then he allowed that car to be used to commit the violation of section 288a, then drove it away while the violation was taking place, and did not do anything to prevent the offenses committed or the brutal beating that the victim endured. He knew of the robbery and made no effort to stop it. Under the circumstances his presence and acts helped to make the crimes possible. His silence and lack of objection under the circumstances amounted to tacit approval of the acts of his co-defendants. The evidence supports the convictions.

[14] The only other contention of appellant relates to his extrajudicial statement made by him to the district attorney at the time of his arrest. This statement was tape recorded, unknown to appellant, and was introduced into evidence by the prosecution. It is contended that the extrajudicial statement contains statements irreconcilable with guilt, and that for this reason the prosecution was bound by the

extrajudicial statement, there being no competent and substantial evidence to the contrary.

[15] The concept that the prosecution is "bound by" extrajudicial statements introduced by the prosecution which are irreconcilable with guilt is applicable only where there is no other evidence which supports the finding of guilt. *People v. Acosta*, 45 Cal.2d 538, 290 P.2d 1. Where there is prosecution evidence which tends to show criminality, it is the function of the jury to determine whether to believe that evidence or the extrajudicial statement. *People v. Silva*, 143 Cal.2d 162, 300 P.2d 25. As the evidence already summarized indicates, that is this case.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ.,
concur.



156 Cal.App.2d 48

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Juan Antonio ROMERO, Defendant and
Appellant.

Cr. 3389.

District Court of Appeal, First District,
Division 2, California.

Dec. 12, 1957.

The defendant was convicted of first degree burglary, and from a judgment of the Superior Court, County of Santa Cruz, Gilbert B. Perry, J., the defendant appealed. The District Court of Appeal, Draper, J., held, inter alia, that where there was no direct evidence that accused committed burglary charged, court was required to give instruction on circumstantial evidence, and deficiencies in form of instruction requested

by accused were immaterial, and failure to cover such subject in the instructions was error, but not prejudicial under circumstances.

Judgment affirmed.

1. Arrest ⇨63(4)

A combination of circumstances including fact that accused when questioned by officers at 2:40 a.m. in residential neighborhood refused to give his name and address and his only explanation of his presence there was that he was looking for a girl named Mary whose address he did not know warranted arrest of accused for investigation of burglary.

2. Criminal Law ⇨395

The failure of officers to inform accused of cause of his arrest is wholly collateral to securing of evidence by search incident to arrest and hence articles found on person of accused who was not informed of cause of his arrest were properly admitted in evidence in burglary prosecution. West's Ann.Pen. Code, § 841.

3. Criminal Law ⇨824(9)

When evidence of guilt is wholly circumstantial the court on its own motion must give instruction that where circumstantial evidence is susceptible of two constructions, both reasonable, jury must adopt the construction pointing to innocence rather than guilt.

4. Criminal Law ⇨784(1), 1172(2)

Where there was no direct evidence that accused committed burglary charged, court was required to give instruction on circumstantial evidence, and deficiencies in form of instruction requested by accused were immaterial and failure to cover such subject in the instructions was error, but not prejudicial under circumstances.

5. Criminal Law ⇨369(1)

Fact that evidence tends to establish an offense other than that for which a defendant is being tried does not, of itself, render such evidence inadmissible.

6. Criminal Law ⇨680(1)

The order of proof is largely in discretion of trial court. West's Ann.Code Civ. Proc. § 2042; West's Ann.Pen.Code, § 1094.

7. Criminal Law ⇨680(1)

In burglary prosecution, admission of evidence tending to identify accused as person who sought to enter the home of person other than one involved in prosecution, before there was evidence implicating accused in the offense charged was not an abuse of discretion and was not prejudicial to accused, the order of proof being largely in discretion of trial court. West's Ann. Pen.Code, § 1094.

8. Witnesses ⇨226

The trial court is granted a broad discretion in controlling method of interrogation. West's Ann.Code Civ.Proc. § 2044.

9. Criminal Law ⇨1170½(1)

Where on direct examination one of arresting officers testified that accused was "booked" for investigation of burglary and vagrancy and on cross examination stated that arrest was made for vagrancy and on redirect was asked for what offense or offenses arrest had been made, accused could claim no error on ground that state was permitted to "impeach its own witness". West's Ann.Code Civ.Proc. §§ 2044, 2049.

Lucas, Wyckoff & Milier, Robert Bennett, Santa Cruz, Raymond A. Amrhein, Watsonville, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Marvin J. Christiansen, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

A jury found defendant guilty of first degree burglary. He appeals from the ensuing judgment.

[1] Appellant asserts that his arrest was without probable cause, and that thus a key and some money found upon his person in a search incident to the arrest were improperly admitted in evidence.

Testimony showed that the home of Mr. and Mrs. Scurich, in Watsonville, was entered at about 2:15 a.m., and that money and some other objects were taken from Mrs. Scurich's purse. Mr. Scurich saw the burglar briefly, and described him to police officers as small, wearing light colored trousers, and having no hat. The officers who responded to the Scurich call had re-entered their patrol car and started to circle the block looking for suspects when they received a radio message that a prowler had attempted to enter the Lynn home, about one and one-half blocks from the Scurich residence. Mr. Lynn told the officers that the prowler had attempted to enter through the kitchen door but had been frightened off. Lynn described the prowler as wearing a dark jacket and light colored trousers. The policemen resumed driving about the neighborhood in search of suspects. They saw appellant walking on the sidewalk across the street from the Scurich home. His clothing answered the descriptions Lynn and Scurich had given, and he was small. He was the only person they had found on the streets in driving about the area. The officers questioned him. He refused to give his name and address, and his only explanation of his presence in the area at 2:40 a.m. was that he was looking for a girl named Mary, whose address he did not know. This combination of circumstances clearly warranted the arrest of appellant for investigation of burglary.

[2] Appellant also argues that his arrest was improper because the arresting officers did not inform him "of the cause of the arrest" as required by law (Pen. Code, § 841). But the rule is clear that this failure is wholly collateral to the securing of evidence by a search incident to the arrest (*People v. Maddox*, 46 Cal.2d 301, 305, 294 P.2d 6). It follows that the articles found on appellant's person were properly admitted in evidence.

[3,4] Appellant contends that the trial court erred in failing to give a requested instruction that where circumstantial evidence is susceptible of two constructions,

both reasonable, the jury must adopt the construction pointing to innocence, rather than guilt. The rule is settled that such an instruction must be given by the court on its own motion when the evidence of guilt is wholly circumstantial (*People v. Merkuris*, 46 Cal.2d 540, 297 P.2d 999; *People v. Bender*, 27 Cal.2d 164, 163 P.2d 8). Here there was no direct evidence that appellant committed the burglary charged. Thus the court was required to give a proper instruction, and deficiencies in the form of the instruction requested by appellant are immaterial. Failure to cover this subject in the instructions was error but, in our opinion, was not prejudicial in this case.

When arrested, appellant had in his pocket a key which had been taken from Mrs. Scurich's purse. This evidence, added to the facts that he fitted the two somewhat general descriptions of the burglar and prowler, that he was the only person on the streets in this area at an unusual hour, and that he refused to identify himself to the police, makes a rather strong case against him. Alone, this might not be enough to establish that the omission of the instruction was without prejudice to him. However, appellant took the witness stand and gave a highly incredible explanation of his presence in this area at this hour. This story cast such an aura of unreality and unreliability over appellant that we are convinced the jury could not have accepted the hypothesis offered by him. Thus the omission of the instruction was not, under the facts of this case, prejudicial (*People v. Candiotta*, 128 Cal.App.2d 347, 275 P.2d 500; see, also, *People v. Bender*, supra).

[5-7] Appellant also complains of the admission of evidence tending to identify him as the person who sought to enter the Lynn home. The fact that evidence tends to establish an offense other than that for which a defendant is being tried does not, of itself, render such evidence inadmissible (*People v. Peete*, 28 Cal.2d 306, 169 P.2d 924). Here the questioned evidence placed appellant near the Scurich residence only a short time after the burglary there, and tended also to explain the

lapse of some 20 to 30 minutes between the Scurich burglary and the appearance of appellant across the street from that home. Appellant attacks the admission of this testimony principally upon the ground that it was given before there was evidence implicating appellant in the Scurich burglary, the offense charged. The reverse order generally is preferred (*People v. Albertson*, 23 Cal.2d 550, 145 P.2d 7). However, the order of proof is largely in the discretion of the trial court (*Code Civ.Proc.* § 2042; *Pen.Code*, § 1094; *People v. Hinshaw*, 40 Cal.App. 672, 182 P. 59). We find no abuse of discretion, and no prejudice to appellant, in admitting the Lynn evidence early in the case.

[8, 9] Appellant's final contention is that the court erred in permitting respondent to "impeach its own witness." On direct examination, one of the arresting officers testified that appellant was "booked" for investigation of burglary and vagrancy. On cross-examination, he said the arrest was made for vagrancy. On redirect, he was asked for what offense or offenses the arrest had been made. It is true that counsel on both sides then discoursed at some length on the subject of impeachment of one's own witness. However, there was no attempt to impeach the witness by evidence of bad character, as proscribed by the code (*Code Civ.Proc.* § 2049), nor was there in fact any evidence of inconsistent statements, to prove which surprise must be shown (*People v. Spinosa*, 115 Cal.App.2d 659, 252 P.2d 409). The trial court carefully restricted any attempted impeachment, and merely allowed the prosecution to ask "What did you arrest the defendant for?" This question had been asked and answered, but the trial court is granted a broad discretion in controlling the method of interrogation (*Code Civ.Proc.* § 2044) and there can be little doubt that here this discretion was exercised in the manner best calculated to bring out the truth.

The judgment is affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

155 Cal.App.2d 744

**COUNTY of LOS ANGELES, Plaintiff
and Appellant,
v.**

**Dan E. BUTCHER et al., Defendants,
Dan E. Butcher, Mary A. Butcher, Leo
Butcher, Clifford R. Bruber, and Pico
Citizens Bank, Respondents.**

Civ. 22398.

District Court of Appeal, Second District,
Division 2, California.

Dec. 5, 1957.

Rehearing Denied Jan. 2, 1958.

Hearing Denied Jan. 28, 1958.

Proceeding on motion to dismiss appeal from judgment dismissing suit by county to enjoin defendants from selling or conveying certain realty. The District Court of Appeal, Fox, Acting P. J., held that where property in question had been deeded to purchasers, or sold to purchasers under contract, pending appeal by county from denial of relief, question of whether an injunction restraining sale of realty should be granted was moot, and appeal would be dismissed on motion.

Appeal dismissed.

1. Appeal and Error ⇨843(2)

Whether an injunction restraining sale of realty should be granted becomes a moot question on appeal, where, pending the appeal, the property has been sold.

2. Vendor and Purchaser ⇨54

Where parties enter into a written contract for purchase and sale of realty pursuant to which purchaser goes into possession and vendor retains legal title as security for purchase price, vendor has no greater rights than he would possess if he had conveyed the land and taken back a mortgage, and the purchaser is for all purposes the owner.

3. Injunction ⇨22

Where granting of an injunction restraining defendants from deeding or selling certain realty could operate only upon resales made after default of contract purchasers, a mere possibility, court under such circumstances, would not grant an injunction.

4. Appeal and Error ⇨781(4)

Where reversal of a judgment would be an idle act, appeal therefrom would be dismissed.

5. Appeal and Error ⇨781(4)

Where certain property which county sought to enjoin defendants from selling had been deeded to purchasers, or sold to purchasers under contract, pending appeal by county from denial of relief, question of whether an injunction restraining sale of realty should be granted was moot and appeal would be dismissed on motion.

Harold W. Kennedy, County Counsel,
and Edward H. Gaylord, Deputy County
Counsel, Los Angeles, for appellant.

Lehman & Van Buskirk, M. Lewis Lehman, Wayne L. Van Buskirk, Los Angeles,
for respondents.

FOX, Acting Presiding Justice.

This is a motion to dismiss the appeal on the ground that the matter is moot.

The County brought this suit to enjoin the defendants Butcher (Dan, Mary and Leo) and Clifford R. Bruber, and Pico Citizens Bank from "offering to sell, contracting to sell, or selling or conveying" any portion of certain real property located in the unincorporated area of Los Angeles County.

The suit is based on the theory that the defendants Butcher had divided the particular property into eight lots without filing a subdivision map with the Regional Planning Commission of the county, as required by the Subdivision Map Act (Business & Professions Code, §§ 11500 to 11709) and as required by County Ordinance No. 4478, known as "The Subdivision Ordinance." It was alleged that these lots had an average width of 47½ feet, which violated the requirements of section 71 of the above ordinance that such lots have an average width of 50 feet.

Just prior to the final inspection by the County of the houses that the Butchers had built on these lots, this suit was filed to en-

join the sale of the properties in question. A preliminary injunction was granted. Upon a trial on the merits, the preliminary injunction was dissolved and the County was denied any relief. It is from this judgment that the County appealed.

Respondents' motion to dismiss the appeal is supported by the separate affidavits of Dan and Mary Butcher to the effect that since entry of judgment in the trial court on January 3, 1957, they have each caused to be sold their respective four parcels of the property here involved, and that "said parcels, each improved with a single family dwelling, are presently occupied by each of the respective vendees."¹

It was stipulated upon oral argument of the motion to dismiss that Dan and Mary Butcher had sold a substantial number of the properties here involved by contracts for the purchase and sale of real property and that the other properties had been disposed of by deed.

It is the position of respondents that since there was no restraining order in effect pending appeal, and no action was taken by the County to keep the matter in status quo during such period, and since the property in the meantime had been sold, the matter has become moot inasmuch as there is no relief the court could now grant the plaintiff.

[1] Whether an injunction restraining the sale of real property should be granted becomes a moot question on appeal where in the meantime the property has been sold. *Stinson v. Blodget*, 123 Cal.App.2d 390, 394, 266 P.2d 947; *Lansdown v. Smith & Sons R. Corp., Ltd.*, 1 Cal.App.2d 618, 620, 37 P.2d 127; *Brennan v. American Trust Co.*, 3 Cal.2d 635-636, 45 P.2d 207. Under these decisions it is perfectly clear that the matter is moot insofar as any of the properties that have been deeded to the purchasers are concerned. This leaves for consideration the status of the properties

with respect to which contracts for the purchase and sale thereof have been entered into, following which possession has been taken by the vendees. In *Elliott v. McCombs*, 17 Cal.2d 23, at page 31, 109 P.2d 329, at page 334, the court pointed out that " * * * a contract for the sale of real estate may be specifically enforced by the purchaser, equity regarding as done that which ought to be done; it considers the purchaser to be the owner of the land. [Citations.] The vendor who retains the legal title as security for the payment of the purchase price has no greater rights than he would possess if he had conveyed the land and taken back a mortgage. [Citation.] The vendee, particularly after he goes into possession of the land under an executory contract, is for all purposes the owner and the vendor retains mere legal title. [Citation.]" Relying on this principle, the court held in *Eisley v. Mohan*, 31 Cal.2d 637, 643, 192 P.2d 5, that a vendee in possession of land under an executory contract whereby title is retained by the state as security, is for all purposes the owner. See to the same effect, *Department of Veterans Affairs of California v. Board of Supervisors*, 31 Cal.2d 657, 659, 192 P.2d 22; and *Sherman v. Quinn*, 31 Cal.2d 661, 663, 192 P.2d 17. In *Taggart v. Cal-Linda Packing Co.*, 146 Cal.App.2d 545, 304 P.2d 172, the court had for consideration a contract for the sale to Pasquale Ferrero and Alma Robba of certain real property upon which there was situated a cannery. In the course of the opinion the court, relying on the *Sherman* and *Elliott* cases, *supra*, observed that "It is familiar law that upon the execution of the purchase and sale contract whereby the cannery property and the equipment mentioned in that contract were conditionally sold to Ferrero and Robba, and upon the buyer's entry into possession thereof, the interests of the parties were to be considered as being that the title to the

1. Leo Butcher also filed an affidavit in support of the motion to dismiss in which he stated that the parcel of property owned by him and involved in this suit "is presently the subject of a complaint

in eminent domain in a suit filed by appellant herein entitled County of Los Angeles v. Leo Butcher, et al., defendants, being No. 683009 in the Superior Court of Los Angeles County."

property being purchased was in the buyers, except that the legal title remained in the sellers, to be retained by them by way of security against the failure of the buyers to complete the contract of purchase." 146 P.2d at page 548, 304 P.2d at page 174.

[2] From the foregoing authorities it is clear that where parties enter into a written contract for the purchase and sale of real property pursuant to which the buyer goes into possession and the seller retains the legal title as security for the purchase price, the latter "has no greater rights than he would possess if he had conveyed the land and taken back a mortgage" and the purchaser "is for all purposes the owner." *Elliott v. McCombs*, supra [17 Cal.2d 31, 109 P.2d 334].

Applying these principles to the factual situation at hand, it may properly be said that the properties in question had been sold since, pursuant to written contracts for the purchase and sale of said properties, the purchasers had taken possession and the sellers held legal title merely as security for payment of the purchase price. *Taggart v. Cal-Linda Packing Co.*, supra. In these circumstances, as said in the *Elliott* case, "The vendee * * * is for all purposes the owner * * *."

[3-5] If the judgment were reversed that would not undo the sales previously made to the persons now in possession under the contracts; and the granting of an injunction upon a new trial or pursuant to direction of this court could operate only upon resales made after default of contract purchasers—a thing now resting in the realm of possibility and speculation. Courts do not grant injunctions upon such an attenuated basis. Reversal of the instant judgment would be an idle act. See *Wright v. Board of Public Works*, 163 Cal. 328, 331, 125 P. 353. The matters involved in this appeal are moot.

The appeal is dismissed.

ASHBURN, J., concurs.

156 Cal.App.2d 123

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John Vincent FELLI, Defendant and
Appellant.

Cr. 3402.

District Court of Appeal, First District,
Division 1, California.

Dec. 16, 1957.

Rehearing Denied Jan. 15, 1958.

Hearing Denied Feb. 11, 1958.

Defendant was convicted in the Superior Court, Santa Clara County, William F. James, J., of burglary, and he appealed. The District Court of Appeal, Fred B. Wood, J., held that under circumstances disclosed officers had been justified in believing that burglary was an "inside job" and had had reasonable cause for believing that defendant, an employee who had not reported for work on the following morning, might have committed offense; and held that, under those circumstances, officers had had legal basis for arresting defendant without a warrant.

Affirmed.

1. Arrest $\S$ 63(4)

Circumstances disclosed, in burglary prosecution, justified officers in believing that burglary was an "inside job" and gave them reasonable cause for believing that defendant, an employee who had not reported for work on the following morning, might have committed offense; and, under those circumstances, officers had legal basis for arresting defendant without a warrant. *West's Ann.Pen.Code*, § 836, subd. 3.

2. Arrest $\S$ 63(4)

Merely observing, by looking through doorway of defendant's room after hotel clerk had unlocked and opened same, goods of type stolen was not such an invasion by officers, of defendant's privacy as would render unavailable and unusable, as basis for arrest without warrant, information previously received and justifying belief that

defendant might have committed burglary. West's Ann.Pen.Code, § 836, subd. 3.

3. Arrest ⇐63(4)

Standing alone, information received from owner of burglarized premises that one of his employees was an ex-convict might not have furnished reasonable cause to believe that such employee was the burglar.

4. Arrest ⇐71

Where officers, who arrested defendant while he was driving his automobile, locked vehicle and took defendant to police headquarters for booking and had vehicle towed to place of storage, search of vehicle, made at storage garage within an hour after arrest, was legal as an incident of arrest.

5. Criminal Law ⇐1169(1)

Assuming that objects obtained some two hours after his arrest in search of defendant's hotel room, which was located several blocks distant from scene of arrest, were illegally seized and should not have been admitted in evidence, error in admission of same would not require reversal of burglary conviction, where other evidence in case was of convincing character.

Silvio E. Borello, Frank C. Burriesci, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of burglary, defendant as grounds for reversal claims (1) all the evidence was improperly admitted because of an illegal arrest and seizure and (2) certain evidence found in his room was illegally obtained, hence, improperly admitted.

The burglary occurred at the Jose Bowl in San Jose sometime between the closing hour on the evening of December 24 and the opening of the place on the morning of December 26, 1956. Certain circumstances indicated it was likely an "inside job" which, coupled with the fact that defendant, an em-

ployee engaged as a pin setter, did not report for work on the morning of the 26th, caused him to be suspected as the perpetrator of the crime.

Officer Hilscher, after inspecting the scene of the crime and talking to the proprietor and one of the latter's employees, went to defendant's hotel room, knocked on the door and received no answer. At Hilscher's request the hotel clerk unlocked and opened the door and the two looked in but did not enter. He did not see defendant in the room.

Hilscher then put out a bulletin for defendant's arrest. He was apprehended at 12:37 p. m. on December 26 while driving his car along a street a few blocks from his hotel room. He was taken to police headquarters and the car was towed to a garage. At 1:30 p. m. the car was searched and a tire lug wrench discovered which became an important piece of evidence at the trial.

At 2:30 the same afternoon the officers went to defendant's hotel room, taking therefrom a Mounds candy box, a carton and a half of Chesterfield cigarettes, a key, some scraps of metal, a piece of paper, and a pair of worn Thom McAn shoes.

(1) Defendant's arrest was legal. A felony had been committed and the officers had reasonable cause for believing that the defendant committed it.

Among the indicia that this was an "inside job" were these: An inside latch had been removed from one of the windows. The window was about three feet above the ground level on the outside and between six and seven feet above the floor on the inside. No other point of entry was found. A series of lockers five and a half feet high were customarily in place along the wall below the window and two beer cases had been moved to a position alongside of the lockers. The beer cases, apparently, had been moved from their customary position on the other side of the corridor. The only parts molested behind the lunch counter were those where money had been kept or where the burglar went to get tools; he did not ransack all the drawers; he went directly to

where the tools were kept and these tools, in turn, were used on the safe. He went to where a piggy bank was hidden behind a utensil tray and removed the money from that. He went to an envelope containing money when he had nine or ten hooks to choose from and took one envelope from this particular hook, the only envelope containing money. Of the several locked doors in the establishment, the burglar went to the door of the office which contained the safe; the other doors were unmolested.

The owner informed the officer that he suspected the defendant; defendant had been seen behind the lunch counter where he had no business; on several occasions he was there, sharpening pencils and looking about; also, that defendant parked his vehicle behind the bowling alley at night and that morning the vehicle was gone; and that defendant was due to report for work that morning but had not shown up.

Officer Hilscher said he based his bulletin for defendant's arrest upon an accumulation of these things.

[1] These circumstances gave the officer reasonable cause for believing that defendant committed the crime and furnished a legal basis for arresting him without a warrant. Pen.Code, § 836, subd. 3.

Plaintiff argues that the officer's knowledge of the presence of a Mounds candy box in defendant's room (gained by looking through the doorway upon his first visit to the room), one of the things which the officer said contributed to his belief that defendant was the burglar (the owner of the bowling alley had told the officer that such a box was missing) was gained unlawfully and, therefore, infected the arrest with illegality.

[2] We think the officer had plenty of reason to believe defendant the perpetrator when he went to the room for the purpose of interviewing him. Merely observing a candy box when looking through the doorway after the hotel clerk had unlocked and opened the door, regular or irregular, legal or illegal, was not such an invasion of defendant's privacy as would render unavail-

able and unusable the information the office had already with unquestioned legality obtained.

So, too, with respect to the knowledge gained of defendant's absence from his room. It apparently impressed the officer with the idea of need for quick action (defendant might be in flight), prompting the officer to issue the bulletin for defendant's arrest at once.

[3] Defendant would make much of the fact that the owner of the bowling alley told Hilscher that defendant was an exconvict, arguing that such information would not furnish a reasonable cause to believe that defendant was the burglar. That might well be so if defendant's prior conviction were the sole basis for such a belief, but it was not. There were the numerous other cogently persuasive circumstances which we have narrated. Moreover, in response to a question by defendant's counsel, Officer Hilscher said he did not base his belief of defendant's guilt upon the fact that defendant had a record.

[4] Defendant has not upon this appeal questioned the legality of the search of the car and the seizure of the lug wrench found in the trunk of the car, except upon the ground of asserted illegality of the arrest which preceded the search. We entertain no doubt as to the legality of that search, despite the interval of time between the arrest and the search. Upon arresting defendant, who had been driving in his car, the arresting officers locked the car and took him to police headquarters for booking. Meanwhile, the police department made arrangements to have the car towed to a place of storage. As soon as defendant was booked one of the officers returned to the scene of the arrest to unlock the car upon the arrival of the tow-truck. The search of the car was made at the storage garage within an hour of the arrest. Such an interval of time would not under the circumstances of this case disconnect and disassociate the two events. It follows that the search of the car was legal as an incident of the arrest.

(2) *Were objects taken from defendant's room legally seized and, as such, properly admitted into evidence?*

The objects specifically mentioned by defendant upon this appeal are a pair of shoes (Ex. 6), a carton and a half of Chesterfield cigarettes (Ex. 8) and the Mounds candy box (Ex. 9). The defendant contends that these objects were erroneously admitted in evidence because they were obtained in a search of his hotel room made some two hours after the arrest and several blocks distant from the scene of the arrest. The state concedes that this contention may be sound, citing *Hernandez v. Superior Court*, 143 Cal.App.2d 20, 299 P.2d 678, and claims that none of this evidence could have been prejudicial to defendant.

[5] We are not prepared to say that the facts of the *Hernandez* case are comparable to those of this case. However, assuming that Exhibits 6, 8 and 9 were illegally seized and should not have been admitted in evidence, we do not find the error prejudicial. We base this conclusion upon the convincing character of other evidence in the case, particularly including the lug wrench found in defendant's car. Lowell Bradford, the head of the laboratory of criminalistics, testified that he took a piece of wood from the premises of the Jose Bowl, sawing it out of a piece of the wall which housed the safe. The paint on the lug wrench matched the paint on the block of wood. There was also paint on the lug wrench which matched samples taken from the cigarette machine (which had been opened by the burglar). Bradford made impressions of marks made by the lug wrench. These impressions matched the impressions in the wood section taken from the bowling alley. The lug wrench was also chipped in one corner. A metal chip was found in the wood from the bowling alley. Bradford concluded that the metal imbedded in the wood was originally part of the tip of the lug wrench and had broken off.

In the words of the Supreme Court in *People v. Watson*, 46 Cal.2d 818, 836, 299 P.2d 243, 254, it is not "reasonably probable

that a result more favorable to the appealing party would have been reached in the absence of the error."

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



155 Cal.App.2d 848

Delilah METZ, Plaintiff and Respondent,

v.

Victor MALLEY, Marie Malley, Defendants and Appellants.

Civ. 5703.

**District Court of Appeal, Fourth District,
California.**

Dec. 9, 1957.

Rehearing Denied Jan. 6, 1958.

Hearing Denied Feb. 5, 1958.

Action by vendor for damages for purchaser's misrepresentations as to value of note and chattel mortgage assigned to vendor by purchaser in part payment of purchase price of house. After nonjury trial, the Superior Court, Riverside County, Hilton H. McCabe, J., entered judgment for vendor in amount of \$9,264 and purchasers appealed. The District Court of Appeal, Barnard, P. J., held that affidavit stating that individual who had purchased the mortgaged restaurant equipment from vendor for \$1,700 after maker of note went out of restaurant business had later sold part of it for \$2,700 and kept two items worth \$500 did not entitle purchaser to new trial where it appeared from affidavit that the equipment which was still located in original restaurant was purchased in view of its usefulness in operating a restaurant at that place and sale had been held more than one year prior to trial.

Affirmed.

1. Fraud ⇨58(1)

In action by vendor for damages for purchaser's misrepresentations as to value of chattel mortgage assigned to vendor by purchaser in part payment of purchase price of house, evidence established that purchaser's statement that mortgaged restaurant equipment was worth in excess of the then unpaid balance of principal and interest on the note referred to value of the equipment itself, and not as to its value as part of and as used in a going business.

2. Fraud ⇨58(2)

In action by vendor for damages for purchaser's misrepresentations as to value of chattel mortgage and note assigned to vendor by purchaser in part payment of purchase price of house, evidence was sufficient to sustain trial court's finding that purchaser had falsely represented to vendor that mortgaged restaurant equipment was worth in excess of the then unpaid balance of principal and interest on the note and that maker of said note was successfully operating restaurant and intended to continue to operate it.

3. Fraud ⇨62

In action by vendor for damages for purchaser's misrepresentations as to value of note with unpaid balance of \$11,000 secured by chattel mortgage assigned to vendor by purchaser in part payment of purchase price of house, evidence sustained trial court's finding that vendor had been damaged in sum of \$9,264 by purchaser's false representations.

4. Evidence ⇨434(5)

In action by vendor for damages for purchaser's misrepresentations as to value of note and chattel mortgage assigned to vendor by purchaser in part payment of purchase price of house, the fact that escrow instructions at bank provided for assignment of note and chattel mortgage without recourse did not render purchaser's alleged oral representations or statements inadmissible as variance with terms of written contract where fraud involved the entire transaction.

5. Estoppel ⇨78(3)

In action by vendor for damages for purchaser's misrepresentations as to value of note and chattel mortgage assigned to vendor by the purchaser in part payment of purchase price of house, vendor was not estopped to assert that she had relied upon purchaser's representations or statements because escrow instructions at bank provided for assignment of note and chattel mortgage without recourse.

6. Fraud ⇨64(5)

In action by vendor for damages for purchaser's misrepresentations as to value of note and chattel mortgage assigned to vendor by purchaser in part payment of purchase price of house, question whether vendor relied upon the statements and representations made by purchaser and whether vendor waived fraud, if present, were for trial court in nonjury trial.

7. New Trial ⇨108(2)

In action for damages for purchaser's misrepresentation as to value of chattel mortgage assigned to vendor in part payment of purchase price of house, trial court which found for vendor in sum of \$9,264 did not abuse its discretion in denying new trial to purchaser who filed affidavit showing that mortgaged restaurant equipment which vendor sold for \$1,700 after mortgagor defaulted in payments was resold in part for \$2,700 by individual who kept two items worth \$500 where sale was held more than one year prior to trial and equipment was resold in original location to be used in restaurant at that place.

Benjamin J. Goodman, Los Angeles, for appellants.

Merrill Brown, Cathedral City, for respondent.

BARNARD, Presiding Justice.

This is an action for damages based on misrepresentations made by the defendant husband in purchasing a house from the plaintiff. On March 28, 1955, Mrs. Metz and Mr. Malley entered into an agreement

under which she agreed to sell him her house in Palm Springs for \$16,500, and he agreed to give her a \$5,500 trust deed on the house and to assign to her a note with an unpaid balance of about \$11,000 which was secured by a chattel mortgage on the equipment in a restaurant in Glendale. The parties opened an escrow at a bank on April 1, 1955. Various differences arose between them which were finally settled and the escrow was completed on May 24, 1955, at which time the plaintiff received an assignment of the chattel mortgage. Shortly thereafter there was a default in payments required under the chattel mortgage, and the plaintiff discovered that the restaurant was not being operated. The plaintiff thereupon gave notice of a sale of the mortgaged equipment at private sale, as permitted by the mortgage terms, which sale was set for July 1, 1955. No other bidders appeared and Mrs. Metz bought in the equipment for \$500. On August 8 she sold it to a third party for \$1,750.

The plaintiff then brought this action alleging, among other things, that the defendants had misrepresented the value of this chattel mortgage in that they had stated and represented to her (1) that the personal property secured by said chattel mortgage was worth in excess of the then unpaid balance of principal and interest of said note, and (2) that the maker of said note was successfully operating said restaurant and intended to continue to operate it. The prayer was for damages in the sum of \$9,364, the difference between the amount that would have been due on the chattel mortgage and the \$1,750 received by the plaintiff. After a trial, the court found that these false representations had been made, and found that the plaintiff had been damaged in the sum of \$9,264 after allowing a credit for \$100 which had been received by the plaintiff. The defendants have appealed from the judgment which followed.

[1-3] It is first contended that the evidence does not sustain the finding that these statements and representations were false. While it is conceded that the second of these

representations was actually made it is argued that both of them were true on March 28, 1955; that on that date the restaurant equipment was actually worth in excess of the then unpaid balance of the note and chattel mortgage; and that the maker of said note (Sholder) was then successfully operating said restaurant and intended to continue to operate it. It is further argued that the uncontradicted evidence established that the fair market value on March 28 of the mortgaged equipment, when used in the operation of a restaurant as a going business, and was in excess of \$11,064; that the first representation made by the defendants had reference to the value of the chattel mortgage as a part of a going business; and that the truth of the second representation is shown by the fact that Sholder, who was then operating the restaurant, told two friends of the plaintiff on April 21, 1955, that he had a three-year lease and expected to keep the place and make the chattel mortgage payments promptly.

There was considerable conflicting evidence relating to the truth of these representations at the time they were made, including the contrary inferences which could well be drawn from the evidence. The history of this restaurant and this equipment is interesting in the light of both of these representations. A Mr. Mushrow had the original lease and originally opened the restaurant in May, 1952. He operated it from May to September of that year and then went into bankruptcy and the restaurant was closed. Mr. Malley testified that he acquired the lease from Mushrow in December, 1952; that he had loaned Mushrow \$3,000 with which to start the restaurant; that "It was a case of either dropping the \$3,000 or going into it deeper, and I decided that I would take it over"; that he did not buy the equipment through the bankruptcy; and that, including his \$3,000 loan and the unpaid balances which he had to pay off on various items, he had paid about \$10,000 for the equipment. Malley, who was a real estate broker, reopened the restaurant in December, 1952, and

operated it until February, 1953. He then subleased to one Rezuki who operated the restaurant for three or four months. Rezuki then sold the restaurant to one Falco who operated it until about April 1954. Falco then sold the restaurant to two women who "lasted" two or three months. They did not sell the restaurant or equipment but just moved out. The restaurant was closed from July to December, 1954. In November, 1954, Mr. Malley listed the restaurant for sale with a Mr. Sholder, a broker who was associated with a firm of business brokers. In December, 1954, Sholder took over the restaurant, paying Malley \$1,000 in cash and giving him the chattel mortgage here in question for \$11,500 payable \$150 a month. Sholder operated the restaurant for about four months, and paid some three monthly payments on the chattel mortgage. On April 1, Sholder asked for Malley's consent to a transfer of the sublease, and then listed the restaurant for sale with the firm of business brokers with which he had been employed. As a result of that listing he sold the restaurant to a Mr. Barnes, who paid \$187 for the supplies on hand, nothing for the good will, and agreed to assume the balance due on the chattel mortgage in question. Barnes went into possession on May 4, and on June 3, 1955, he "just picked up and left" and mailed the key to Malley. Barnes testified that when he took possession of the restaurant the equipment was not in good shape; that the refrigeration went out the fourth day he was there; that the exhaust fan motor was burned out; that the bottom of the steam table was rusted out and leaked and he never used it; that some of the other equipment was in bad repair, including the dish washing machine; that Malley told him that he would not accept the responsibility for putting the equipment in working condition; and that at the time he took possession the value of the equipment if sold separate from the restaurant would not exceed \$2,000.

The attorney for Mrs. Metz testified that after she bid in the property for \$500 he attempted to sell the property for her, that

he contacted a number of proposed buyers, that he received three offers running from \$1,100 to \$1,700, and that he finally sold it for \$1,750, which was the best offer he could get.

The first of these representations was as to the value of the equipment itself, and not as to its value as part of and as used in a going business. The second was as to an additional security arising from the reliability and responsibility of the maker of the note. It does not conclusively appear from the evidence that this equipment was worth in excess of \$11,000 on November 8, 1955; nor that on that date Sholder was successfully operating the restaurant and that he intended to continue to operate it. The evidence, with the inferences reasonably to be drawn therefrom fully supports a contrary conclusion with respect to both of these representations. It would appear from Malley's own testimony that in an attempt to recoup his loss he paid about \$7,000 for this equipment in December, 1952. It could well be inferred from the evidence that the value of the equipment greatly deteriorated thereafter. As holder of the master lease Malley consented to all of the sales that were later made, and gave subleases to several of those buyers. Apparently, he knew that Sholder intended to sell at the time he and Mrs. Metz entered into the escrow at the bank. It could reasonably be inferred that his knowledge of the facts was such that he was not justified in making the representations he made. It could also be inferred from the evidence as a whole, including but not confined to that above summarized, that Sholder was not operating the restaurant successfully on March 28, 1955, and that Malley then knew or should have known that Sholder did not intend to continue to operate it. While there was some contrary evidence the evidence sufficiently sustains the findings that these representations were made, that they were false, and as to the amount of damage.

[4, 5] It is next contended that evidence of the alleged representations and statements made by the defendants was not ad-

missible to establish fraud because it was at variance with the terms of the written contract. It is argued that since the escrow instructions at the bank provided for the assignment of this note and chattel mortgage "without recourse" the court erred in receiving any such evidence, even though no objection thereto was made; and that the plaintiff was not relying upon any representations or statements made to her because she knew that she was purchasing the note and mortgage without recourse. While that fact might well bar the plaintiff from suing the defendants on the note itself, it would not bar her from maintaining this action for fraud in selling the note and mortgage to her. This fraud involved the entire transaction including any written contract there was.

[6,7] The appellants' further contentions that the respondent did not rely upon any of the statements and representations made to her, and that she waived the fraud if any there was, are based upon either conflicting evidence or other inferences which might have been drawn from some of the evidence. There is no merit in the further contention that the court abused its discretion in refusing to grant a new trial since an affidavit was presented stating that the man who purchased the property from Mrs. Metz for \$1,700 later sold part of it for \$2,700 and kept two items said to be worth \$500. It appears from this affidavit that these fixtures were still located in the original restaurant, and it would also reasonably appear that they were purchased in view of their usefulness in operating a restaurant at that place. The trial date was more than a year after the sale, and the showing of diligence left much to be desired. Under the circumstances, the court was justified in denying the motion for a new trial. The material findings are supported by the evidence, and we find no reversible error in the record.

The judgment is affirmed.

MUSSELL, J., concurs.

**Matter of the ESTATE of Herman
DEUTSCH, etc., Deceased.**

**Aaron ELMORE, Appellant,
v.**

**CITIZENS NATIONAL TRUST & SAVINGS
BANK et al., Respondents.**

Civ. 22669.

**District Court of Appeal, Second District,
Division 1, California.**

Dec. 12, 1957.

Probate proceeding. The Superior Court, Los Angeles County, Harold W. Schweitzer, J., appointed bank nominated by widow as administrator with will annexed and denied petition of individual named as executor in decedent's will for issuance of letters testamentary. The individual named in will as executor appealed. The District Court of Appeal, Doran, J., held that where individual who was named in will as executor, with knowledge of decedent's death and fact that individual was named in will as executor, delayed for more than two and one half years in petitioning for letters testamentary and individual had committed himself in manner adverse to other persons interested in estate, trial court's refusal to appoint such individual as executor was not an abuse of discretion.

Affirmed.

1. Executors and Administrators ☞16

Statute providing that executor who is named in will and who fails to timely petition for probate of will and for issuance of letters testamentary may be held to have renounced right to letters and court may appoint an administrator unless good cause for delay is shown is not mandatory but discretionary, and action of trial court will not be disturbed in absence of showing of abuse of discretion. West's Ann.Prob. Code, § 324.

2. Executors and Administrators ☞15

Where attorney who was named in will as executor delayed for more than two and

one half years in petitioning for letters testamentary and during that period of time attorney had given legal advice pertaining to estate to decedent's sons and had committed himself in manner which was adverse to other persons interested in the estate, trial court's refusal to appoint attorney as executor was not an abuse of discretion. West's Ann.Prob.Code, § 324.

Wiseman & Elmore, Los Angeles, for appellant.

Lawrence E. Drumm, Frederick W. Mahl, Jr., Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from an order denying the petition of appellant Elmore, an attorney named as executor in decedent's will, and appointing the respondent bank administrator with the will annexed. The will, which was admitted to probate, bequeathed the estate to two sons by a prior marriage. Testator also left surviving a wife, Erna Deutsch, a resident of Germany, who nominated the bank as administrator with will annexed, and opposed the Elmore appointment.

The trial court found that decedent's attorney, Aaron Elmore, who had prepared and retained a copy of the will, knew of decedent's death which occurred on February 25, 1954, and knew as early as June 4, 1954 that this instrument was decedent's last will and "that he was named as Executor in said document; and that * * * said document was in the possession of one of decedent's sons". Notwithstanding this knowledge, "Aaron Elmore failed to petition for probate of said will * * * until January 27, 1957", after the surviving spouse had caused a petition for letters of administration to be filed, "and that no good cause for such delay appears or is shown".

As a further reason for the denial of Elmore's belated petition, the trial court found that subsequent to decedent's death, Elmore "gave legal advice to a portion of the persons interested in the estate, concerning transactions which affect the rights

of other persons interested in the estate; that in giving such legal advice Aaron Elmore has committed himself in a manner which is adverse to the interest of such other persons", whose rights "would be prejudiced and adversely affected" by the attorney's appointment as executor; and that the best interests of the estate "would be served by appointment of the Bank as administrator c. t. a."

It is appellant's contention that the testator's expressed will concerning appointment of an executor "is strong and overpowering. Almost Absolute"; that neither mere delay in applying for letters testamentary nor adverse interest should prevent appellant's appointment as executor; that no adverse interest was shown, and that the trial court abused its discretion in denying appellant's petition.

Section 324 of the Probate Code provides that "If the person named in a will as executor, for 30 days after he has knowledge of the death of the testator and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause of delay is shown".

[1] As stated in *Re Estate of Fiddymment*, 74 Cal.App.2d 72, 74, 168 P.2d 61, the provisions of Section 324 are not mandatory but discretionary, and the action of the trial court will not be disturbed in the absence of a showing of an abuse of discretion. In the instant case no such abuse of discretion has been made to appear.

[2] Appellant's delay of more than two and a half years in petitioning for letters testamentary, coupled with the giving of legal advice to decedent's sons during that period, pertaining to the estate, and committing "himself in a manner which is adverse to such other persons" interested in the estate, furnishes ample support for the court's exercise of discretion in refusing to appoint appellant as executor.

The record discloses letters written by appellant attorney to decedent's sons, advis-

ing that certain shares of stock sold were not assets of the estate and were not community property and that the testator had made a valid gift of such stock; that testator's widow, respondent herein, was not entitled to support or family allowance, and had no interest as an heir in decedent's estate, and that the estate had no interest in a certain partnership having assets of about \$8,000 and an annual income of about \$5,000.

Appellant testified that no compensation was received from the sons but that advice was given and letters written. "Probably from a purely technical standpoint it can be said that I did represent them, but those are the facts". As stated by the trial court, "if you are in a position where you would be representing the sons, there would be a definite conflict of interest".

In view of the situation as shown by the record, it cannot be said the trial court abused its discretion or committed any reversible error in declining to appoint appellant as executor of the estate.

The order is affirmed.

WHITE, P. J., and FOUNT, J., concur.



155 Cal.App.2d 777

Agnes D. DOOLEY, Plaintiff and Appellant,
v.

Elmer B. DOOLEY, Defendant and
Respondent.
No. 17458.

District Court of Appeal, First District,
Division 1, California.

Dec. 6, 1957.

Action by wife for divorce upon ground of extreme cruelty. The Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., granted wife interlocutory decree of divorce, 70 percent in value of community property, \$250 monthly child

support and awarded wife no alimony but reserved jurisdiction to do so in the future. The wife appealed. The District Court of Appeal, Fred B. Wood, J., held that where decree provided that wife's right of alimony was reserved to wife to be exercised in event of substantial improvement in the financial circumstances of the husband but that such right should not be exercised until and except there was such substantial improvement, the decree inferentially excluded the case in which wife's needs might be increased and decree would be amended to read that wife's right of alimony was to be exercised only in event of change of circumstances.

Decree modified, and as modified, decree affirmed.

1. Divorce ⇨111, 146

In action by wife for divorce upon ground of extreme cruelty, record established that wife was not precluded from offering any evidence that was relevant and that trial court did not prejudice any issue in the case.

2. Divorce ⇨235

Where husband's take home pay was \$538 per month and wife who was to receive \$250 monthly child support payments received 70 percent of community property which included a family residence and a summer home, and summer home could presumably be rented or sold, the trial court did not abuse its discretion in denying alimony to wife.

3. Divorce ⇨287

The fact that a judgment granting an alimony award lacks the support of a finding or that no evidence was offered on that behalf is not ground for reversal; likewise, the fact that the denial of an award of alimony lacks the support of evidence is not a ground for reversal, especially where there is no indication that the wife was precluded from presenting her case.

4. Divorce ⇨287

Where divorce decree denied alimony to wife but decree provided that wife's right

of alimony was reserved to be exercised in event of substantial improvement in financial circumstances of husband but that such right should not be exercised until and except there was such substantial improvement, decree inferentially excluded case in which wife's needs might be increased and decree would be amended to reserve jurisdiction to award alimony in event of change of circumstances. West's Ann.Civ. Code, § 139.

Connolly & Farbstein, San Francisco, for appellant.

Doyle & Clecak, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff has appealed from an interlocutory decree of divorce granted in her favor upon the ground of extreme cruelty. It awarded her over 70% in value of the community property (including the family dwelling and a summer home, valued by her at \$17,000 and \$7,600, respectively); gave her custody of the minor children (aged 18, 15, 11 and 6 at the time of the trial), directing defendant to pay her for their support \$80, \$75, \$50 and \$45 per month, respectively; and awarded her no alimony but reserved jurisdiction to do so in the future.

Plaintiff appealed from the whole of the judgment but in her opening brief confined the appeal to the denial of alimony. The reservation of jurisdiction clause reads as follows: "That no alimony be awarded to plaintiff at this time and that plaintiff's right of alimony be and the same is hereby reserved to plaintiff to be exercised in the event of a substantial improvement in the financial circumstances of the defendant, but said right shall not be exercised until and except there be such substantial improvement."

[1] (1) *Plaintiff complains that she did not get a fair trial*; i. e., that the trial court refused to hear all the evidence concerning the circumstances of the parties, rendered its decision before having all the evidence

before it, and failed to hear all the evidence on extreme cruelty.

Our examination of the record does not bear out these contentions.

During the direct examination of plaintiff the trial judge indicated it was unnecessary to go into the detailed items of plaintiff's support needs, adding "because I know with that income [\$635 per month, gross; \$538 or \$539, net] it is just a question of trying to make it go around. You can't stretch the pay check." Plaintiff's counsel thereupon indicated his concurrence and asked plaintiff the minimum amount needed for herself and the children. She said it would take from \$350 to \$360 per month. It does not appear that plaintiff was precluded from offering any evidence she had concerning her own needs.

Later, while court and counsel were discussing the division of the community property, plaintiff's counsel said, "* * * could we keep the matter of the division open while we present further facts to your Honor?" Defendant's counsel, responding, indicated a desire to submit the matter. Whatever plaintiff's counsel meant by the words "further facts" he did not go ahead with their presentation except to ask defendant a few questions concerning assets and income, if any, that had not already been presented to the court. Here, again, we see no curtailment. It is apparent that both parties, when they submitted the cause, understood they were doing so upon the evidence theretofore introduced.

Concerning the claim that plaintiff was prevented from putting on all her evidence concerning defendant's cruelty, it appears that near the conclusion of certain testimony of an agent of defendant's employer concerning defendant's earnings, the court asked plaintiff's counsel if he wanted to put on his corroborating witness. Counsel said he did, recalled plaintiff for one question, and then called the corroborating witness. We find nothing in the record to indicate that plaintiff's counsel wished to examine any witness further concerning cruelty.

It does not appear that plaintiff was precluded from offering any evidence that was relevant nor that the court prejudged any issue in the case.

[2] (2) *Plaintiff claims insufficiency of evidence and abuse of discretion in relation to the failure to award alimony.*

The evidence does not support such a claim.

Deductions for taxes and health and medical insurance premiums reduced defendant's take home pay from \$635 to about \$533 a month. The \$250 support payments to plaintiff for the children will cut that down to \$288 a month, plus income from his share of the community property.

Those facts, plus the award of more than 70% of the community property (including the family residence and a summer home, which latter presumably could be rented or sold), do not leave the non-award of alimony without support in the evidence. Nor do they token abuse of discretion.

[3] It is not a ground for reversal that the judgment granting an alimony award lacks the support of a finding or that no evidence was offered on that behalf. *Scheibe v. Scheibe*, 57 Cal.App.2d 336, 343, 134 P. 2d 835; see also *Stanton v. Stanton*, 113 Cal.App. 462, 465-466, 298 P. 524. A fortiori it should not be a ground for reversal that the denial of an award lacks the support of evidence, especially where there

is no indication that plaintiff was precluded from presenting her case.

[4] (3) *The clause reserving jurisdiction later to award alimony is too narrowly limited in scope.*

This clause purports to limit the exercise of such jurisdiction to the case in which it appears that there has been a "substantial improvement" in defendant's financial circumstances, inferentially excluding the case in which plaintiff's needs have increased. The law places no such limitation upon the jurisdiction which it gives the trial court to modify. Civ.Code, § 139. See *Wilson v. Wilson*, 104 Cal.App.2d 167, 231 P.2d 128. It is doubtful if any such limitation in a decree is or could be legally operative, but to avoid any doubt in that regard this clause should be modified to remove the limitation.

The interlocutory decree is amended by striking from the next to the last paragraph of the findings and from paragraph (6) of the judgment the words "substantial improvement in the financial circumstances of the defendant, but said right shall not be exercised until and except there be such substantial improvement," and inserting in lieu thereof the words "change of circumstances."

As thus modified the interlocutory decree is affirmed.

PETERS, P. J., and BRAY, J., concur



